[redacted] Acc. No. [redacted]

Class No. [redacted] Book No. [redacted]

Author [redacted]

Title [redacted]

[redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date

DONATED
By
PANDIT SHAMBOO NATH DAR,
(1901 — 1969)
ADVOCATE,
and former President
SRINAGAR MUNICIPAL COUNCIL

Advocate High Court
Jammu & Kashmir
Srinagar.

[redacted] Acc. No. [redacted]

Class No. [redacted] Book No. [redacted]

Author [redacted]

Title [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL,** the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON,** the Courts of the Judicial Commissioners of **CENTRAL PROVINCES, OUDH, PESHAWAR** and **SIND**

REPORTED IN

The following 30 Legal Periodicals:

Allahabad (1)Indian Law Reports, (2) Law Journal; **Bombay** (1) Indian Law Reports, (2) Law Reporter; **Calcutta** (1) Indian Law Reports, (2) Law Journal, (3) Weekly Notes; **Lahore** (1) Indian Law Reports, (2) Law Journal, (3) Punjab Law Reporter, (4) Punjab Weekly Reporter; **Madras** (1) Indian Law Reports, (2) Law Journal, (3) Law Times, (4) Law Weekly, (5) Weekly Notes; **Nagpur** (1) Law Journal, (2) Law Reports; **Oudh** (1) Cases, (2) Law Journal, (3) Oudh and Agra Law Reporter ; **Patna** (1) Cases, (2) Indian Law Reports, (3) Law Reporter (4) Law Times; **Rangoon** (1) Indian Law Reports, (2) Burma Law Journal; **Sind** Law Reporter; Criminal Law Journal and All India Reporter,

Books Checked

WITH

A large number of extra Rulings not reported elsewhere.

S. N. D.
Advocate High Court
Jammu & Kashmir
Srinagar.

VOLUME 74, 1923.

EDITOR:

S. D. CHAUDHRI, B.A., LL. B.,

VAKIL, HIGH COURT, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.

K UNIVERSITY LIB.
K. DIVISION
Acc No 75443
Date 18.12.69

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

CONSOLIDATED

Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.

45 I. L. R., ALLAHABAD SERIES, FROM MAY TO AUGUST, 1923.

Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
237	Surwan Prasad Tiwari v. Basdeo Narain Singh ..	74	124	335	Inayat Husain v. Faiz Muhammad ..	71	767
245	Lakshmi Chand v. Anandi ..	71	574	336	Lalta Prasad v. Kharga ..	71	773
250	Emperor v. Hira ..	71	605	339	Fateh Singh v. Thakur Rukmini Ramanji Maharaj ..	72	8
255	Suraj Mal v. Nathawa ..	76	983	353	Canwnpore Cotton Mills Co., Ltd. v. Great Indian Peninsula Railway ..	71	614
258	Emperor v. Durga Prasad ..	76	969	359	Kesho Saran v. Khairati Lal	74	836
260	Harihar Prasad v. Udai Nath Sah ...	74	113	361	Kamta Prasad v. Sheo Prasad Charan ..	71	971
263	Jhinku Singh v. Sital Singh ..	74	133	363	Ram Badan Singh v. Janki ..	71	692
267	Jhunwa v. The Municipal Board of Dhampur ..	71	291	364	Radha Mohan v. M. C. White	73	413
268	Priya Lall v. Bohra Champa Ram ..	*To be printed.*		369	Bindeshi Prasad Tiwari v. Badal Singh ..	74	873
272	Emperor v. Allu ..	74	260	374	Ram Das v. Inayat-Ullah ..	71	1027
273	Kannu Mal v. Indarpal Singh	71	278	376	Muhammad Umar Khan v. Ummatul Rahim Bibi ..	71	965
276	Ajudhia Prasad v. Gobind Prasad ..	71	1034	378	Munni Babu v. Kunwar Kamta Singh ..	72	86
277	Bahadur Singh v. Ram Bahadur ..	71	405	380	Secretary of State for India in Council v. Jiwan and Abdullah ..	71	609
281	Emperor v. Hori Lal ..	76	971	383	Sadar Singh Kondari v. Amar Singh Kondari ..	71	991
286	Ambika Prasad v. Jhinak Singh	71	321	384	Kaniz Fatima Begam v. Ram Nandan Dhar Dube ..	73	977
290	Sadiq Ali v. Abdul Baqi Khan	71	460	386	Hazari Lal v. Nimar ..	71	1038
297	Bhagwati Shukul v. Ram Jatan Tiwari ..	73	648	388	Ram Sewak Rai v. Sheo Naik Rai ..	73	945
300	Emperor v. Khetal ..	73	62	390	Bhagwan Das Naik v. Mahadeo Prasad Pal ..	71	959
304	Mahadeo Prasad v. Hamidan..	71	457	395	Mohan Lal v. Ganga Prasad ..	71	975
306	Ram Sahai v. Binode Bihari Ghosh ..	71	402	396	Vilayat Husain v. Misran ..	72	92
309	Ram Charitra v. Mohan Dei ..	71	488	401	Umrao Beg v. Mukhtar Beg ..	74	687
311	Ram Raghubar Lal v. Dip Narain Singh ..	71	749	404	Mir Singh v. Makkhan ..	74	88
316	Sheo Ram Koeri v. Ikram-un-Nissa Bibi ..	71	631	407	Chaturbhuj v. Govind Ram ..	74	571
319	Sheo Ramji v. Sri Ridhnath Mahadeoji ..	71	480	410	Mahabir Prasad v. Parsandi	74	939
321	Suraj Narayan Prasad v. Ram Ghulam Shukul ..	76	1050	413	Balgobind v. Badri Prasad ..	74	449
323	Emperor v. Mahadeo Prasad..	76	1025	419	Muhammad Mumtaz Ali Khan v. Mohan Singh ..	74	476
329	Emperor v. Anandi ..	71	689				
332	Gadre v. Brijnandan Saran ..	*To be printed.*					

45 I. L. R., ALLAHABAD SERIES, FROM MAY TO AUGUST, 1923—concld.

425	Yad Ram v. Sundar Singh ..	74	778
429	Dwarka Ram v. Jhulai Pande	72	134
432	Ahmad Husain v. Muhammad Fasih-Ullah ..	74	1039
434	Raghunath Singh v. Sri Narain	73	1018
437	Kunj Bihari Lal v. Naraini ..	71	1026
438	Gobardhan Das v. Makundi Lal ..	74	1024
441	Hari Shankar v. Ram Piari ..	74	834
443	Secretary of State for India in Council v. Akbar Ali ..	74	8
445	Ram Chandar v. Chhabbu Lal	75	323
449	Aliman Begam v. Ali Husain..	73	1029
450	Prag Narain v. Jwala Prasad..	74	666
453	Kedar Nath Raj Narain v. The East Indian Railway Company ..	74	300
455	Jagannath Singh v. Moti Lal..	73	958
456	Girdhari Singh v. Bhupal Singh ..	74	745
458	Mariam-un-Nissa Bibi v. Babu Ram ..	73	1016
459	Sheo Badan Tiwari v. Sahibzadi Kunwar ..	75	792
461	Bijai Shankar v. Ram Charitra Singh ..	75	35
466	Rekhab Das v. Sheobai ..	74	656
472	Ram Nath v. Mannu Lal ..	73	615
474	Emperor v. Pancham ..	73	943

47 I. L. R., BOMBAY SERIES, FOR JULY-AUGUST, 1923.

487	Madhavji Visram v. Rammik lal Vadilal ..	70	474
493	Muller Maclean and Co. v. Kadder Bhoy Mulla Esmailji	72	246
509	Eagle Star and British Dominions Insurance Company v. Dinanath ..	72	266
523	Bai Balagauri v. Motilal Ghellabhai ..	72	224
527	Hirachand Motichand v. Hansabai ..	72	62
529	Raghunath Vithal v. Purnanand Saraswati Swami ..	72	312
534	Gangaram Balkrishna v. Vasudeo Dattatraya ..	73	912
542	Mahableshwar Narayan v. Subramanya Shivram ..	72	309
548	Menahim v. Ahrain Solomon	*To be printed.*	
552	Bhagubai v. Appaji Sitaram	72	277
556	Gangadha Narayan v. Ibrahim	72	307
559	Khimchand Narotamdas v. Bhhogilal Hirachand ..	72	324
563	Keshavlal Brothers & Co. v. Diwanchand & Co. ..	74	396
578	Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. ..	73	436
589	Kurpal Hemraj v. Shamrao Raghunath ..	72	321
593	Fernadez v. Rodrigues ..	*To be printed.*	
597	Basan Gowda v. Irgowdatti ..	73	196
607	Shankar Sakharam v. Ratanji Premji ..	*To be printed.*	
621	Sandu Walji v. Bhikchand Surajmal ..	75	118
632	Ganesh Narhur v. Dattatraya Pandurang ..	72	249
637	Vithal Yeshvant v. Shivappa Mallappa ..	72	659
643	Raghunath Govind v. Gangaram Yesu ..	75	893
652	Rangappa Kondappa v. Vithu Krishnaji ..	72	404
654	Broach City Municipality v. Gulam Rasul ..	72	636

25 BOMBAY LAW REPORTER, FROM APRIL TO 15TH JUNE, 1923.

345	Mathuradas v. Nathubhai ..	70	920
350	G. I. P. Railway v. Himatlal	73	606
354	Devchand v. Jamshedji ..	74	302
358	Hanmant v. Shidu ..	72	556
361	Rama v. Dhondi ..	76	607
371	Kalyanchand v. Bhogilal ..	73	310
375	Peerkha v. Bapu ..	73	231
378	Damodar v. Govindji ..	73	240
381	Sandu v. Bhikchand ..	75	118
390	Sukhananad v. Bhimraj ..	73	254
392	Tyebbhai v. Abdul Husain ..	*To be printed.*	
395	Siddappa v. Pandurang ..	72	626
398	Balkrishna v. Collector "Bombay Suburban" ..	73	354
404	Bapuji v. Dattu ..	73	279
408	Lala Miya v. Manubibi ..	73	246
411	Bhau v. Hari ..	72	631
414	Vadilal v. Manekji ..	*To be printed.*	
429	Sitaram v. Ganpat ..	73	412
431	Vijbhukhandas v. Ishvardas	74	292
435	Motilal v. Harnarayan ..	73	365
437	Shanker v. Ramchandra ..	73	415
440	Chunilal v. Kashibhai ..	73	419
443	Chimanbhai v. Keshavlal ..	73	464
445	Hirachand v. Nemchand ..	73	465
446	Totaram v. Chhoturam ..	73	454
447	Gulam Mohiudd n v. Dayabhai	73	442
449	Hari v. Sakharam ..	73	443
450	Bala v. Bhiku ..	73	125
452	Thakoredas v. Lallubhai ..	75	102
453	Vithu v. Ganesh ..	74	149
459	Harj van v. Gajanan ..	73	187
462	Dagdu Rajaram Marwadi v. Laxman Pandushet Thakur	73	455
463	Navalkar v. Sarojini Naidu ..	73	133
468	Ratanchand v. Damji ..	73	474
470	Secretary of State v. G. I. P. Railway ..	73	468
474	Raghunath v. Gangaram ..	75	893

25 BOMBAY LAW REPORTER, FROM APRIL TO 15TH JUNE, 1923—concld.

480	Gajanan Vinayak v. Assistant Collector, Salsette ..	*To be printed.*	
484	Vankapaiya v. Nazar Ali ..	*To be printed.*	
488	Joita v. Parshottam ..	73	974
490	Vishnu v. Narasinha ..	73	1011
491	Timmappa v. Manjaya ..	73	424
494	Dada v. Yesu ..	73	402
499	Ramchandra v. Nipunge ..	73	379
503	Govind v. Kachubhai ..	73	978
508	Vishnu v. Ramchandra ..	73	1017
510	Kahandas v. Jivan ..	73	1023
513	Saraspur Manufacturing Co. v. B. B. & C. I. Railway ..	73	1027
516	Venkat Raman v. Baburaya ..	73	1020
518	Govindas v. Ganpatdas ..	73	1030
520	Gangadas v. Jekisondas ..	73	1032
521	Ahmed v. Ganesh ..	73	1035
527	Secretary of State v. Laxmibai	72	898
531	Harichand v. Govind ..	71	763
537	Hurnandrai v. Pragdas ..	72	485
541	Venkatarayanim v. Venkata Subadrayamma ..	71	1035
548	Saratkumari Dasi v. Amullya Dhan Kundu ..	71	632
560	Sahdeo Narain Deo v. Kusum Kumari ..	71	769
568	Ram Bujhawan Prosad v. Nathu Ram ..	71	933
577	Kamulammal v. Visvanathaswami Naicker ..	71	643
582	Subramonian v. Lutchman ..	71	650
588	Champsey Bhara & Co. v. Jivraj Balloo Spinning & Co.	73	436
595	Bachoo v. Velji Bhimsey & Co.	*To be printed.*	
599	Natha Gulab & Co. v. Shaller and G. I. P. Railway ..	*To be printed.*	
604	Thorappa v. Umedmalji ..	*To be printed.*	
610	De Souza v. Daphtary ..	*To be printed.*	
621	Fulkuverbai v. Kesrisingh ..	73	242

2 BURMA LAW JOURNAL, FOR MAY 1923.

103	Kra Chan U v. King Emperor	76	575
106	A. H. D. Jones v. Messrs. K. Jones ..	76	597
108	Maung Sa v. Ma U Ma ..	76	600
109	Maung No v. Maung Po Thein	76	612
113	Maung Sein v. Maung Maung	76	617
114	Ma Shwe Yin v. Maung Ba Tin	76	620
119	Ma Hin Tha v. Ma Thet Su ..	76	624
125	Maung Tha Gyaw v. Emperor	76	646
127	Maung Po Hmyin v. J. B. Bhattacharjee ..	76	649
130	Y. A. Shakoor & Co. v. Finlay Fleming and Co. ..	*To be printed.*	

4 I. L. R., LAHORE SERIES, FOR JULY-AUGUST 1923.

202	Diyan v. Hira Nand ..	73	898
208	Rodha Ram v. Amar Chand	*To be printed.*	
211	Mula Ram v. Jiwanda Ram ..	72	452
215	Bubby Hurry & Co. v. M. Hertz & Co. ..	73	421
224	Khushi Ram v. Emperor ..	72	617
233	Ladha Singh v. Hukam Devi	75	57
236	Bal Kaur v. Devki ..	75	109
239	Liquidator, Union Bank of India v. Gobind Singh ..	*To be printed.*	
243	Jaggan Nath v. Daud ..	75	103
246	Jassu Ram v. Emperor ..	*To be printed.*	
249	Qadar Bakhsh v. Mangha Mal	73	889
252	Beni Parshad v. Gurdevi ..	73	894
254	Salig Ram v. Badhawa ..	73	759
256	Pala Ram v. Notified Area Committee, Kot Addu ..	73	785
258	Fitz-Holmes v. Bank of Upper India, Ltd. ..	*To be printed.*	
263	Ghulam Mustafa v. Ghulam Nabi ..	75	461
271	Abdul Rashid, *In re* ..	76	385
282	Kala v. Mam Chand ..	73	988
284	Kanhaya Lal v. National Bank of India ..	75	7

5 LAHORE LAW JOURNAL, FOR JUNE 1923.

234	Chet Ram v. Spedding & Co.	74	479
236	Khazana Mal v. Jagan Nath ..	74	484
238	Khota v. Nawaz ..	72	795
246	Muhammad Hussan-ud-Din v. Saif Ali Shah ..	74	451
251	Nabi Bakhsh v. Muhammad Salam Ullah ..	72	91
253	Naman v. Batan Singh ..	74	589
257	Nanak Chand v. Mohammad Zahur-ud-Din ..	73	927
259	Ralia Ram v. Amir Chand ..	74	122
262	Sundar Singh v. Ram Saran Das ..	*To be printed.*	
266	Ujagar Singh v. Sucha Singh ..	74	489
269	Umri v. Shah Muhammad ..	74	497
271	Abdullah v. Emperor ..	71	998
272	Bishan Das v. Emperor. ..	71	700
276	Maulu v. Crown ..	*To be printed.*	

46 I. L. R., MADRAS SERIES, FOR JULY-AUGUST 1923.

525	Singaravelu Mudaliar v. Chokkalinga Mudaliar ..	70	994
536	Ramaswami Goundan v. Muthu Velappa Gounder ..	71	1039
567	Kottal Kunhalikutti v. Kunhamayan ..	72	833
574	Jagannatha Sastri v. Sarathambal Ammal ..	71	530
579	Annalai Deiskar v. Govinda Rao ..	72	5
583	Raghava Chariar v. Murugesa Mudali ..	72	545
592	Perumal Chetty v. Kandasami Chetty ..	72	925
597	Kunhi Kutti v. Raman ..	72	145
605	Gopal Naidu v. King-Emperor	73	343
631	Kelu Achan v. Cheriya Parvathi Nethiar ..	73	87
650	Muhammad Kunhi v. Packrichi Umma ..	72	671
659	Subraya v. Krishna ..	73	584
673	Chief Commissioner of Income-Tax v. Doraiswami Ayyangar ..	74	22
679	Marakarutti v. Veeran Kutti ..	73	1050

45 MADRAS LAW JOURNAL, FOR AUGUST 1923.

124	Chockalingam Chetiar v. Palani Ambalam ..	73	926
125	President, Dt. Board South Kanara v. Gopalakrishna Bhatta ..	74	223
129	Lakshminarayana Aiyar v. Subramania Aiyar ..	73	74
133	Venkatagurunatha Sastri, *In re* ..	72	612
135	Kelu Achan v. Parvathi Nethiyar ..	73	87
150	Chief Commissioner Income Tax Madras v. Duraiswami Aiyangar ..	74	22
153	Krishna Reddy v. Thanikachala Mudali ..	73	1054
156	Secretary of State for India v. Appa Rao ..	76	212
157	Babasah v. Hajee Mahomed Akbar Sahib ..	73	297
161	Parthasarathy Reddiar v. Kandaswami Mudaliar ..	73	954
164	Srirangam Municipal Council v. Bodi ..	72	703
166	Sivasubramania Pillai v. Theethiappa Pillai ..	75	572
175	Parthasarathy Aiyar v. Subbaraya Gramany ..	72	559
186	Kondal Rayal Reddiar v. Ranganayaki Ammal ..	74	166
199	Varda Reddi v. Srinivasa Mudaliar ..	72	683
203	Ramaswami Aiyar v. Venkatarama ..	75	406
208	Pakkiam Solomon v. Chellah Pillai ..	75	17
210	Muthukaruppa Chetty v. Paiya Kavundan ..	73	956
212	Dharma Raja v. Pethur Raja	74	4
215	Bishwa Nath Singh v. Jugal Kishore ..	73	241
219	Surapati Roy v. Ram Narayan Mukerji ..	73	193
224	Ponnusami Odayar v. Ramasami Thathan ..	74	945
228	Bera Chandramma v. Chandram Naganna ..	75	170
230	Dharam Singh, *In re* ..	74	959
231	Govindu Kaviraj Purohito v. Gauranga Saw ..	75	739
233	Kuppaswami Chetty v. Singaravelu Chetty ..	75	848
238	Sri Venkatarangayya Appa Rao Bahadur v. Marampudi Bejiraju ..	76	61
240	Kamaraju v. Chunduri Gunnayya ..	74	1003
242	Bamubai Framji Commissariat v. Manilal Jugaldas ..	*To be printed.*	
247	Sudamani Das v. Sarat Lal ..	73	530
249	Foolcoverbai v. Keshrisingh Rajmal ..	73	242
253	Mirza Abid Hussain Khan v. Ahmad Husain ..	75	502
254	Udham Singh v. Gurdip Singh	*Not reportable.*	
255	Kaliyaperumal Naidu v. Bavaj Sahib ..	73	941
258	Koppassa Menon v. Kallani Ammal ..	75	476
263	Gnanamma v. Krishna Reddi	75	369
274	Rajagopala Naidu v. Ramasubramania Aiyar ..	74	198
279	Thachroth Hydross, *In re* ..	75	695
289	Balgobind v. Badri Prasad ..	74	449
295	Tata Iron and Steel Company v. The Chief Revenue Authority of Bombay ..	74	469
305	Ayarvali Pokker, *In re* ..	74	952
309	Murari Rao v. Balavanath Dikshit ..	76	342
312	Mamilayya v. Venkataratnam	*To be printed.*	
315	Venkiteswarayyan v. Aswatha Narayanan ..	75	491

18 LAW WEEKLY, FROM 27TH JULY TO 10TH AUGUST 1923.

92	Heng Moh and Company v. Lim Saw Yean ..	75	287
96	Chief Commissioner of Income Tax Madras v. Doraiswami Ayyangar ..	74	22
99	Kuppusamy Chetty v. Singaravelu Chetty ..	75	848
105	Hari Krishnan Pillai v. Arur Panditharar ..	72	688
109	Parthasarathi Chetti v. Abdul Rahman Sahib ..	75	489
111	Ramamma v. Gurunathan ..	72	881
113	Thachroth Hydross, *In re* ..	75	695
124	Chhotey Lal v. Collector of Moradabad ..	69	44
130	Singam Aiyangar v. Anganna Naidu ...	72	703
132	Venkayya v. Paidamma ..	73	944
133	Arumugam Pillai, *In re* ..	*To be printed.*	
135	Muhammad Ghouse Sahib v. Shaik Mohideen Sahib ..	73	985
137	Baliram Singh v. Seth Narsingdas ..	75	546
141	Gopi Lal v. Lakhpat Rai ..	*Not reportable.*	
146	Husain Khan v. Ahmad Husain ..	75	502
147	Prasanna Deb Raikat v. Chandra Shaha ..	75	556
148	Banubai Framji v. Manilal Jugaldas ..	*To be printed.*	
153	Foolcooverbai v. Rai Sahib Keshrisingh Rajmal ..	73	242
156	Parthasarathy Reddiar v. Kandaswamy Mudaliar ..	73	954
160	Kanniappa Mudaliar v. Chinnaswamy Chettiar ..	73	540
165	Rajagopala Aiyangar v. Ramanuja Aiyangar ..	72	459
167	Thiruvangadachariar v. Chockalingam Chetty ..	76	234
169	Varada Reddi v. Srinivasa Mudaliar ..	72	683
173	Satyanarayana v. Narasayamma ..	73	948
177	Chenraya Goundan v. Athappa Goundan ..	75	336
181	Avudayappa Mudaliar, *In re* ..	74	856
183	Ramaswamy Aiyer v. Venkatarama Aiyar ..	75	406
188	Marimuthu, *In re* ..	73	961
193	Bibi Akhtari Begam v. Diljan Ali ..	71	621
198	Ratnachalam Aiyar v. Sivachidambaram Pillai ..	76	207
203	Kenath Achan v. Kalliani Amma ..	75	476
209	Visvanatha Asari v. Sami Asari ..	73	982
210	Secretary of State for India in Council v. Radhika Prasad Bapuli ..	74	785

(1923) MADRAS WEEKLY NOTES, FROM 22ND JULY TO 9TH SEPTEMBER.

447	Kanniappa Mudaliar v. Chinnasami Chettiar ..	73	540
450	Secretary of State for India v. Appu Rao ..	76	212
451	Avudayappa Mudaliar v. Emperor ..	74	856
452	Karri Bappanna v. Sankari Yerramma ..	74	218
454	Veerabhadrayya v. Ramachandra Venkatakrishna Rao ..	73	66
460	Rani Jagadamba Kumari v. Narain Singh ..	*To be printed.*	
463	Pamidimrari Ganamma v. Krishna Reddi ..	75	369
471	Marakkarutti v. Veeran Kutty	73	1050
474	Sriramachandra Venkatanarayana v. Narasimharow ..	72	865
477	Varisai Rowther v. Emperor	73	163
489	Kelu Achan v. Parvathi Nethiyar ..	73	87
499	Kondal Royal Reddiar v. Ranganayaki Ammal ..	74	166
508	Neelakandhan Nambudri v. Vasudean Numbudri ..	73	1041
509	Alagu Pillai v. Mayallappa Pillai ..	74	609
510	Kachi Reddi v. Saki Reddi ..	74	793
511	Kumar Naresh Narayan Roy v. The Secretary of State ..	*To be printed.*	
518	Amina Umma v. Rayarappan Nambiar ..	74	1026
519	Ponnusami Odayan v. Ramasami Thathan ..	74	945
522	Salayjee v. Fatima Bi Bi ..	71	753
524	Sambasadasiva China Rayal Varu v. Maddulappa ..	74	968
525	Bholanath Sen v. Balaram Das	70	932
526	Pramatha Nath Roy v. William Arthur Lee ..	68	900
528	Shankar Ganesh Dabir v. Secretary of State ..	69	367
529	Venkiteswarayyan v. Narayana	75	491
533	Subba Rao Garu v. Sri Balusu Buchi Sarvarayudu ..	72	292
545	Chenraya Gounden v. Athappa Gounden ..	75	336
547	Hurnandrai Fulchand v. Pragdas Budshen ..	72	485
550	Rajagopala Naidu v. Ramasubramania Ayyar ..	74	198
554	Naganna Naidu v. Venkatappayya ..	76	594
557	Ashdown and Company Ltd. v. Chief Revenue Authority ..	75	392

(1923) MADRAS WEELY NOTES, FROM 22ND JULY TO 9TH SEPTEMBER—concld.

564	Ramakrishna Annavi v. Pichandi Chettiar ..	74	777
564	Kurshit Kathum by Agent Mahomed Ismail Sheriff Sahib v. Hyder Khan Sahib	75	93
565	Pakkiri Kanni v. Haji Mohammad Manjoor Sahib ..	75	334
566	Kandaswami Gounden v. Narayanaswomi Gounden ..	76	306
567	Chandrama v. Naganna ..	75	170
568	Venkataramana Aiyar v. Ramaswamy Aiyangar ..	74	966
571	Chidambaram Chetti v. Kandaswami Goundan ..	74	155
578	Foolcooverbai v. Kesharisingh Rajmal ..	73	242
580	Banubai Framji Commissariat v. Manilal Jugaldas ..	*To be printed.*	
583	Keshavlal Brothers and Company v. Diwanchand and Company ..	74	396
590	Mirza Abid Hussain v. Ahmad Husain ..	75	502
591	Lal Ram Singh v. Deputy Commissioner of Partabgarh ..	76	922
596	Champsey Bhara and Company v. Jivraj Balloo Spinning ..	73	436
601	Sudhamani Das v. Surat Lal Das ..	73	530
603	Tata Iron and Steel Co., Ltd. v. Chief Revenue Authority, Bombay ..	74	469
609	Imperial Bank of India v. U Kai Gyaw Thu and Co. Ltd.	76	910
614	Heng Moh and Company v. Lim Saw Yean ..	75	287
616	Phirozshaw Bomanjee Petit v. Bai Foolbai ..	76	929
620	Bishwa Nath Singh v. Jugal Kishore ..	73	244
622	Naba Kumar Das v. Rudra Narayan Jana ..	*To be printed.*	
626	Putli Bai v. Sorabji Naoroji..	76	996

19 NAGPUR LAW REPORTS, FROM JULY TO SEPTEMBER 1923.

99	Maroti v. Tuka Ram ..	76	934
104	Vithoba v. Lal Singh ..	76	980
110	Hindusingh v. Mangal ..	72	438
114	Hookamchand v. Nidhansingh	67	245
116	Dhansingh v. Keshcoprasad ..	72	388
119	Kalicharan v. Ratansingh ..	75	589
122	Yeshwantrao v. The Municipal Committee Nagpur ..	73	52
124	Babooji v. Ramgopal ..	73	52
126	Trimbalk v. Sheoram ..	65	941
128	Vithal v. Ramchandra ..	72	327
131	Moongalal v. Nanni ..	67	806
135	Nandram v. Ranchhordas ..	65	716
139	B. D. Jiwandas v. The Agent, E. I. R. Company, Howrah	73	1033
144	Onkarsa v. Birdichand ..	73	1037
147	Ramnath v. Sitaram ..	74	81

2 I. L. R. PATNA SERIES, FOR JULY 1923.

459	Cheta Mahto v. King-Emperor	74	536
469	Raja Makund Deb v. Sri. Jagannath Jenamoni ..	72	230
488	Mahadeo Prasad v. Bissessar Prasad ..	74	695
504	Rameshwerdhari Singh v. Sadhu Saran Singh ..	72	629
508	Stoney v. Stoney ..	72	811
517	Gansa Oraon v. Emperor ..	73	561

(1923) PATNA CASES, FROM 2ND JULY TO 30TH JULY.

209	Chaurasi Mahasarjek v. Bhagan Sahu ..	74	144
213	Surujdeo Narayan Singh v. Partap Rai ..	75	284
216	Inderbansi Kuer v. Babu Satnarain Singh ..	74	626
220	Lachmi Narain Marwari v. King-Emperor ..	77	177
225	Raghunath Sunl v. Ramrup Raut ..	76	2
229	Bhagwat Prashad Singh v. Dwarka Prasad Singh ..	74	174
234	Bhagjogni v. Sakhi Mahton ..	*To be printed.*	
235	Jadu Nandan Sahay v. Hanuman Sahay ..	77	421
237	Kabir Shah v. King-Emperor	*To be printed.*	
239	Abdul Hamid v. King-Emperor	75	72
241	Bibi Kaniz Zohra v. Saiyed Muztaba Husain ..	77	209
247	Ramdulari Kuer v. Jang Bahadur Singh ..	77	378
249	Binanand Sawase v. Thuroo Mahto ..	76	277
256	Ratna Koer v. Nanhaki ..	73	1053

4 PATNA LAW TIMES, FROM 19TH JUNE TO 31ST JULY 1023.

409	Bhagwan Lal v. Rajendra Prasad Sahi ..	77	1
414	Mr. A. H. Forbes v. Hanuman Bhagat ..	77	32
418	Jai Krishna v. Soghra ..	71	881
424	Ram Sunder v. Amrit Pajiyar	72	135
425	King-Emperor v. Ali Hyder ..	*To be printed.*	
427	Raja Makund Deb v. Sri Jagannath Jenamoni ..	72	230
439	Ramyad Singh v. Chhedia Barhi ..	71	345
441	Wayezul Huq v. Shobrati Jolaha ..	74	258
443	East Indian Railway Co. v. Sukhdeo Das ..	74	431
447	Raja Indrajit Pratap Bahadur Sahi v. Amar Singh ..	74	747
457	Brij Ratan Das v. Raghunandan Gir ..	71	944
462	Gansa Oraon v. King-Emperor	73	561
473	Fulbati Kumari v. Rao Maheshwari Prasad Singh ..	74	668
487	Chattrapat Pratap Bahadur Sahi v. C. G. Lees ..	72	648
491	Bibi Zainab v. Paras Nath ..	75	430
495	Jagdhari Rai v. Langat Gope	75	676
498	Jaibhadra Jha v. Matukdhary Jha ..	76	113
502	Jivan Raut v. King-Emperor	72	519
503	Bhangi Dubey v. Emperor ..	72	360
504	Bhuneshwari Prasad Singh v. Kishen Dayal Bhagat ..	72	405
505	Suka Raut and Jhulan Raut v. King-Emperor ..	75	705
508	Karshan Bhaban Chatalia v. Indra Narain Chandra ..	76	49
512	Nripendra Nath Chatterji v. Jhumak Mander ..	75	681
513	Bhagwat Prasad Singh v. Dwarka Prasad Singh ..	74	174
516	Debendra Kumar v. Fyzabad Bank. Ltd. ..	75	53
521	The King-Emperor v. Bhola Bhagat ..	72	375
525	Kesho Prasad Singh v. Lakhu Rai ..	75	305

1 I. L. R., RANGOON SERIES, FROM MARCH TO JUNE, 1923.

60	A. E. Salayjee v. Fatima Bibi	71	753
66	M. Subramonian v. M. L. R. M. Lutchman ..	71	650
78	Owner Heiwa Maru v. Bird and Co. ..	76	458
102	Maung Po Kan v. Daw At ..	*To be printed.*	
121	Dawsons Bank Ltd. v. C. R. V. V. Chetty ..	76	522
129	Rampiyar v. Deva Rama ..	76	475
135	Maung Hlaing v. Maung Chit Su ..	76	449
138	K. K. Secaunder v. J. A. M. Kasiyar ..	76	441
142	*In the matter of* Certain First Grade Advocates of the late Court of The Judicial Commissioner of Upper Burma	74	913
146	Bibby Brothers v. Messrs. Charles R. Cowie and Co. ..	74	916
153	Official Assignee v. Mohamed E. Naikwarah ..	74	919
161	Maung Po Maung v. Ma Pyit Ya ..	74	933
176	Ma Mi v. Hadji Mahomed Bin Haji Pullai Mahomed ..	75	31
186	Maung Gyi v. Maung On Gaing	74	970
189	Ma Zan Nyein v. Maung Kyaw Zan ..	74	1027
196	Sook Lal v. Dal Chand ..	74	835
199	King-Emperor v. Nga Po Chit	74	1050
209	Nga Waik v. King-Emperor ..	74	1042
211	U Damadaya v. King-Emperor	74	954
218	King-Emperor v. Annawdin ..	74	960
220	E. E. Dawoodjee and Sons v. The Municipal Corporation of the City of Rangoon ..	76	519
226	The Jupiter General Insurance Company, Ltd. v. Abdul Aziz	76	479
231	The Jupiter General Insurance Company Ltd., v. Abdul Aziz ..	76	482
256	Ma Thein Tin v. Maung Ba Than ..	76	493
258	Maung Hmat v. Ma Htay ..	76	494
261	Aung Dun v. Maung Tun Ya	76	508
265	Maung Tun U v. Maung Po Shok ..	76	504
274	Maung Sa v. Ma U Ma ..	76	600
276	Phomon Singh v. A. J. Wells	76	677
281	Maung Po Thaung v. Ma Gyi	76	812
283	Takir Ram Kolwar v. Swamy Naidu ..	*To be printed.*	
285	Apalu *alias* Apana v. King-Emperor ..	75	295
290	S. C. Gupta v. King-Emperor	76	425
299	Maung Saing v. Emperor ..	76	431
301	Bagh *alias* Maung Po Sein v. King-Emperor ..	75	296
303	Ah Shein v. Emperor ..	76	396
306	Nga Sein Po v. King-Emperor	76	21
308	Maung Po Hmyin v. King-Emperor ..	76	649
313	Tha Gyaw v. King-Emperor	76	646
316	Maung Po Thu Daw v. Maung Po Than ..	*To be printed.*	
335	D. F. Chalmers v. Government	*To be printed.*	
339	Y. A. Shakool and Co. v. Finlay Fleming and Co. ..	*To be printed.*	
343	Ma Shwe Yin v. Maung Ba Tin ..	76	620
351	Ma Thin Myaing v. Maung Gyi ..	75	166

1 I. L. R., RANGOON SERIES, FROM MARCH TO JUNE 1923—concld.

360	Maung Lun Bye v. Maung Po Nyun ..	76	679
363	Maung No v. Maung Po Thein	76	612
370	Ma Hla U v. Maung Shwe Yin	76	814
372	Valab Das v. Maung Ba Than and Jivandas Savchand v. Maung Ba Than ..	To be printed.	
384	Moolla Dawood Cotton Manufacturing Company, Limited *In re* ..	To be printed.	
390	Maung Gyi v. King-Emperor	76	705
397	Maung Po Lu v. King-Emperor	76	700

24 CRIMINAL LAW JOURNAL, FOR JULY-AUGUST 1923.

433	Mul Singh v. Emperor ..	72	593
439	Kunhamad Haji v. Emperor..	72	599
449	Streenivasa Chetty v. Emperor ..	72	609
451	Waryam Singh v. Emperor ..	72	611
452	Venkatagurunatha Sastri, *In re* ..	72	612
453	Newa Lal Rai v. Emperor ..	72	613
453	Garine Satyanarayana v. Emperor ..	72	613
454	Bodh Kishen Goala v. Emperor	72	614
455	Ramaswami Thevan v. Emperor ..	72	615
456	Kanma Kondiah, *In re* ..	72	616
457	Khushi Ram v. Emperor ..	72	617
461	Bahawala v. Duni Chand ..	72	621
462	Chakrakodi Shama Shastri v. Emperor ..	72	622
463	Municipal Committe, Lahore v. Rattan Chand ..	72	623
464	Puniya Syamalo, *In re* ..	72	624
465	Ramamma v. Gurunatham ..	72	881
466	Ghulam Nabi v Jamala ..	72	882
467	Kesho Singh v. Emperor ..	72	883
467	Kedar Nath v. Jaleswar Ram	72	883
469	Venkatarama Aiyar v. Sundaram Pillai ..	72	885
471	Ramgobind Ram v. Emperor	72	887
474	Dost Muhammad v. Asa Ram	72	890
475	Baldeo Dubey v. Emperor ..	72	891
476	Maruthayee v. Appavu Pillai	72	892
477	Padarath Kurmi v. Emperor	72	893
478	Rahim v. Emperor ..	72	894
481	Gajo Chaudhury v. Debi Chaudhury ..	72	945
484	Salim v. Emperor ..	72	948
485	Akbar Ali v. Emperor ..	72	949
486	Raktu Singh v. Emperor ..	72	950
487	Abdul Hamid v. Hassan Raza	72	951
489	Baishnab Charan Das v. Amin Ali ..	72	953
490	Jairam Sahu v. Emperor ..	72	954
491	Durga Bharathi v. Emperor..	72	955
492	Jiblal Teli v. Gena Sahu ..	72	956
493	Lal Chand v. Dasondhi ..	72	957
494	Ram Lakham v. Emperor ..	72	958
495	Gajo Singh v. Emperor ..	72	959
497	Emperor v. Dewan Kahar ..	72	961
506	Charan Das v. Rodu ..	72	970
507	Lachmi Narain v. Mukhram	72	971
509	Emperor v. Jhabbar Mull ..	72	973
510	Ma E Shi v. U Aditsa ..	72	974
511	Karupiah Naidu v. Muthuswami ..	72	975
513	Ram Asre v. Emperor ..	73	49
516	Yeshwantrao Pandey v. Secretary, Municipal Committee ..	73	52
517	Ghisa v. Emperor ..	73	53
517	Akhoy Mondal v. Basu Rai	73	53
518	Nageshwar v. Emperor ..	73	54
519	Nge Chan Tha v. Emperor ..	73	55
525	Mian Jan v. Emperor ..	73	61
526	Khetal v. Emperor ..	73	62
529	Nga Saan v. Emperor ..	73	145
531	Ganapathi Sarma v. Emperor	73	147
537	Surendra Bikram Singh v. Emperor ..	73	153
539	Mandayapurath Eresakutty, *In re* ..	73	155
541	Emperor v. Nga Kala ..	73	157
542	Tanak Chaudhry v. Emperor	73	158
545	Bansidhar Marwari v. Indar Narain Singh ..	73	161
547	Varisai Rowther, *In re* ..	73	163
557	Ramjharia v. Piar Koeri ..	73	173
559	Nga Ba Sein v. Emperor ..	73	175
561	Nar Singh v. Emperor ..	73	257
564	Lachhi Ram v. Emperor ..	73	260
565	Shakur v. Emperor ..	73	261
566	Kashiram v. Emperor ..	73	262
569	Sadek Reza v. Sachindra Nath Roy ..	73	265
570	Manjoo v. Emperor ..	73	266
573	Emperor v Fazal Dad ..	73	269
575	Kanailal v. Hyder Ali ..	73	271
576	Maula Bakhsh v. Emperor ..	73	272
577	Ganesh Shankar Vidyarthi v. Emperor ..	73	321
578	Shib Chandra v. Rabbani Mondal ..	73	322
579	Nadar v. Emperor ..	73	323
581	Nga Tun Lin v. Emperor ..	73	325
583	Ajodhya Tewari v. Emperor	73	327
584	Rambit v. Emperor ..	73	328
584	Girdhar Sarkar v. Harish Chandra ..	73	328
585	A First Grade Pleader, *In the matter of* ..	73	329
587	Indar Singh v. Emperor ..	73	331
588	Mansur v. Emperor ..	73	332
590	Abdul Rahim v. Ma Shwe May	73	334
590	Chhotai Singh v. Emperor ..	73	334
591	Krishnarao v Emperor ..	73	335
592	Emperor v. Puttoo Lal ..	73	336

Alphabetical List of Cases reported in Volume 74 of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Names of cases reported.	Where reported.	Page.
A. L. A. R. Firm v. Maung Thwe ..	(1923) A. I. R. (L. B.) 69 ..	54
Abdul Aziz v. Lakhmi Chandra ..	37 C. L. J. 494; (1923) A. I. R, (C.) 676 ..	545
Abdul Hakim v. Sajjad Hussain ..	10 O. L. J. 46; 26 O. C. 209; 9 O. & A. L. R. 733; (1923) A. I. R. (O.) 209 ..	304
Abdul Wahid Khan v. Abdullah Khan ..	21 A. L. J. 529; 45 A. 656; 24 Cr. L. J. 817; (1924) A. I. R. (A.) 1 ..	849
Abdullah Khan v. Muhammad Maqbul Husain ..	21 A. L. J. 538; 45 A. 565; (1923) A. I. R. (A.) 603 ..	822
Abinash Chandra Roy v. Fulchand Chaudhuri ..	50 C. 737 ..	1032
Abuvakkar v. Kunhikuttiyali ..	16 L. W. 768; 31 M. L. T. 389; (1923) A. I. R. (M.) 153 ..	27
Administrator-General, Madras v. V. V. Ramiah	43 M. L. J. 347; (19 2) M. W. N. 571; 16 L. W. 711; (1922) A. I. R. (M.) 491 ..	182
Aftab Begam v. Muhammad Ayub ..	21 A. L. J. 607; 45 A. 653 ..	345
Ahidannessa Bibi v. Isuf Ali Khan ..	50 C. 610; 27 C. W. N. 941 ..	1010
Ahmad Husain v. Muhammad Fasihullah ..	21 A. L. J. 319; (1923) A. I. R. (A) 455; 45 A. 432 ..	1039
Ahmadullah v. Abdul Rahim ..	21 A. L. J. 545; 45 A. 592; (1924) A. I. R. (A.) 26 ..	763
Ahmed Ibrahim v. A. A. Ganny ..	1 R. 56; 2 Bur. L. J. 40; (1923) A. I. R. (R.) 209; 24 Cr. L. J. 745 ..	74
Aisha Bibi v. Chhajju Mal ..	*Allahabad High Court ..	776
Ajodhya Singh v. Khusro Begam ..	9 O. & A. L. R. 321 ..	582
Alaga Pillai v. Emperor ..	24 Cr. L. J. 846 ..	955
Alagu Pillai v. Veluchami ..	(1923) M. W. N. 331, 509; 32 M. L. T. 369; 18 L. W. 26; 45 M. L. J. 76; (1923) A. I. R. (M.) 576 ..	609
Alama Chand v. Chhajju ..	(1923) A. I. R. (A.) 530; 45 A. 559 ..	339
Allu v. Emperor ..	21 A. L. J. 72; (1923) A. I. R. (A.) 193; 45 A. 272; 24 Cr. L. J. 756 ..	260
Ammani Ammal v. Pe iasami Udayan ..	32 M. L. T. 323; 45 M. L. J. 1; (1923) M. W. N. 652; (1924) A. I. R. (M.) 75 ..	58
Ananda Chandra Chakravarti v. Broja Lal Singh	36 C. L. J. 356; (1923) A. I. R. (C.) 142; 50 C. 292 ..	793
Ananda Mohan Roy v. Gour Mohan Mullick ..	21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929 P. C. ..	499
Arjun Sahu v. Kelai Rath ..	2 Pat. 317; (1923) A. I. R. (Pat.) 436 ..	150
Arlandu v. Sithambram ..	(1923) A. I. R. (L. B.) 82 ..	278
Arunachalam Chetty v. Emperor ..	45 M. L. J. 543; (1923) M. W. N, 876; 24 Cr. L. J. 837 ..	949
Ashiq Ali v. Ghulam Sarwar ..	9 O. & A. L. R. 521 ..	553
Ashiq Husain Khan v. Emperor ..	45 A. 25; (1923) A. I. R. (A.) 333; 24 Cr. L. J. 857 ..	1049
Aulad Ali v. Abdul Hamid ..	(1923) A. I. R. (Pat.) 490; 2 Pat. 715 ..	102
Avadayappa Mudaliar, *In re* ..	18 L. W. 181; 24 Cr. L. J. 824; (1924) A. I. R. (M.) 40 ..	856
Ayarvali Pokker, *In re* ..	45 M. L. J. 305; (1923) M. W. N. 758; 18 L. W. 899; 24 Cr. L. J. 840 ..	952
Ayub Kareem v. Jaffar Ayub ..	6 N. L. J. 209; (1923) A. I. R. (N.) 298 ..	45
Baba v. Emperor ..	24 Cr. L. J. 738 ..	66
Badlu v. Naraini ..	*Lahore High Court ..	17
Baijnath Rai v. Gokul Rai ..	21 A. L. J. 659; (1924) A. I. R. (A.) 27 ..	498

Balappa Gheranpa v. Akkubai ..	*Bombay High Court ..	220
Balda Pasi v. Nasir Khan ..	9 O. & A. L. R. 457; 24 Cr. L. J. 814 ..	718
Baldeo v. Sher Bahadur Singh ..	9 O. & A. L. R. 761 ..	42
Baldeo Singh v. Deputy Commissioner, Kheri ..	10 O. L. J. 112; 9 O. & A. L. R. 587; (1924) A. I. R. (O.) 1 ..	503
Baldeo Singh v. Meghu Singh ..	(1919) Pat 386 ..	202
Ba gobind v. Badri Prasad ..	21 A. L. J. 578; (1923) A. I. R. (P. C.) 70; 9 O. & A. L. R. (P. C.) 581; 26 O. C. 217; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368 P. C. ..	449
Balkishan v. Raghubar Dayal ..	45 A. 81; (1923) A. I. R. (A.) 409 ..	911
Balwant Singh v. Mare Singh ..	21 A. L. J. 542 ..	322
Bansidhar Marwari v. Emperor ..	24 Cr. L. J. 862 ..	1054
Banwari Rai v. Chethru Lal Rai ..	*Patna High Court ..	1033
Bapujirao v. Raghunathrao ..	*Bombay High Court ..	285
Basant Rai v. Kesho Ram ..	9 O. L. J. 612; (1923) A. I. R. (O.) 139 ..	346
Basanta Kumar Roy v. Manjuri Dassi ..	*Calcutta High Court ..	679
Beni v. Emperor ..	1 P. L. R. 117 Cr.; (1923) A. I. R. (Pat.) 536; 24 Cr. L J 835; 5 P. L. T. 46 ..	947
Beni Madho v. Shamshad Ali ..	26 O. C. 56; (1923) A. I. R. (O.) 238 ..	253
Benoy Bhusan Roy v. Dhirendra Nath De ..	38 C. L. J. 114 ..	178
Beti Mahalakshmi Bai v. Badan Singh ..	21 A. L. J. 604; 45 A. 649 ..	927
Bhagwan Bakhsh Singh v. Surendra Bikram Singh ..	10 O. L. J. 209; (1924) A. I. R. (O.) 11 ..	335
Bhagwan Ramanuj v. Ramkrishna Bose ..	(1922) A. I. R. (P. C.) 184; 26 C. W. N. 722 P. C. ..	561
Bhagwat Prashad v. Dwarka Prasad Singh ..	4 P. L. T. 513; (1923) Pat. 229; 2 Pat. 809; 1 P. L. R. 453; (1924) A. I. R. (Pat.) 23	174
Bhagwati Prasad v. Achhaibar Singh ..	9 O. L. J. 531; (1923) A. I. R. (O.) 93; 26 O. C. 24 ..	214
Bhagwati Prasad v. Emperor ..	9 O. & A. L. R. 850; 24 Cr. L. J. 741 ..	69
Bhairab Chandra Dutt v. Kali Kumar Dutt ..	37 C. L. J. 491; (1923) A. I. R. (C.) 606 ..	1038
Bhairabendra Narain Roy v. Rajendra Narain Roy	50 C. 487; (1924) A. I. R. (C.) 45 ..	193
Bhikam Khan v. Dan Singh ..	(1923) A. I. R. (A.) 544 ..	7
Bhuru v. Datu Ram ..	(1922) A. I. R. (L.) 59; 4 L. L. J. 461 ..	282
Bibby Brothers v. Charles R. Cowie & Co. ..	1 R. 116 ..	916
Bi a Na b n v. E nam Narayan Singh ..	4 P. L. T. 606 ..	938
Bindeshri Pande v. Sheo Ratan Pande ..	9 O. & A. L. R. 443 ..	811
Bindeshri Prasad Tewari v. Badal Singh ..	21 A. L. J. 228; (1923) A. I. R. (A.) 394; 45 A. 319 ..	873
Bindhiachal Rai v. Sita Ram ..	*Allahabad High Court ..	21
Bire dra Kishore v. Trailakhya Nath Roy ..	37 C. L. J. 521; (1923) A. I. R. (C.) 673 ..	547
Bireswar Ghose v. Panchcouri Ghose ..	37 C. L. J. 145; 27 C. W. N. 587; (1923) A. I. R. (C.) 538 ..	975
Bisheshwar Pratap Narain Sahi v. Asarfi Singh ..	*Patna High Court ..	110
Bishun Mohon v. Narayan Prasad ..	*Patna High Court ..	140
Bishun Narayan v. Bibi Ramji ..	*Allahabad High Court ..	842
B shun Singh v. Emperor ..	24 Cr. L. J. 790 ..	534
Butterfield v. Butterfield ..	50 C. 143; (1923) A. I. R. (C.) 426 ..	250
Certain First Grade Advocates, *In the matter of* ..	1 R. 142; (1924) A. I. R. (R.) 1 F. B. ..	913
Chan Htoon Aung v. Akyab Municipality ..	(1923) A. I. R. (L. B.) 75 ..	34
Chand Mall Babu v. Bai Behari Bose ..	50 C. 718 ..	1021
Chandrakisore Datta Majumdar v. Upendra Chandra Choudhuri ..	37 C. L. J. 319; (1923) A. I. R. (C.) 563 ..	612
Charu Chandra Pramanik v. Nahush Chandra Kundu ..	36 C. L. J. 35; (1923) A. I. R. (C.) 1; 50 C. 49 ..	630
Chaturbhuj v. Gobind Ram ..	21 A. L. J. 348; 45 A. 407 ..	571
Chaurasi Mahsarick v. Bhagan Sahu ..	(1923) Pat. 209; 2 Pat. 787; (1924) A. I. R. (Pat.) 20 ..	144
Chet Ram v. Spedding & Co. Ltd. ..	5 L. L. J. 234 ..	479
Cheta Mahto v. Emperor ..	2 Pat. 459; 4 P. L. T. 727; 24 Cr. L. J. 792	536
Chhajju v. Jhabba ..	*Allahabad High Court ..	681
Chhammi Lal v. Sukhrani Kunwar ..	(1923) A. I. R. (A.) 537 ..	19

Chidambaram Chetty v. Kandasami Goundan ..	(1923) M. W. N. 571; 45 M. L. J. 346; 18 L. W. 757; 46 M. 708; (1924) A. I. R. (M.) 1 F. B. ..	155
Chote Lal Modi v. Emperor ..	1 P. L. R. 137 Cr; (1923) A. I. R. (Pat.) 542; 24 Cr. L. J. 806 ..	710
Dalsher v. Emperor ..	9 O. & A. L. R. 547; 24 Cr. L. J. 800 ..	544
Darshan Singh v. Ratan Lal ..	9 O. & A. L. R. 463 ..	821
Debi Parshad v. Bhago ..	5 L. L. J. 187 ..	682
Debi Singh v. Emperor ..	24 Cr. L. J. 831 ..	863
Deenabandhu Rajaguru v. Vishwarasarayi Lachanna Dora ..	(1923) M. W. N. 634; 24 Cr. L. J. 830 ..	862
Dev Chad Chatraji v. Jamsedji Shahpurji ..	25 Bom. L. R. 354; (1923) A. I. R. (B.) 369	302
Devi Prasad v. Secretary of State for India ..	21 A. L. J. 454; 45 A. 554 ..	746
Dharma Raja v. Pethu Raja ..	45 M. L. J. 212; 18 L. W. 243; (1923) M. W. N. 677; 46 M. 811; (1924) A. I. R. (M.) 179 ..	4
Dharma Singh v. Emperor ..	45 M. L. J. 230; 18 L. W. 612; 46 M. 766; (1923) M. W. N. 893; 24 Cr. L. J. 847; (1924) A. I. R. (M.) 30 ..	959
Dhirja v. Mithan Lal ..	(1923) A. I. R (A.) 562 ..	914
Dina Nath v. Nek Ram ..	21 A. L. J. 88; (1923) A. I. R. (A.) 175; 24 Cr. L. J. 747 ..	75
Diyal Kaur v. Mehtab Kaur ..	3 L. L. J. 458 ..	639
Dukhi v. Emperor ..	24 Cr. L. J. 784 ..	448
Durga Prasad v. G. I. P. Ry. & E. I. Ry. ..	(1925) Pat. 284; 5 P. L. T. 42 ..	993
Durgo v. Prem Singh ..	*Lahore High Court ..	653
Dutt Prasad Singh v. Sri Narain ..	21 A. L. J. 340; (1923) A. I. R. (A.) 503 ..	557
Dwarka v. Idu ..	9 O. & A. L. R. 445 26 O. C. 361 ..	813
Dwarka Das-Ajodhiya Prasad v. Lachmi Narain-Girdhari Lal ..	*Allahabad High Court ..	692
Dwarka Singh v. Emperor ..	25 O. C. 142; (1922) A. I. R. (O.) 254; 24 Cr. L. J. 828 ..	860
East Indian Railway Company v. Makhanlal-Bindesri Prasad ..	21 A. L. J. 515; 45 A. 575; (1923) A. I. R. (A.) 625 ..	814
East Indian Railway Company v. Sukhdeo Das Gobardhan ..	4 P. L. T. 443; (1924) A. I. R. (Pat.) 25 ..	431
Emperor v. Annawdin ..	1 R. 218; 2 Bur. L. J. 246; (1923) A. I. R. (R) 231; 24 Cr. L. J 848 ..	960
——— v. Dulla ..	45 A. 58. (1923) A. I. R. (A.) 360; 24 Cr. L. J. 862 ..	1054
——— v. Ganesh Chandra Goldar ..	50 C. 12[illegible]; (1923) A. I. R. (C.) 458; 24 Cr. L. J. 760 ..	264
——— v. J. John ..	45 A. 145; (1923) A. I. R. (A.) 474; 24 Cr. L. J. 758 ..	262
——— v. Kale ..	45 A. 143. (1923) A. I. R. (A.) 473; 24 Cr. L. J. 766 ..	270
——— v. Narotam ..	10 O. L. J. 68; (1923) A. I. R. (O.) 217; 24 Cr. L. J. 770 ..	434
——— v. Nga Po Chit ..	1 R. 199; 2 Bur. L. J. 241; (1923) A. I. R. (R.) 227; 24 Cr. L. J. 858 ..	1050
——— v. Profulla Kumar Mazumdar ..	50 C. 41; (1923) A. I. R. (C.) 453; 24 Cr. L. J. 763 ..	267
——— v. Rameshwar Tewari ..	9 O. & A. L. R. 526; (1923) A. I. R. (O.) 165, 10 O. J. 299; 24 Cr. L. J. 795 ..	539
——— v. Umrao ..	21 A. L. J. 316; (1923) A. I. R. (A.) 355; 24 Cr. L. J. 753 ..	257
Eran Khan v. Emperor ..	50 C. 658, 24 Cr. L. J. 838; (1924) A. I. R. (C.) 47 ..	959
Ezekiel Moses v. Russa Engineering Works ..	1 R. 47; 2 Bur. L. J. 46 ..	16
Faghfur Mirza v. Khushal Chand ..	26 O. C. 59; (1923) A. I. R. (O.) 241 ..	246
Fakir Chand v. Nanug Ram ..	*Allahabad High Court ..	721
Fateh Singh v. Jagannath Bakhsh Singh ..	10 O. L. J. 132; 10 O. & A. L. R. 74, (1923) A. I. R. (O.) 242 ..	549
Feroza Jan v. Amir Ali ..	9 O. L. J. 593; 9 O. & A. L. R. 103; (1923) A. I. R. (O.) 119; 24 Cr. L. J. 781 ..	445
Firm of Shyam Lal Gokul Chand v. Jamil Ahmad	*Patna High Court ..	487

Fulbati Kumari v. Maharaj Kumar Rao Mohesh-wari Prashad Singh ..	(1923 Pat. 161; 4 P. L. T. 473; (1 23) A. I. R. (Pat.) 453; 2 Pat. 685 ..	668
Fyzabad Bank Ltd. Arrah Branch v. Ramdyal Marwari ..	4 P. L. T, 571 ..	831
Gajraj Singh v. Sri Thakurji Maharaj Radha Rawanji ..	*Allahabad High Court ..	894
Gajraj Tewari v. Bhagirathi Pande ..	*Allahabad High Court ..	14
Ganesh Din v. Lachman Singh ..	*Allahabad High Court ..	755
Ganeshi Lal v. Em eror ..	4 L. L. J. 484; 24 Cr. L. J. 767 ..	271
Ganga Ratan v. Chandika Prasad ..	9 O. & A. L. R. 319 ..	573
Gangadhar Daji v. Govind Narayan ..	(1923) A. I. R. (N.) 296 ..	107
Gangu v. Kongshi ..	(1923) A. I. R. (N.) 805 ..	53
Gauri Shankar v. Manki Kunwar ..	21 A. L. J. 571; 45 A. 624; (1924) A.I. R. (A.) 17 ..	466
Ghansham Singh v. Bhola Singh ..	21 A. L. J. 465; (1923) A. I. R. (A.) 496; 45 A. 506 F. B. ..	411
Ghulam Nabi v. Basheshar Mal ..	4 L. L. J. 298; (1923) A. I. R. (L) 407 ..	693
Girdhari Lal v. Firm Achal Singh-Takhat Singh ..	21 A. L. J. 522; 45 A. 569; (1923) A. I. R. (A.) 605 ..	64
Girdhari Singh v. Bhupal Singh ..	45 A. 456; (1923) A. I. R. (A;) 516 ..	745
Giris Chandra v. Bhabataran Shakari ..	37 C. L. J. 524 (1923) A. I. R. (C.) 667 ..	552
Goberdhan Das v. Makundi Lal ..	21 A. L. J. 342; (1923) A. I. R. (A.) 435; 45 A. 438 ..	1024
Gobinda v. Nandu ..	(1922) A. I. R. (L.) 217 ..	644
Gopal Das v. Gauri Shanker Prasad ..	*Allahabad High Court ..	186
Gopala Chetty v. Vijayaraghavacharjar ..	45 M. 378; 30 M. L. T. 283; (1922) A. I. R. (P. C.) 115; (1922) M. W. N. 386; 16 L. W. 200; 26 C. W. N. 977; 43 M. L. J. 305; 24 Bom. L. R. 1197; 20 A. L. J. 862; 36 C. L. J. 308 P. C. ..	621
Gopalasamy Iyengar v. Nummachi Reddiar ..	17 L. W. 254; (1923) A. I. R. (M.) 392 ..	416
Gopi Nath Shukul v. Sat Narai Shukul ..	(1923) A. I. R. (A.) 384 ..	1014
Gulab Singh v. Shib Lal ..	21 A. L. J. 331; (1923) A. I. R. (A.) 347 ..	286
Gulli v. Sawan ..	4 L. 72; 5 L. L. J. 482 ..	146
Gulzar Jan v. Emperor ..	4 L. 120; 24 Cr. L. J. 769; 5 L. L. J. 522	433
Gupta Nand v. Behari Lal ..	21 A. L. J. 567 ..	827
H. K. Bhedwar v. C. S. R. Rao ..	27 C. W. N. 919; 24 Cr. L. J. 748 ..	76
Habibullah v. Gola Asmoter Khatun ..	37 C. L. J. 395; 27 C. W. N. 720; (1923) A. I. R. (C.) 612 ..	575
Hakam v. Ralia Ram ..	4 L. 66; 24 Cr. L. J. 751 ..	79
Har Prasad v. Raghubar Dayal ..	21 A. L. J. 541; 45 A. 628 ..	817
Hardial v. Alam ..	*Allahabad High Court ..	177
Hari Narain Das, *In re* ..	50 C. 141; (1923) A. I. R. (C.) 409 ..	244
Hari Shankar v. Ram Pyari ..	21 A. L. J. 326; (1923) A. I. R. (A.) 502; 45 A. 441 ..	834
Harihar Prasad v. Udai Nath Sah ..	21 A. L. J. 77; (1923) A. I. R. (A.) 190; 45 A. 260 ..	113
Hayatunnessa Chowdhurani v. Achia Khatun ..	50 C. 743 ..	1017
Hemendra Lal Singh Deo v. Fakir Chandra Datta	50 C. 650; 27 C. W. N. 621; (1923) A. I. R. (C.) 626 ..	929
Husaini v. Muhammad Zamir Abedi ..	9 O. & A. L. R. 440; 26 O. C. 319 ..	802
Hussain Sahib v. Hammad Saheb ..	16 L. W. 312; 31 M. L. T. 180; (1922) M. W. N. 562; (1923) A. I. R. (M.) 43 ..	812
Imam Din Khan v. Abdul Sattar Khan ..	*Oudh Judicial Commissioner's Court ..	62
Inayat Ilahi v. Hardeo Sahai ..	21 A. L. J. 610; (1924) A. I. R. (A.) 29 ..	325
Indar Singh v. Gurdayal Singh ..	*Oudh Judicial Commissioner's Court ..	86
Inder Deo Rai v. Ram Charitter Rai ..	(1923) A. I. R. (A.) 560 ..	971
Inderbansi Kuer v. Satnarain Singh ..	4 P. L. T. 373; (1923) Pat. 216. (1923) A. I. R. (Pat.) 521 ..	626
Indrajit Pratap Bahadur Sahi v. Amar Singh ..	21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277 P. C. ..	747
Iqbal Haidar Khan v. Wasi Fatima Bibi ..	45 A. 53; (1923) A. I. R. (A.) 358 ..	1014

Isher Singh v. Surat Singh ..	4 L. 356 ..	294
Ishwari Prasad Narayan Deo v. Chota Nagpur Banking Association ..	*Patna High Court ..	841
Ismail Yacoobjee v. Abdoolla Hajee Abba & Co.	(1923) A. I R. (L. B.) 80 ..	13
Isup Ali v. Gour Chandra Deb ..	37 C. L. J. 184; (1923) A. I. R. (C.) 496 ..	591
Jag Mohan Singh v. Mata Badal ..	9 O. L. J. 623; (1923) A I. R. (O) 153 ..	351
Jageshar v. Empe or ..	9 O. & A. L. R. 203: 24 Cr. L. J 789 ..	533
Jagesor Pande v. Deo Dat Pande ..	21 A L. J. 608; 9 O. & A. L. R. (A.) 879; 45 A. 654 ..	931
Jago Mahton v. Khirodhar Ram ..	2 Pat 759 ..	130
Jai Singh Gir v. Sita Ram Singh ..	21 A. L. J. 333; (1923) A. I. R. (A.) 349 ..	757
Jainarain-Ramjash v. Sitaram Marwari ..	(1923) Pat. 175; (1923) A. I. R. (Pat) 520 ..	941
Jaldhari Rai v. Muhammad Abdui Kabir ..	1 P. L. R. 244; (1923) A. I. R. (Pat.) 470; 4 P. L. T. 669 ..	649
Jamaluddin v. Emperor ..	24 Cr. L. J. 812 ..	716
Jamna v. Ramraji ..	9 O. L. J. 627; 9 O. & A. L. R. 32; (1923) A. I. R. (O.) 146 ..	380
Jamna Pershad v. Balbhaddar ..	9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O.) 147 ..	353
Janki Pershad v. Someshar Pershad ..	9 O. L. J. 599; (1923) A. I. R. (O.) 23 ..	324
Janki Ray v. Kalanand Singh ..	2 Pat. 192; (1923) A. I. R. (Pat.) 381; 4 P. L T. 705 ..	464
Jasuram Marwari v. Emperor ..	24 Cr. L. J. 745; 2 P. L. R. 13 Cr. ..	73
Jatti v. Banwari Lal ..	21 A. L. J. 582; (1923) A. I. R. (P. C.) 136; 18 L. W. 273; 45 M. L. J. 355; (1923) M. W. N. 687; 25 Bom. L. R. 1256; 4 L. 350 P C ..	462
Jhari Koeri v. Bijai Singh ..	21 A. L. J. 563; 45 A. 613 ..	865
Jharu Lal v. Madan Das ..	2 Pat. 357; (1923) A. I. R. (Pat.) 410; 24 Cr. L. J. 809 ..	713
Jhinku Singh v. Sital Singh ..	21 A. L. J. 81. (1923) A. I. R. (A.) 267; 45 A. 263 ..	133
Jitmull-Girdhari Lall v. Ram Gopal Bohitram ..	50 C. 12; (1923) A. I. R. (C.) 419 ..	273
Juanendra Nath Ghosh v. Kumar Jogendra Narain S nha ..	2 (Pat.) 247; (1923) A. I. R. Pat. 384 ..	608
Jugal Keshwar-Bholanath v. Kishori Lal-Bihari Lal ..	Patna High Court ..	923
Jugnu Khan v. Rudra Partab Singh ..	26 O. C. 118; (1923) A. I. R. (O.) 216 ..	429
K. B. Dutt v. Taraprasanna Roy Chaudhry ..	(1923) Pat. 280; 2 Pat. 909; 5 P. L. T. 11	753
Kach Reddi v. Narayana Reddi ..	18 L. W. 29; (1923) M. W N. 510; (1924) A. I. R. (M) 44 ..	793
Kalloo Singh v. Bakhtawar Singh ..	9 O L. J. 657; 9 O. & A. L. R. 113; (1923) A. I. R. (O.) 121; 26 O. C. 289 ..	390
Kamin Kumar Deb v. Durga Charan Nag ..	37 C. L. J. 122; (1923) A I. R (C.) 521 ..	392
Kannathayaparkum Puthulath Amina Umma v. Anandravan Cheriya Rayarappan Nappiar ..	(1923) M. W. N. 518; (1923) A. I. R. (M.) 706 ..	1026
Kapleshwar Jha v. Raghunandan Prasad ..	1 P. L. R. 370; 4 P L. T. 718 ..	474
Kapur Chand v. Kanhaiya Lal ..	21 A L. J. 641; (1924) A. I. R. (A.) 34 ..	513
Karam Singh v. Dalchand ..	*Allahabad H gh Court ..	723
Karim Bakhsh v. Abdul Haq ..	26 O. C. 62; (1923) A I. R. (O.) 240 ..	249
Karri Bapanna v. Sunkari Yerramma ..	18 L. W. 49; 45 M. L. J. 324; 33 M. L. T. 46; (1923) A. I. R. (M.) 718 ..	218
Kartar Singh v. Labh Singh ..	5 L. L. J. 192; (1923) A. I. R. (L.) 355 ..	685
Kartik Chandra Chatterji v. Nagendra Nath Roy	5 P. L. T. 41 ..	760
Kashi Nath v. Emperor ..	21 A. L. J. 671 ..	11
Kashi Prasad v. Panna Lal ..	(1923) A. I. R. (A.) 529 ..	359
Kausilla Kuer v. Sukhdei ..	21 A. L. J. 452; (1923 A. I. R. (A.) 579 ..	761
Kedar Nath v. Jagar Nath Das ..	1 P L. R. 73 ..	131
Kedar Nath v. Nanak ..	*Al ahabad High Court ..	486
Keshava Prasad Singh v. Secretary of State for India ..	*Patna High Court ..	881
Kesho Dass v. Hanuman Panday ..	21 A. L. J 576; 45 A. 640 ..	924
Kesho Prasad Singh v. Ramdeni Singh ..	2 Pat. 183; (1923) A. I. R. (Pat.) 397; 4 P. L. T. 689 ..	454

Kesho Saran v. Khairati Lal ..	21 A. L. J. 248; (1923) A. I. R. (A.) 310; 45 A. 359 ..	836
Keshvalal Bros. & Co. v. Diwan Chand & Co. ..	(1923) A. I. R. (P. C.) 105; 25 Bom. L. R. 854; (1923) M. W. N 583; 27 C. W. N. 974; 47 B. 563; 45 M. L. J. 630; 33 M. L. T 342; 1 P. L. R. 434 Cr. P. C. ..	396
Khairuddin v. Sahu Gulab Das ..	*Allahabad High Court ..	220
Khalil v. Mohammad Ismail ..	9 O. L. J. 540; (1923) A. I. R. (O.) 101 ..	195
Khalil Ullah Shah v. Ewaz Ali ..	26 O. C. 128; (1923) A. I. R. (O.) 214 ..	390
Khazana Mal v. Jagan Nath ..	5 L. L. J. 236; 4 L. 200 ..	484
Kidar Nath Rajnarain v. East Indian Railway ..	21 A. L. J. 351; 45 A. 453; (1923) A. I. R. (A.) 538 ..	300
Kiran Sarkar v. Emperor ..	24 Cr. L. J. 815; 5 P. L. T. 15; 2 P. L. R. 10 Cr. ..	719
Kishun Prasad Sahu v. Hakim Chaudhury ..	*Patna High Court ..	973
Kondal Rayar v. Ranganayaki Ammal ..	45 M. L. J. 186; (1923 M. W. N. 499; 18 L. W. 465; 46 M. 791; (1924) A. I. R. (M.) 49 ..	166
Kondine Kamaya v. Kavidena Ramamma ..	(1922) M. W. N. 176; (1922) A. I. R. (M.) 95; 16 L. W. 934 ..	458
Konthalattammal v. Soundarathachi ..	18 L. W. 256; 45 M. L. J. 481; 33 M. L. T. 80; 46 M. 873; (1923) M. W. N. 902 ..	896
Krishna Chandra Bhowmik v. Emperor ..	37 C. L. J. 535; (1923) A. I. R. (C.) 562; 24 Cr. L. J 798 ..	542
Krishna Dass v. Ram Ugrah Singh ..	21 A. L. J. 500; (1923) A. I. R. (A.) 549 ..	845
Krishnadas Acharjee Chowdhury v. Samsan Ali Sheikh ..	37 C. L. J. 139; (1923) A. I. R. (C.) 431 ..	925
Kusam Dei v. Hur Dutt ..	26 O. C. 98 ..	459
Kyaw Dwe v. Emperor ..	(1923) A. I. R. (L. B.) 67; 24 Cr. L. J. 750	78
Lachmi Narain v. Bombay-Baroda and Central India Railway Company ..	45 A. 235; (1923) A. I. R. (A.) 449 ..	248
Lal Bahadur v. Murli Dhar ..	*Oudh Judicial Commissioner's Court ..	95
Lal Bahadur v. Paspat Prasad ..	10 O. L. J. 31; 9 O. & A. L. R. 173; (1923) A. I. R. (O.) 154 ..	301
Lallu Ram v. Reoti Ram ..	21 A. L. J. 669; 9 O & A. L. R. (A.) 674 ..	353
Lalta Prasad v. Darshan Singh ..	*Allahabad High Court ..	839
Lalta Prasad v. Ram Bahadur ..	21 A. I. J. 434; (1923) A. I. R. (A.) 540 ..	349
Laxmichand Javermal v. Municipal Committee of Nandurbar ..	(1923) A. I. R. (B.) 413 ..	205
Ma Hmun v. Ma Ngwe Thin ..	1 R. 34; (1923) A. I. R. (R.) 171 ..	104
Ma Lun Me v. Ma Kin ..	2 Bur. L. J. 67; (1923) A. I. R. (R.) 155	1037
Ma Ngwe Kin v. Ma Hme ..	1 R. 42; (1923) A. I. R. (R.) 206 ..	100
Ma Win v. Ma Ngon ..	(1923) A. I. R. (L. B.) 77 ..	44
Ma Zan Nyein v. Maung Kyaw Zan ..	1 R. 189; (1923) A. I. R. (R.) 258 ..	1027
Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande ..	25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 47 B. 798 P. C. ..	362
Mahabali Dasin v. Manu Mandal ..	*Patna High Court ..	828
Mahabir Prasad v. Kanhaiya Lal ..	21 A. L. J. 526 ..	372
Mahabir Prasad v. Parsandi ..	21 A. L. J. 345; 45 A. 410; (1923) A. I. R (A.) 532 ..	939
Mahadeo v. Emperor ..	9 O. L. J. 597; 9 O. & A. L. R. 60; (1923) A I R. (O.) 112; 4 Cr. L. J. 808 ..	712
Mahadeo Prasad v. Bissessar Prasad ..	2 Pat. 488; 4 P. L. T. 707 ..	695
Mahadeo Singh v. Dhobi Singh ..	(1923) Pat. 283; 4 P. L. T. 721; 2 Pat. 916 ..	838
Mahalakshmi v. Subbarayadu ..	17 L. W. 429; (1923) A. I. R. (M.) 472; 24 Cr. L. J. 783 ..	447
Maharaj Prasad v. Emperor ..	21 A. L. J. 673; 9 O. & A. L. R. (A.) 694; 24 Cr. L. J. 779 ..	443
Maobub Ali Khan v. Emperor ..	4 L. L. J. 485; 24 Cr. L. J. 780 ..	444
Mahesha v. Rameshar ..	10 O. L. J. 24; (1923) A. I. R. (O.) 173; 26 O. C. 329 ..	295

Mahomed Solaiman v. Kumar Birendra Chandra Singh ..	50 C. 243; (1922) A. I. R. (P. C.) 405; 4 M. L. J. 388; 32 M. L. T. 115; 27 C. W. N. 74 ; 37 C. L. J. 561 P. C. ..	906
Makbul Ahmad v. A. J. L. Allen ..	50 C. 689; 27 C. W. N 649; (1923) A I. R. (C.) 657; 24 Cr. L. J. 849 ..	1041
Makhan Lal v. Natthi ..	21 A L. J. 382; (1923) A. I. R. (A.) 509	640
Makkhan Lal v. Kishun Lal ..	(1923) A. I. R. (A.) 454 ..	320
Makund Singh v. Ghafur-un-Nissa ..	9 O. & A. L R. 549 ..	108
Mandar v. Emperor ..	24 Cr. L. J. 823 ..	855
Manicka Vachaka Desika Gyana Sambanda v. Vaithilinga Mudaliar ..	18 L. W. 247 ..	115
Maniruddin v. Emperor ..	24 Cr. L. J. 829 ..	861
Manohar Lal v. Achhutanand ..	9 O. L. J. 618; (1923) A. I. R. (O.) 27 ..	340
Manphul Singh v. Hamid Ali Khan ..	21 A. L. J. 416; (1923) A. I. R. (A.) 576..	528
Maqbul Husain v. Ahmad Husain ..	(1923) A. I. R. (A.) 557 ..	251
Mariam Begam v. Mohammad Mehdi ..	9 O. & A. L. R. 635 ..	40
Mata Ghulam Singh v. Sital Prasad ..	26 O. C. 112; (1923) A. I. R. (O.) 206 ..	409
Mata Palat v. Emperor ..	(1923) A. I. R. (A.) 479; 24 Cr. L. J. 811 ..	715
Mathura Prasad v. Anandi Kunwar ..	21 A. L J. 498 ..	911
Mathura Singh v. Kandhai Pathak ..	9 O. & A. L. R. 465 ..	816
Mathura Singh v. Sheo Mohan Prasad ..	9 O. & A. L. R. 437; 10 O. L. J. 337 ..	792
Maung Chit Hlaing v. N. A. R. M. Chetty ..	*Rangoon High Court ..	1020
Maung Gyi . Maung On Gaing ..	1 R. 186 ..	970
Maung Kyaw Dun Zan v. Ma Sein ..	1 R. 19; 2 Bur. L. J. 50; (1923) A. I. R. (R.) 151 ..	58
Maung Lun v. Maung Dun ..	(1923) A. I. R. (L. B.) 75 ..	39
Maung Po Lun v. Ma E Mai ..	(1923) A. I. R. (L. B.) 57 ..	47
Maung Po Maung v. Ma Pyit Ya ..	1 R. 161; 2 Bur. L. I. 79; (1923) A. I. R. (R.) 180 ..	933
Maung Po Thaik v. Maung Tha Byaw ..	(1923) A. I. R. (L. B.) 74 ..	18
Maung Shwe Hnyin v. Ful Chand ..	(1923) A. I. R. (L. B.) 60 ..	52
Maung Shwe La v. Ma Kywe ..	(1923) A. I. R. (L. B) 92 ..	9
Maung Shwe The v. Ma E Bon ..	(1923) A. I. R. (L. B.) 128 ..	128
Maung Thit Sa v. Maung Nat ..	(1923) A. I. R. (L. B.) 7 ..	41
Medai Dalavoi Thirumalaiyappa Mudalier v. Na nar Tevan ..	16 L. W. 478; 4 U. P. L. R. (P. C.) 92; (1922) A I. R. (P. C.) 307; (1922) M. W. N. 804; 27 C. W. N: 365; 21 A. L. J. 282; 31 M. L. T. 149 P. C. ..	604
Meenakshi Vethiar Amma v. Cheriya Parvathi Nethiar ..	(1923) M. W. N 657 ..	1012
Mi San Ma Khaing v. Shwe Ba ..	(1923) A. I. R. (L. B.) 82 ..	164
Midnapur Zemindary Co. Ltd. v. Uma Charan Mandal ..	21 A. L. J. 723; (1923) A L. R. (P. C.) 187; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W N. 832 145 M. L. J. 6 3; 25 Bom. L. R. 1287 P. C. ..	482
Mir Khan v. Sharfu ..	5 L. L. J. 163; (1923) A. I. R. (L.) 560 ..	577
Mir Singh v. Makkhan ..	21 A. L J. 300; 45 A. 404; (1923) A. I. R. (A.) 421 ..	88
Mithu Lal v. Sri Lal ..	*Allahabad High Court ..	918
Mohammad Ali v. Hasan Jafar ..	10 O. L. J. 199; (1923) A. I. R. (O.) 237 ..	480
Mohammad Jafar v. Ram Charan ..	10 O. L. J. 43; 9 O. & A. L. R. 155; 26 O. C. 204; (1923) A. I. R. (O.) 176 ..	316
Mohammad Mumtaz Ali Khan v. Mohan Singh ..	(1923) A. I. R. (P. C) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383 P.C..	476
Mohammad Yunis Khan v. Gulab ..	9 O. & A. L. R. 448; (1923) A. I. R. (O.) 172; 24 Cr. L. J. 811 ..	715
Mohammad Zain Khan v. Nurul Hassan Khan ..	21 A. L. J 650 ..	142
Mohan Lal v. Prasadi Lal ..	45 A. 46; (1924) A. I. R. (A.) 11 ..	999
Mohiddin v. Ibrahim ..	*Bombay High Court ..	161
Morrier. J. R. B. v. Raghumull ..	50 C 29; (1923) A. I. R. (C.) 429 ..	287
Mrs. May Boudville v. Emperor ..	(1923) A. I. R. (R.) 65 24 Cr L. J. 741 ..	72
Muhammad Afzal v. Muhammad Mahmood ..	21 A. L. J. 595; (1924) A. I. R. (A.) 28 ..	343

Muhammad Amirul Hasan v. Muhammad Jewad Hussain ..	5 P. L. T. 13 ..	769
Muhammad Baksh v. Muhammad Abdul Baqi Khan ..	21 A. L. J. 661 ..	490
Muhammad Fahimul Huq v. Jagat Ballav Ghosh	2 Pat. 391; (1923) A. I. R. (Pat.) 475; 4 P. L. T. 675 ..	403
Muhammad Hassan-ud-Din v. Saif Ali Shah ..	4 L. 122; 5 L. L. J; 246 ..	451
Muhammad Jan v. Duli Chand ..	3 L. L. J. 473 ..	583
Muhammad Siddiq Ali Khan v. Anwarul Hasan	21 A. L. J. 521; 45 A. 563 ..	389
Muiz-ud-Din v. Mohammad Ikhlaq ..	21 A. L. J. 516 ..	756
Mul Raj v. Fazl Imam ..	21 A. L. J. 424, 43 A. 500. (1923) A. I. R. (A.) 583 ..	307
Muneshar Tewari v. Mahesha Kueri ..	*Allahabad High Court ..	197
Munga v. Lachmiprasad ..	6 N. L. J. 70; (1923) A. I. R. (N.) 65 ..	51
Munna Lal v. The Collector of Shahjahanpur ..	45 A. 96; (1923) A. I. R. (A.) 470 ..	995
N. N. V. Chetty Firm v. K. A. P. L Chetty Firm	(1923) A. I. R. (L. B.) 107 ..	151
Naba Kishore v. Paro Bewa ..	50 C. 23; (1922) A. I. R. (C.) 198 ..	283
Nagappan Mudaliar v. Emperor ..	(1923) A. I. R. (R.) 135; 24 Cr. L. J. 755 ..	259
Nagendra Bala v. Bejoy Chand ..	50 C; 577; (1923) A. I. R. (C.) 734; 28 C. W. N. 114 ..	153
Nageshar Sahai v. Shiam Bahadur ..	26 O. C. 33 ..	255
Naini Mal v. Emperor ..	24 Cr. L. J. 804 ..	708
Naman v. Ratan Singh ..	4 L. 102; 5 L. L. J. 253 ..	589
Nand Kishore v. Kishori Lal ..	10 O. L. J. 29; 9 O. & A. L. R. 544; (1923) A. I. R. (O.) 181; 26 O. C. 350 ..	299
Nand Kishore Missir v. Kalika Missir ..	(1923) A. I. R. (Pat.) 539; 24 Cr. L. J. 845	957
Nandan Prasad v. Abdul Aziz ..	21 A. L. J. 372; 45 A. 497; (1923) A. I. R. (A.) 581 ..	367
Nanhu v. Ram Dayal ...	9 O. & A. L. R. 460 ..	818
Nannhu v. Roshan Singh ..	*Allahabad High Court ..	112
Narain v. Tukaram ..	(1923) A. I. R. (N.) 310 ..	93
Narain Singh v. Zalim Singh ..	(1923) A. I. R. (A.) 573 ..	351
Narsingh Thakur v. Bishun Pargash Singh ..	1 P. L. R. 258, (1923) A. I. R. Pat 441 ..	642
Nasir Khan v. Itwari ..	21 A. L. J. 667; 9 O. & A. L. R. (A.) 645 ..	905
Nath Sahai v. Imam Reza ..	*Patna High Court ..	912
Nathu Ram v. Ghanshyam ..	(1923) A. I. R. (A.) 519 ..	824
Nga Po Tin v. Nga Po Saung ..	1 R. 53; 2 Bur. L. J. 321 (1923) A. I. R. (R.) 211; 24 Cr. L. J. 740 ..	68
Nga Waik v. Emperor ..	1 R. 209; 2 Bur. L. J. 76; (1923) A. I. R. (R.) 251; 24 Cr. L. J. 850 ..	1042
Niamat-Ullah v. Safut-un-Nissa Bibi ..	*Allahabad High Court ..	768
Nidhi Ram v. Parsa Ram ..	(1923) A. I. R. (L.) 693; 5 L. L. J. 507 ..	1
Nilkanth v Mahabir Singh ..	9 O. & A. I. R. 207; 26 O. C. 345 ..	558
Nursing Dass Kothari v. Chattoolal Misser ..	50 C. 615; 27 C. W. N. 639; (1923) A. I. R. (C.) 611 ..	996
Official Assignee v. Mohamed E. Naikwarah ..	1 R. 153; 2 Bur. L. J. 248 ..	919
Oppenheim v. Mahomed Haneef ..	45 M. 496 26 C. W. N. 642; 16 L. W. 33; 30 M. L. T. 201; 4 U. P. L. R. (P. C.) 36; (1922) A. I. R. (P. C.) 120; (1922) M. W. N 396; 43 M. L. J. 422; 24 Bom. L. R. 1245; 36 C. L. J. 444 P. C. ..	616
Paleshwari Prasad v. Shankar Dayal ..	*Allahabad High Court ..	169
Palti v. Nirdhan Gope ..	1 P. L. R. 390; 4 P. L. T. 650 ..	815
Pandurang v. Kishan ..	19 N. L. R. 79; (1923) A. I. R. (N.) 295 ..	20
Panna Lal v. Bohra Panna Lal ..	21 A. L. J. 436 ..	481
Parakuzhiyil Ayamad v. Emperor ..	18 L. W. 350; 24 Cr. L. J. 852 ..	1044
Parshadi Lal v. Laiq Singh ..	21 A. L. J. 701 ..	943
Patel Ambaram Kubardas v. Secretary of State for India ..	(1923) A. I. R. (B.) 416 ..	196
Peary Mohun Mukherjee v. Monohar Mukherjee ..	27 C. W. N. 989; 38 C. L. J. 255 ..	373
Phul Chand v. Surji ..	(1923) A. I. R. (A.) 457 ..	684
Pirthi Pal Singh v. Muhammad Ejaz Rasul Khan	*Oudh Judicial Commissioner's Court ..	90
Ponnusami Odayar v. Ramasami Thathan ..	45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 46 M. 758; 24 Cr. L. J. 833; (1924) A. I. R. (M.) 15 F. B. ..	945

Prag Narain v. Jwala Prasad ..	21 A. L. J. 435; (1923) A. I. R. (A.) 458; 45 A. 450 ..	666
President, District Board, South Canara v. Gopalakrishna Bhatta ..	32 M. L. T. 378; 18 L. W. 82; 45 M. L. J. 125; 46 M. 808; (1923) A. I. R. M. 689 ..	223
Puhup Deo Kuer v. Ramcharitar Barhi ..	4 P. L. T. 544 ..	87
Puppooth v. Vayisravanath Manakkal Raman Samayajipad ..	44 M. L. J. 515; 17 L. W. 558; 32 M. L. T. 107; (1923) M. W. N. 301; (1923) A. I. R. (M.) 553 ..	309
Putievu Kamraju v. Chunduri Gunnayya ..	45 M. L. J. 240; 18 L. W. 233; (1923) M. W. N. 756 ..	1003
Puttoo Khan v. Ahmad Zaman Khan ..	9 O & A. I. R. 978 ..	56
R. S. Bion v. Sheogulam Lal ..	*Patna High Court ..	843
Rabi Pratab Narain Singh v. Ram Prasad Bharthi	21 A. L. J. 636 ..	502
Radha Krishun Shukul v. Nokh Lal Shukul ..	21 A. L. J. 488; (1923) A. I. R. (A.) 566 ..	964
Radhakrishna Ayyar v. Sundaraswamier ..	36 C. L. J. 450; 16 L. W. 18; 31 M. L. T. 31; 45 M. 475; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 257; 20 A. L. J. 937; 49 I. A. 211 P. C. ..	584
Radhika Raman v. Satnarain Koeri ..	*Patna High Court ..	961
Radhika Raman Bihariji Maharaj v. Bohra Sham Sundar Lal ..	21 A. L. J. 518; (1923) A. I. R. (A.) 526; 45 A. 561 ..	382
Ragha Mal v. Abdus Sattar ..	(1923) A. I. R. (A.) 565 ..	879
Ragho Pershad v. Secretary of State for India ..	9 O. L. J. 629; (1923) A. I. R. (O.) 114 ..	369
Raghudatt v. Emperor ..	9 O. & A. L. R. 517; 24 Cr. L. J. 791 ..	535
Raghunath Singh v. Jetto Singh ..	(1923) A. I. R. (A.) 613 ..	830
Raghunathaswami Iyengar v. S. Gopal Rao ...	(1922) M. W. N. 652; 16 L. W. 682; 43 M. L. J. 622; (1923) A. I. R. (M.) 135; 32 M. L. T. 1 ..	596
Rajagopala Aiyangar v. Soundara Raja Aiyangar	(1923) M. W. N. 636; 45 M. L. J. 476 ..	1018
Rajagopala Naidu v. Ramasubramania Ayyar ..	(1923) M. W. N. 550; 45 M. L. J. 274; 18 L. W. 325; 33 M. L. T. 21; 46 M. 782; (1924) A. I. R. (M.) 19 F. B. ..	198
Rajani Bandhu Chatterjee v. Kali Prasanna Chatterjee ..	*Calcutta High Court ..	279
Rakhal Chandra Chatterjee v. Rohini Kumar Chatterjee ..	37 C. L. J. 399; 27 C. W. N. 549; (1923) A. I. R. (C.) 650 ..	601
Ralia Ram v. Amir Chand ..	(1923) A. I. R. (L.) 203; 4 L. 52; 5 L. L. J. 259 ..	122
Ram Chand v. Bank of Upper India Ltd., Delhi	3 L. 59; 24 P. W. R. (1922); (1922) A. I. R. (L.) 281; 5 L. L. J. 558 ..	187
Ram Chand Khanna v. Goswami Ram Puri ..	21 A. L. J. 385; 45 A. 501; (1923) A. I. R. (A.) 513 ..	379
Ram Das Rai v. Abdul Gafoor ..	*Allahabad High Court ..	297
Ram Dial v. Sher Singh ..	21 A. L. J. 387; 45 A. 518; (1923) A. I. R. (A.) 538 ..	358
Ram Lal Malik v. Deodhari Rai ..	2 Pat. 771; 5 P. L. T. ..	781
Ram Narain v. Somi ..	45 A. 189; (1923) A. I. R. (A.) 449 ..	277
Ram Rup v. Ghani Ahmad ..	9 O. & A. L. R. 62; 9 O. L. J. 624; (1923) A. I. R. (O.) 156 ..	162
Ramakrishna Annavi v. Pichandi Chettiar ..	(1923) M. W. N. 564 ..	777
Ramaswami Aiyar v. Subramania Aiyar ..	16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M.) 147; 46 M. 47 ..	804
Rambhanjan Singh v. Pashupat Rai ..	2 Pat. 784 ..	847
Ramcharan Singh v. Sheo Dutta Singh ..	2 Pat. 260; (1923) A. I. R. Pat. 386; 4 P. L. T. 666 ..	619
Ramdeo Singh v. Mukhan Singh ..	(1923) Pat. 19 ..	330
Ramjit Ahir v. Emperor ..	2 Pat. 309. (1923 A. I. R. (Pat.) 413 1 P. L. R. 236; Cr. 24 Cr. L. J. 801 ..	[illegible]
Ramnandan Parbat v. Deni Sahi ..	1 P. L. R. 366; 5 P. L. T. 26 ..	877
Ramnath v. Sitaram ..	19 N. L. R. 147; (1923) A. I. R. (N.) 288 ..	81
Ramrup Ghoshain v. Mahabir Shah ..	2 Pat. 833 ..	825

Rangi Sah v. B. N. W. Railway Co. ..	4 P. L. T. 402; 1 P. L. R. 154 Cr; (1923) A. I. R. Pat. 540; 24 Cr. L. J 855 ..	1047
Reily v. A. Y. Rajkumari ..	36 C. L. J. 245 (1922) A I R. (C.) 493 ..	770
Rekhab Das v. Sheobal ..	21 A. L. J. 393; (1923) A. I. R. (A.) 495; 45 A. 466 ..	656
Ritlal Singh v. Emperor ..	24 Cr. L. J. 813 ..	717
Rose Charlotte v. Walter Edgar ..	45 M. L. J. 327· 18 L. W. 354 ..	139
Rudra Pratap Narain Singh v. Nirman Prasad Singh ..	9 O. L. J 552; (1923) A. I. R. (O) 61 ..	225
Rup Kishore v. Kanhaiya Lal ..	10 O. L. J, 141; (1923) A. I. R. (O.) 227; 26 O. C. 266 ..	563
Ruqaiya Begam v. Imdad Ali ..	9 O. L. J. 590; 9 O. & A. I. R. 81; (1923) A. I. R. (O.) 117 ..	321
S. M. A. R. Chetty Firm v. Ko Teik Ka ..	1 R. 22; 2 Bur. L. J. 69; (1923) A. I. R. (R.) 176 ..	82
Sachindra Nath Roy v. Maharaj Bahadur Singh ..	44 P. L. R. (P. C.) 57; 30 M. L. T. 96; 24 Bom. L. R. 659; (1922) M. W. M. 338; 26 C. W. N. 858 (1922) A. I. R. (P. C.) 187; 49 C. 203; 48 I. A. 335 P. C. ..	660
Sahu Govind Prasad v. Kundan ..	*Allahabad High Court ..	760
Sain Ditta v. Nur Ahmad ..	4 L. L. J. 476 ..	194
Sambasadasiva Chinna Rayal Varu v. Bandar Maldulappa ..	(1923) M. W. N. 524; (1924) A. I. R. (M.) 73	968
Sant Bakhsh v. Dildar Husain ..	*Oudh Judicial Commissioner's Court ..	88
Sant Ram v. Emperor ..	9 O. & A. L. R. 324; 24 Cr. L. J. 799 ..	543
Saradakripa Lala v. Bepin Chanrda Pal ..	37 C. L. J. 538; (1923) A I. R. (C) 679 ..	555
Sarat Chandra Ghose v. Emperor ..	37 C. L. J. 171; (1923) A. I. R. (C.) 408; 24 Cr. L. J 851 ..	1043
Sario Kuar v. Enait ..	*Allahabad High Court ..	331
Sasi Kanta Achariya v. Salim Sheikh ..	50 C. 626; 27 C. W. N. 987; (1923) A. I. R. (C.) 624 ..	1001
Secretary of State for India v. Akbar Ali ..	21 A. L. J. 338; 45 A. 443; (1923) A. I. R. (A.) 523 ..	8
——————— v. Nagaraja Aiyar ..	17 L. W. 618; 32 M. L. T. 230; (1923) M. W. N. 327 44 M. L. J. 845, (1923) A. I. R. (M.) 665 ..	281
——————— v. Radhika Prasad ..	44 M. L. J. 685; 46 M. 259; 18 L. W. 210; (1923) A. I. R. (M.) 667 ..	785
Secy. to the Chief Commr., Income Tax, Madras v. Doraiswami Aiyengar ..	(1923) M. W. N. 413; 18 L. W. 96; 45 M. L. J. 150; 46 M. 673: (1923) A. I. R. (M). 682 ..	22
Seshadu Reddi v. Pichi Reddi ..	16 L. W 839; (1923) A. I. R. (M.) 163; 32 M. L. T. 89 ..	35
Shah Muhammad Maudood v. Rameshwar Singh Bahadur ..	1 P. L. R. 281; (1923) A. I. R. (Pat.) 530	693
Sham Behari Lal v. Ram Kali ..	21 A. L. J. 656; (1924) A. I. R. (A.) 15 ..	495
Shamsher Singh v. Ram Kali ..	9 O & A. L. R. 424 ..	784
Shankar Mahableshwar v. Manjunath Subba ..	*Bombay High Court. ..	298
Shankar Sahi v. Buichu Ram ..	(1923) A. I. R. (A.) 569 ..	18
Sheo Dutt v. Bishunnath Singh ..	9 O L. J. 546; (1923) A. I. R. (O.) 91 ..	206
Sheo Nandan v. Balgobind Misra ..	21 A. L. J. 697 ..	647
Sheo Narayan Lal v. Munaqqa ..	9 O. L. J. 610; (1923) A. I. R. (O.) 118 ..	344
Sheo Paltan v. Sukhdeo Singh ..	26 O. C. 107; (1923) A. I. R. O. 235 ..	401
Sheonarayan v. Ramprasad ..	(1923) A. I. R. (N.) 241 ..	317
Shiboo v. Emperor ..	45 A. 17; (1922) A. I. R. (A). 488; 24 Cr. L. J 854 ..	1046
Shunmugappa v. Sangarya Chetty ..	18 L. W. 907; (1924) M. W. N. 90 ..	120
Shyam Lal v. Radhe Shyam ..	10 O. L. J. 139; (1923) A. I R. O.) 208 ..	546
Shyam Sunder Rai v. Jagarnath Misra ..	1 P. L. R. 373; (1923) Pat. 263; (1923) A I. R. (Pat.) 590, 2 Pat. 925 ..	758
Sia Shachari Peari v. Ram Kishori Kuer ..	2 Pat 796 ..	867
Sita Ram Tewari v. Ponjdar Rai ..	45 A. 490; (1923) A I. R (A.) 525 ..	315
Sook Lal v. Dal Chand ..	1 R. 196 (1923 A. I. R. (R.) 256 ..	835
Sri Narain v. Liquidator Union Bank of India ..	4 L. 109; 5 L. L. J. 56 ..	600
Sri Ram v. Mani Ram ..	21 A. L. J. 569 ..	922

Sripat Singh Dugar v. Hariram Goenka ..	31 M. L. T. 38; 26 C. W. N. 7 ; (1922) A. I. R. (P. C.) 51: 4 . P. L. R. (P. C.) 68; 16 L. W, 147;(1922)M. W. N. 671 **P.C**	597
Subbaiya Pandaram v. Muhammad Mustapha Maracayar ..	21 A. L. J. 730; (1923) A. I. R. (P C.) 175; 45 M. L. J. 588: 25 Bom. L. R. 1275; 46 M. 751; 18 L. W. 903; (1924) M. W. N. 65 **P. C.** ..	492
Sultan Bakhsh v. Abdul Majid ..	*Allahabad High Court ..	24
Suraj Narain v. Jang Bahadur ..	*Allahabad High Court ..	2
Suresh Chandra Ghose v. Emperor ..	24 Cr, L. J. 757 ..	261
Surjimull Murlidhar Chandick v. Ananta Lal Damani ..	45 M. L. J. 399; 18 L. W. 485; (1923) M. W. N. 743; 46 M. 948 ..	1029
Surwan Prasad v. Basdeo Narain Singh ..	21 A. L. J. 65; (1923) A. I. R. (A.) 129; 45 A. 237 ..	124
Swami Dayal v. Muhammad Sher Khan ..	9 O. & A. L. R. 205 ..	485
Tara v. Emperor ..	21 A. L. J. 585; 45 A. 633; 24 Cr. L. J. 785	529
Tara Kumar Ghose v. Kumar Arun Chandra Singh ..	36 C. L. J. 389; (1923) A. I. R. (C.) 261 ..	383
Tata Iron and Steel Co. Ltd., v. Chief Revenue Authority, Bombay ..	21 A. L. J. 675; 25 Bom. L. R. 908; (1923) A. I. R. P. C) 148; (1923) M. W. N. 603; 45 M. L. J. 295; 18 L. W. 372; 9 O. & A. L R. 783; 33 M. L T. 301; 47 B. 724; 28 C. W. N. 307; 39 C. L. J. 16 **P. C.** ..	469
Tikkan Ram v. Lal ..	(1923) A. I. R. (L.) 3 1 ..	939
U Damayadaya v. Emperor ..	1 R. 211; (1923) A. I. R. (R.) 212, 24 Cr. L. J. 842 ..	954
U Gunawa v. U Pyinnyadipa ..	1 R. 15; 2 Bur. L. J. 30; (1923) A. I. R. (R.) 187 ..	6
U Kyo v. Mg. Pan Yo ..	(1923) A. I. R. (L. B.) 102 ..	154
U Thudamawara v. Emperor ..	1 R. 49; 2 Bur. L. J. 22; (1923) A. I. R. (R.) 146; 24 Cr. L. J. 737 ..	65
Ujagar Singh v. Sucha Singh ..	5 L. L. J. 266 ..	489
Uman Shanker v. Aisha Khatun ..	*Allahabad High Court ..	869
Umed v. Emperor ..	24 Cr. L. J. 826 ..	858
Umrao Beg v. Mukhtar Beg ..	21 A. L. J. 308; 45 A. 401, (1923) A. I. R. (A.) 494 ..	687
Umri v. Shah Muhammad ..	5 L. L. J. 269 ..	497
Ussan Kasim Sait v. Secretary of State for India ..	17 L W. 610; (1923) M. W. N. 315; 44 M. L. J. 638; (1923) A. I. R. (M.) 624 ..	25
Uttam Singh v Rutan Devi ..	5 L. L. J 217; (1924) A. I. R. (L.) 28 ..	688
Venkata Row v. Tuljaram Row ..	20 A. L. J. 833; 26 C. W. N. 646; 30 M. L. T. 272; 45 M. 298; 4 U. P. L. R. (P. C.) 33; (1922) A. I. R. (P. C.) 69; (1922) M. W. N. 392; 43 M. L. J. 298; 24 Bom. L. R 1191; 36 C. L. J. 319 **P. C.** ..	765
Venkatanarayaniah v. Subramania Iyer ..	17 L. W. 453; (1923) A. I. R. (M.) 492 ..	209
Venkataramana Aiyar v. Coimbatore Mercantile Bank Ltd. ..	(1923) M. W. N. 568; 18 L. W. 304 ..	966
Venkatasubramania Aiyar v. Usuff ..	45 M. L. J. 50; 18 L. W. 314; (1923) A. I. R. (M.) 708 ..	1006
Vijbhukhandas Kashidas v.Ishwardas Jagjivandas	25 Bom. L R. 431; (1923) A I. R. (B.) 397	292
Vithu v. Ganesh Ramchandra ..	25 Bom. L. R. 453; (1923) A. I. R. (B) 396	149
Wahari Mander v. Emperor ..	(1923) A. I. R. (Pat) 527; 24 Cr. L. J. 825	857
Wayezul Huq v. Shobrati Jolaha ..	4 P. L. T. 441; 1 P. L. R. 161; 24 Cr. L. J. 754 ..	258
Waziri Begam v. Sashi Bhusan Rai ..	4 P. L. T. 546; (1923) Pat. 293; 2 Pat 874	820
Yad Ram v. Sunder Singh ..	21 A. L. J. 313; (1923) A. I. R. (A) 392; 45 A. 425 ..	778
Yaqub Beg v. Rasul Beg ..	10 O. L. J. 86; (1923) A. I. R. (O.) 254 ..	517
Zamindar Garu of Nuzvid v. Government Pleader	45 M. L. J. 721 ..	544

Table showing seriatim the pages of Volume 74 of Indian Cases and the corresponding pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Page.	Names of cases reported.	Where reported.
1	Nidhi Ram v. Parsa Ram ..	(1923) A. L. R. (L.) 693; 5 L. L. J. 507.
2	Suraj Narain v. Jang Bahadur ..	*Allahabad High Court.
4	Dharma Raja v. Pethu Raja ..	45 M. L. J. 212; 18 L. W. 243; (1923) M. W. N. 677; 46 M. 811; (1924) A. I. R. (M.) 179.
6	U Gunawa v. U Pyinnyadipa ..	1 R. 15; 2 Bur. L. J. 30; (1923) A. I. R. (R.) 187.
7	Bhikam Khan v. Dan Singh ..	(1923) A. I. R. (A.) 544.
8	Secretary of State for India v. Akbar Ali ..	21 A. L. J. 338; 45 A. 443; (1923) A. I. R. (A.) 523.
9	Maung Shwe La v. Ma Kywe ..	(1923) A. I. R. (L. B.) 92.
11	Kashi Nath v. Emperor ..	21 A. L. J. 671.
13	Ismail Yacoobjee v. Abdoolla Hajee Abba & Co.	(1923) A. I. R. (L. B.) 80.
14	Gajraj Tewari v. Bhagirathi Pande ..	*Allahabad High Court.
16	Ezekiel Moses v. Russa Engineering Works ..	1 R. 47; 2 Bur. L. J. 46.
17	Badlu v. Naraini ..	*Lahore High Court.
18	Maung Po Thaik v. Maung Tha Byaw ..	(1923) A. I. R. (L. B.) 74.
18	Shankar Sahi v. Buichu Ram ..	(1923) A. I. R. (A.) 569.
19	Chhammi Lal v. Sukhrani Kunwar ..	(1923) A. I. R. (A.) 537.
20	Pandurang v. Kishan ..	19 N. L. R. 79; (1923) A. I. R. (N.) 295.
21	Bindhiachal Rai v. Sita Ram ..	*Allahabad High Court.
22	Secy. to the Chief Commr., Income Tax, Madras v. Doraiswami Aiyengar ..	(1923) M. W. N. 413; 18 L. W. 96; 45 M. L. J. 150; 46 M. 673; (1923) A. I. R. (M.) 682.
24	Sultan Bakhsh v. Abdul Majid ..	*Allahabad High Court.
25	Ussan Kasim Sait v. Secretary of State for India	17 L. W. 610; (1923) M. W. N. 315; 44 M. L. J. 638; (1923) A. I. R. (M.) 624.
27	Abuvakkar v. Kunhikuttiyali ..	16 L. W. 768; 31 M. L. T. 389; (1923) A. I. R. (M.) 153.
31	Chan Htoon Aung v. Akyab Municipality ..	(1923) A. I. R. (L. B.) 75.
35	Seshadu Reddi v. Pichi Reddi ..	16 L. W. 839; (1923) A. I. R. (M.) 163; 32 M. L. T. 89.
39	Maung Lun v. Maung Dun ..	(1923) A. I. R. (L. B.) 75.
40	Mariam Begam v. Mohammad Mehdi ..	9 O. & A. L. R. (O.) 935.
41	Maung Thit Sa v. Maung Nat ..	(1923) A. I. R. (L. B.) 76.
42	Baldeo v. Sher Bahadur Singh ..	9 O. & A. L. R. 781.
44	Ma Win v. Ma Ngon ..	(1923) A. I. R. (L. B.) 77.
45	Ayub Kareem v. Jaffar Ayub ..	6 N. L. J. 209; (1923) A. I. R. (N.) 298.
47	Maung Po Lun v. Ma E Mai ..	(1923) A. I. R. (L. B.) 57.
51	Munga v. Lachmiprasad ..	6 N. L. J. 70; (1923) A. I. R. (N.) 65.
52	Maung Shwe Hnyin v. Ful Chand ..	(1923) A. I. R. (L. B.) 60.
53	Gangu v. Kongshi ..	(1923) A. I. R. (N.) 305.
54	A. L. A. R. Firm v. Maung Thwe ..	(1923) A. I. R. (L. B.) 69.
56	Puttoo Khan v. Ahmad Zaman Khan ..	9 O. & A. L. R. 978.
58	Maung Kyaw Dun Zan v. Ma Sein ..	1 R. 19; 2 Bur. L. J. 50; (1923) A. I. R. (R.) 151.
58	Ammani Ammal v. Peliasami Udayan ..	32 M. L. T. 323; 45 M. L. J. 1; (1923) M. W. N. 652; (1924) A. I. R. (M.) 75.
62	Imam Din Khan v. Abdul Sattar Khan ..	Oudh Judicial Commissioner's Court.
64	Girdhari Lal v. Firm Achal Singh-Takhat Singh ..	21 A. L. J. 522; 45 A. 569; (1923) A. I. R. (A.) 605.
65	U Thudamawara v. Emperor ..	1 R. 49; 2 Bur. L. J. 22; (1923) A. I. R. (R.) 146; 24 Cr. L. J. 737.
66	Baba v. Emperor ..	24 Cr. L. J. 738.

68	Nga Po Tin v. Nga Po Saung ..	1 R. 53; 2 Bur. L. J. 32; (1923) A. I. R. (R.) 211; 24 Cr. L. J. 740.
69	Bhagwati Prasad v. Emperor ..	9 O. & A. L. R. 850; 24 Cr. L. J. 741.
72	Mrs. May Boudville v. Emperor ..	(1923) A. I. R. (R.) 65; 24 Cr. L. J. 744.
73	Jasuram Marwari v. Emperor ..	24 Cr. L. J. 745; 2 P. L. R. 13 Cr.
74	Ahmed Ibrahim v. A. A. Ganny ..	1 R. 56; 2 Bur. L J. 40; (1923) A. I. R. (R.) 209; 24 Cr. L. J. 746.
75	Dina Nath v. Nek Ram ..	21 A. L. J. 88; (1923) A. I. R. (A.) 175; 24 Cr. L. J. 747.
76	H. K. Bhedwar v. C. S. R. Rao ..	27 C. W. N. 919; 24 Cr. L. J. 748.
78	Kyaw Dwe v. Emperor ..	(1923) A. I. R. (L. B.) 67; 24 Cr. L. J. 750.
79	Hakam v. Ralia Ram ..	4 L. 66; 24 Cr. L. J. 751.
81	Ramnath v. Sitaram ..	19 N. L. R. 147; (1923) A. I. R. (N.) 288.
82	S. M. A. R. Chetty Firm v. Ko Teik Ka ..	1 R. 22; 2 Bur. L. J. 69; (1923) A. I. R. (R.) 176.
86	Indar Singh v. Gurdayal Singh ..	*Oudh Judicial Commissioner's Court.
87	Puhup Deo Kuer v. Ramcharitar Barhi ..	4 P. L. T. 544.
88	Sant Bakhsh v. Dildar Husain ..	*Oudh Judicial Commissioner's Court.
88	Mir Singh v. Makkhan ..	21 A. L. J. 300; 45 A. 404; (1923) A. I. R. (A.) 421.
90	Pirthi Pal Singh v. Muhammad Ejaz Rasul Khan	*Oudh Judicial Commissioner's Court.
93	Narain v. Tukaram ..	(1923) A. I. R. (N.) 310.
95	Lal Bahadur v. Murli Dhar ..	*Oudh Judicial Commissioner's Court.
100	Ma Ngwe Kin v. Ma Hme ..	1 R. 42; (1923) A. I. R. (R.) 206.
102	Aulad Ali v. Abdul Hamid ..	(1923) A. I R. (Pat) 490; 2 Pat. 715.
104	Ma Hmun v. Ma Ngwe Thin ..	1 R. 34; (1923) A. I. R. (R.) 171.
107	Gangadhar Daji v. Govind Narayan ..	(1923) A. I. R. (N.) 296.
108	Makund Singh v. Ghafur-un-Nissa ..	9 O. & A. L. R. 549.
110	Bisheshwar Pratap Narain Sahi v. Asarfi Singh ..	*Patna High Court.
112	Nannhu v. Roshan Singh ..	*Allahabad High Court.
113	Harihar Prasad v. Udai Nath Sah ..	2 A. L. J. 77; (1923) A. I. R. (A.) 190; 45 A. 260.
115	Manicka Vachaka Desika Gyana Sambanda v. Vaithilinga Mudaliar ..	18 L. W. 247.
120	Shunmugappa v. Sangarya Chetty ..	18 L. W. 907; (1924) M. W. N. 90.
122	Ralia Ram v. Amir Chand ..	(1923) A. I. R. (L.) 203; 4 L. 52; 5 L. L. J. 259.
124	Surwan Prasad v. Basdeo Narain Singh ..	21 A. L. J. 65; (1923) A. I. R. (A.) 129; 45 A. 237.
128	Maung Shwe The v. Ma E Bon ..	(1923) A. I. R. (L. B.) 128.
130	Jago Mahton v. Khirodhar Ram ..	2 Pat. 759.
133	Jhinku Singh v. Sital Singh ..	21 A. L. J. 81; (1923) A. I. R. (A.) 267; 45 A. 263.
134	Kedar Nath v. Jagar Nath Das ..	1 P. L. R. 73.
139	Rose Charlotte v. Walter Edgar ..	45 M. L. J. 327; 18 L. W. 354.
140	Bishun Mohon v. Narayan Prasad ..	*Patna High Court.
142	Mohammad Zain Khan v. Nurul Hassan Khan ..	21 A. L. J. 650.
144	Chaurasi Mahsarick v. Bhagan Sahu ..	(1923) Pat. 209; 2 Pat. 787; (1924) A. I. R. (Pat.) 20.
146	Gulli v. Sawan ..	4 L. 72; 5 L. L. J. 482.
149	Vithu v. Ganesh Ramchandra ..	25 Bom. L. R. 453; (1923) A. I. R. (B.) 396.
150	Arjun Sahu v. Kelai Rath ..	2 Pat. 317; (1923) A. I. R. (Pat.) 436.
151	N. N. V. Chetty Firm v. K. A. P. L. Chetty Firm	(1923) A. I. R. (L. B.) 107.
153	Nagendra Bala v. Bejoy Chand ..	50 C. 577; (1923) A. I. R. (C.) 734; 28 C. W. N. 114.
154	U Kyo v. Mg. Pan Yo ..	(1923) A. I. R. (L. B.) 102.
155	Chidambaram Chetty v. Kandasami Goundan ..	(1923) M. W. N. 571; 45 M. L. J. 346; 18 L. W. 757; 46 M. 768; (1924) A. I. R. (M.) 1 F. B.
161	Mohiddin v. Ibrahim ..	*Bombay High Court.
162	Ram Rup v. Ghani Ahmad ..	9 O. & A. L. R. 62; 9 O. L. J. 624; (1923) A. I. R. (O.) 156.
164	Mi San Ma Khaing v. Shwe Ba ..	(1923) A. I. R. (L. B.) 82.
166	Kondal Rayar v. Ranganayaki Ammal ..	45 M. L. J. 186; (1923) M. W. N. 499; 18 L. W. 461; 46 M. 791; (1924) A. I. R. (M.) 49.

174	Bhagwat Prashad v. Dwarka Prasad Singh ..	4 P. L. T. 513; (1923) Pat. 229; 2 Pat. 809 1 P. L. R. 453; (1924) A. I. R. (Pat.) 23.
177	Hardial v. Alam ..	*Allahabad High Court.
178	Benoy Bhusan Roy v. Dhirendra Nath De ..	38 C. L. J. 114.
182	Administrator-General, Madras v. V. V. Ramiah	43 M. L. J. 347; (1922) M. W. N. 571; 16 L. W. 711; (1922) A. I. R. (M.) 491.
186	Gopal Das v. Gauri Shanker Prasad ..	*Allahabad High Court.
187	Ram Chand v. Bank of Upper India Ltd., Delhi	3 L. 59; 24 P W. R. 1922; (1922) A. I. R. (L.) 281; 5 L. L. J. 558
193	Bhairabendra Narain Roy v. Rajendra Narain Roy ..	50 C 487; (1924) A. I. R. (C.) 45.
194	Sain Ditta v. Nur Ahmad ..	4 L. L. J. 476.
195	Khalil v. Mohammad Ismail ..	9 O. L. J. 540; (1923) A. I. R. (O.) 101.
196	Patel Ambaram Kuberdas v. Secretary of State for India ..	(1923) A. I. R. (B.) 416
197	Muneshar Tewari v. Mahesha Kueri ..	*Allahabad High Court.
198	Rajagopala Naidu v. Ramasubramania Ayyar ..	(1923) M. W. N. 550; 45 M. L. J. 274; 18 L. W. 326; 33 M. L T. 21; 46 M. 782; (1924) A. I. R. (M.) 19 F. B.
202	Baldeo Singh v. Meghu Singh ..	(1919) Pat. 386.
205	Laxmichand Javermal v. Municipal Committee of Nandurbar ..	(1923) A. I. R. (B.) 413.
206	Sheo Dutt v. Bishunnath Singh ..	9 O L. J. 546; (1923) A. I. R. (O.) 91; (1924) A. I. R. (M.) 19.
209	Venkatanarayania v. Subramania Iyer ..	17 L. W. 153; (1923) A. I. R. (M.) 492.
214	Bhagwati Prasad v. Achhaibar Singh ..	9 O. L. J. 531; (1923) A. I. R. (O.) 93; 26 O. C. 24.
218	Karri Bapanna v. Sunkari Yerramma ..	18 L. W. 49; 45 M. L. J. 324; 33 M. L. J. 46; (1923) A. I. R. (M.) 718.
220	Khairuddin v. Sahu Gulab Das ..	*Allahabad High Court.
220	Balappa Ghenappa v. Akkubai ..	*Bombay High Court.
223	President, District Board, South Canara v. Gopalakrishna Bhatta ..	32 M. L. T. 378; 18 L. W. 823; 45 M. L. J. 125; 46 M. 802; (1923) A. I R. (M.) 689.
225	Rudra Pratap Narain Singh v. Nirman Prasad Singh ..	9 O. L. J. 552; (1923) A. I. R. (O.) 61.
244	Hari Narain Das *In re*, ..	50 C. 141; (1923) A. I. R. (C.) 409.
246	Faghfur Mirza v. Khushal Chand ..	26 O. C. 59; (1923) A. I. R. (O.) 241.
248	Lachmi Narain v. Bombay Baroda and Central India Railway Company ..	45 A. 235; 1923) A. I. R. (A.) 449.
249	Karim Bakhsh v. Abdul Haq ..	26 O C. 62; 1923) A. I. R. (O.) 240.
250	Butterfield v. Butterfield ..	50 C, 153; (1923) A. I. R. (C.) 420.
251	Maqbul Husain v. Ahmad Husain ..	(1923) A. I. R (A.) 557.
253	Beni Madho v. Shamshad Ali ..	26 O. C. 56; (1923) A. I. R. (O.) 238.
255	Nageshar Sahai v. Shiam Bahadur ..	26 O. C. 33.
257	Emperor v. Umrao ..	21 A. L. J. 316; (1923) A. I R. (A.) 355; 24 Cr. L J. 753.
258	Wayezul Huq v. Shobrati Jolaha ..	4 P. L. T. 441; 1 P. L. R. 161; 24 Cr. L. J. 754.
259	Nagappan Madaliar v. Emperor ..	(1923) A. I. R. (L. B.) 135; 24 Cr. L. J. 755.
260	Allu v. Emperor ..	21 A L. J. 72; (1923) A. I. R. (A.) 193; 45 A 272; 24 Cr. L. J. 756.
261	Suresh Chandra Ghose v. Emperor ..	24 Cr. L. J. 757.
262	Emperor v. J. John ..	45 A. 145; (1923) A. I. R. (A.) 474; 24 Cr. L. J. 758.
264	Emperor v. Ganesh Chandra Goldar ..	50 C. 127; (1923) A. I. R. (C.) 458; 24 Cr. L. J. 700.
267	Emperor v. Profulla Kumar Mazumdar ..	50 C. 41; (1923) A. I. R. (C.) 453; 24 Cr. L. J. 763.
270	Emperor v. Kale ..	45 A. 143; (1223) A. I. R. (A.) 473; 24 Cr. L. J. 766.
271	Ganeshi Lal v. Emperor ..	4 L. L. J. 484; 24 Cr. L. J. 767.
273	Jitmull-Girdhari Lal v. Ram Gopal Bohitram ..	50 C. 12; (1923) A. I. R. (C.) 419.
277	Ram Narain v. Somi ..	45 A. 169; (1923) A. I. R. (A.) 449.
278	Arlandu v. Sithambram Chatterjee ..	(1923) A. I. R. (L. B.) 82.

279	Rajani Bandhu Chatterjee v. Kali Prasanna ..	*Calcutta High Court.
281	Secretary of State for India v. Nagaraja Aiyar ..	17 L. W. 618; 32 M. L. T. 230; (1923) M. W. N. 3 7; 44 M. L. J. 645; (1923) A. I. R. (M.) 665.
282	Bhuru v. Datu Ram ..	(1922) A. I. R. (L.) 57; 4 L. L. J. 461.
283	Naba Kishore v. Paro Bewa ..	50 C. 23; (1922) A. I. R. (C.) 198.
285	Bapujirao v. Raghunathrao ..	*Bombay High Court
286	Gulab Singh v. Shib Lal ..	21 A. L. J. 331; (1923) A. I. R. (A.) 347.
287	Morrier, J. R. B. v. Raghumull ..	50 C. 29; (1923) A. I. R. (C.) 439.
292	Vijbhukhandas Kashidas v. Ishwardas Jagjivandas	25 Bom L. R. 431; (1923) A. I. R. (B.) 397.
294	Isher Singh v. Surat Singh ..	4 L. 356.
295	Mahesha v. Rameshar ..	10 O. L. J. 24; (1923) A. I. R. (O.) 173; 26 O. C. 329.
297	Ram Das Rai v. Abdul Gafoor ..	*Allahabad High Court.
298	Shankar Mahableshwar v. Manjunath Subba ..	*Bombay High Court.
299	Nand Kishore v. Kishori Lal ..	10 O. L. J. 2 ; 9 O. & A. L. R. 544; (1923) A. I. R. (O.) 181; 26 O. C. 350.
300	Kidar Nath Rajnarain v. East Indian Railway ..	21 A. L. J 351; 45 A. 453; (1923) A. I. R. (A.) 538.
301	Lal Bahadur v. Paspat Prasad ..	10 O. L. J. 31; 9 O. & A. L. R. 173; (1923) A. I. R. (O.) 154.
302	Dev Chand Chatraji v. Jamsedji Shahpurji ..	25 Bom. L. R. 354; (1923) A. I. R. (B.) 369.
304	Abdul Hakim v. Sajjad Hussain ..	10 O. L. J. 46; 26 O. C. 209; 9 O. & A. L. R. 733; (1923) A. I. R. (O.) 209.
307	Mul Raj v. Fazl Imam ..	21 A. L. J. 424; 45 A. 520; (1923) A. I. R. (A.) 583.
309	Puppooth v. Vayisravanath Manakkai Raman Somayajipad ..	44 M. L. J. 515; 17 L. W. 558; 32 M. L. T. 107; (1923) M. W. N. 301; (1923) A. I. R. (M.) 553.
315	Sita Ram Tewari v. Foujdar Rai ..	45 A. 493; (1923) A. I. R. (A.) 525.
316	Mohammad Jafar v Ram Charan ..	10 O. L. J. 43; 9 O & A. L. R. 155; 26 O. C. 204; (1923) A. I. R. (O.) 176.
317	Sheonarayan v. Ramprasad ..	(1923) A. I. R. (N.) 241.
320	Makkhan Lal v. Kishun Lal ..	(1923) A. I. R. (A.) 454.
321	Ruqaiya Begam v. Imdad Ali ..	9 O. L. J. 590; 9 O. & A. L. R. 81; (1923) A. I. R. (O.) 117.
322	Balwant Singh v. Mare Singh ..	21 A. L. J. 542.
324	Janki Pershad v. Someshar Pershad ..	9 O. L. J. 599; (1923) A. I. R. (O.) 23.
325	Inayat Ilahi v. Hardeo Sahai ..	21 A. L. J. 610; (1924) A. I. R. (A.) 29.
330	Ramdeo Singh v. Mukhan Singh ..	(1923) Pat. 19.
331	Sarjo Kuar v. Enait ..	*Allahabad High Court.
335	Bhagwan Bakhsh Singh v. Surendra Bikram Singh	10 O. L. J. 209; (1924) A. I. R. (O.) 11.
339	Alama Chand v. Chhajju ..	(1923) A. I. R. (A.) 530; 45 A. 559.
340	Manohar Lal v. Achhutanand ..	9 O. L. J. 618; (1923) A. I. R. (O.) 27.
343	Muhammad Afzal v. Muhammad Mahmood ..	21 A. L. J. 595; (1924) A. I. R. (A.) 28.
344	Sheo Narayan Lal v. Munaqqa ..	9 O. L. J. 610; (1923) A. I. R. (O.) 118.
345	Aftab Begam v. Muhammad Ayub ..	21 A. L. J. 607 45 A. 653.
346	Basant Rai v. Kesho Ram ..	9 O. L. J. 612; (1923) A. I. R. (O.) 139.
349	Lalta Prasad v. Ram Bahadur ..	21 A. L. J. 434; (1923) A. I. R. (A.) 540.
351	Jag Mohan Singh v. Mata Badal ..	9 O. L. J. 623; (1923) A. I. R. (O.) 153.
351	Narain Singh v. Zalim Singh ..	(1923) A. I. R. (A.) 573.
353	Lallu Ram v. Reoti Ram ..	21 A. L. J. 669; 9 O. & A. L. R. (A.) 674.
353	Jamna Pershad v. Balbhaddar ..	9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O.) 147.
358	Ram Dial v. Sher Singh ..	21 A. L. J. 387; 45 A. 518; (1923) A. I. R. (A.) 538.
359	Kashi Prasad v. Panna Lal ..	(1923) A. I. R. (A.) 529.
360	Kalloo Singh v. Bakhtawar Singh ..	9 O. L. J. 657; 9 O. & A. L. R. 113; (1923) A. I. R. (O.) 121; 26 O. C. 289.
362	Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande ..	25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389. 47 B. 798 P. C.
367	Nandan Prasad v. Abdul Aziz ..	21 A. L. J. 372; 45 A. 497; (1923) A. I. R. (A.) 581.

369	Ragho Pershad v. Secretary of State for India ..	9 O. L. J. 629; (1923) A. I. R. (O.) 114.
372	Mahabir Prasad v. Kanhaiya Lal ..	21 A. L. J. 526.
373	Peary Mohun Mukherjee v. Monohar Mukherjee ..	27 C. W. N. 989; 38 C. L. J. 255.
379	Ram Chand Khanna v. Goswami Ram Puri ..	21 A. L. J. 385; 45 A. 501; (1923) A. I. R. (A.) 513.
380	Jamna v. Ramraji ..	9 O. L. J. 627; 9 O. & A. L. R. 32; (1923) A. I. R. (O.) 146.
382	Radhika Raman Bihariji Maharaj v. Bohra Shiam Sundar Lal ..	21 A. L. J. 518; (1923) A. I. R. (A.) 526; 45 A. 561.
383	Tara Kumar Ghose v. Kumar Arun Chandra Singh ..	36 C. L. J. 389; (1923) A. I. R. (C.) 261.
389	Muhammad Siddiq Ali Khan v. Anwarul Hasan ..	21 A. L. J. 521; 45 A. 563.
390	Khalil Ullah Shah v. Ewaz Ali ..	26 O. C. 128; (1923) A. I. R. (O.) 214.
392	Kamini Kumar Deb v. Durga Charan Nag ..	37 C. L. J. 122; (1923) A. I. R. (C.) 521.
396	Keshavlal Bros. & Co. v. Diwan Chand & Co. ..	(1923) A. I. R. (P. C.) 105; 25 Bom. L. R. 854; (1923) M. W. N. 583; 27 C. W. N. 974; 47 B. 563; 45 M. L. J. 630; 33 M. L. T. 342; 1 P. L. R. 434 Cr. **P. C.**
401	Sheo Paltan v. Sukhdeo Singh ..	26 O. C. 107; (1923) A. I. R. (O.) 35.
403	Muhammad Fahimul Huq v. Jagat Ballav Ghosh	2 Pat. 391; (1923) A. I. R. (Pat.) 475; 4 P. L. T. 675.
409	Mata Ghulam Singh v. Sital Prasad ..	26 O. C. 113; (1923) A. I. R. (O.) 206
411	Ghansham Singh v. Bhola Singh ..	21 A. L. J. 465; (1923) A. I. R. (A.) 496; 45 A. 506 **F. B.**
416	Gopalasamy Iyengar v. Nummachi Reddiar ..	17 L. W. 54; (1923) A. I. R. (M.) 392.
420	Jugnu Khan v. Rudra Partab Singh ..	26 O. C. 118; (1923) A. I. R. (O.) 216.
431	East Indian Railway Company v. Sukhdeo Das Gobardhan ..	4 P. L. T. 443; (1924) A. I. R. (Pat.) 25
433	Gulzar Jan v. Emperor ..	4 L. 120; 24 Cr. L. J. 769; 5 L. L. J. 522.
434	Emperor v. Narotam ..	10 O. L. J. 68; (1923) A. I. R. (O.) 217; 24 Cr. L. J. 770.
443	Maharaj Prasad v. Emperor ..	21 A. L. J. 673; 9 O. & A. L. R. (A.) 694; 24 Cr. L. J. 779.
444	Mahbub Ali Khan v. Emperor ..	4 L. L. J. 488; 24 Cr. L. J. 780.
445	Feroza Jan v. Amir Ali ..	9 O. L. J. 593; 9 O. & A. L. R. 103; (1923) A. I. R. (O.) 119; 24 Cr. L. J. 781.
447	Mahalakshmi v. Subbarayadu ..	17 L. W. 429; (1923) A. I. R. (M.) 470; 24 Cr. L. J. 783.
448	Dukhi v. Emperor ..	24 Cr. L. J. 784.
449	Balgobind v. Badri Prasad ..	21 A. L. J. 578; (1923) A. I. R. (P. C.) 70; 9 O. & A. L. R. (P. C.) 581; 26 O. C. 217; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368 **P. C.**
451	Muhammad Hassan-ud-Din v. Saif Ali Shah ..	4 L. 122; 5 L. L. J. 246.
454	Kesho Prasad Singh v. Ramdeni Singh ..	2 Pat. 183; (1923) A. I. R. (Pat.) 397; 4 P. L. T. 689.
458	Kondine Kamaya v. Kavidena Ramamma ..	(1922) M. W. N. 176; (1922) A. I. R. (M.) 95; 16 L. W. 934.
459	Kusam Dei v. Hur Dutt ..	26 O. C. 98.
462	Jatti v. Banwari Lal ..	21 A. L. J. 582; (1923) A. I. R. (P. C.) 136; 18 L. W. 273; 45 M. L. J. 355; (1923) M. W. N. 687; 25 Bom. L. R. 1256; 4 L. 350 **P. C.**
464	Janki Ray v. Kalanand Singh ..	2 Pat. 192; (1923) A. I. R. (Pat.) 381; 4 P. L. T. 705.
466	Gauri Shankar v. Manki Kunwar ..	21 A. L. J. 571; 45 A. 624; (1924) A. I. R. (A.) 17.
469	Tata Iron and Steel Co. Ltd., v. Chief Revenue Authority, Bombay ..	21 A. L. J. 675; 25 Bom. L. R. 908; (1923) A. I. R. (P. C.) 148; (1923) M. W. N 603; 45 M. L. J. 295; 18 L. W. 372; 9 O. & A. L. R. 783; 33 M. L. T. 301; 47 B. 724; 28 C. W. N. 307; 39 C. L. J. 16 **P. C.**
474	Kapleshwar Jha v. Raghunandan Prasad ..	1 P. L. R. 370; 4 P. L. T. 718.

476	Mohammad Mumtaz Ali Khan v. Mohan Singh ..	(1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383 **P. C.**
479	Chet Ram v. Spedding & Co. Ltd. ..	5 L. L. J. 234.
480	Mohammad Ali v. Hasan Jafar ..	10 O. L. J. 109; (1923) A. I. R. (O.) 237.
481	Panna Lal v. Bohra Panna Lal ..	21 A. L. J. 436.
482	Midnapur Zemindary Co. Ltd. v. Uma Charan Mandal ..	21 A. L. J. 723; (1923) A. I. R. (P. C.) 187; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 45 M. L. J. 663; 25 Bom. L. R. 1287 **P. C.**
484	Khazana Mal v. Jagan Nath ..	5 L. L. J. 236; 4 L. 200.
485	Swami Dayal v. Muhammad Sher Khan ..	9 O. & A. L. R. 205.
486	Kedar Nath v. Nanak ..	*Allahabad High Court.
487	Firm of Shyam Lal Gokul Chand v. Jamil Ahmad	*Patna High Court.
489	Ujagar Singh v. Sucha Singh ..	5 L. L. J. 266.
490	Muhammad Baksh v. Muhammad Abdul Baqi Khan	21 A. L. J. 661.
492	Subbaiya Pandaram v. Mahamad Mustapha Maracayar ..	21 A. L. J. 730; (1923) A. I. R. (P. C.) 175; 45 M. L. J. 588; 25 Bom. L. R. 1275; 46 M. 751; 18 L. W. 903; (1924) M. W. N. 65 **P. C.**
495	Sham Behari Lal v. Ram Kali ..	21 A. L. J. 656; (1924) A. I. R. (A.) 15.
497	Umri v. Shah Muhammad ..	5 L. L. J. 269.
498	Baijnath Rai v. Gokul Rai ..	21 A. L. J. 659; (1924) A. I. R. (A.) 37.
499	Ananda Mohan Roy v. Gour Mohan Mullick ..	21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929 **P. C.**
502	Rabi Pratab Narain Singh v. Ram Prasad Bharthi	21 A. L. J. 646.
503	Baldeo Singh v. Deputy Commissioner, Kheri ..	10 O. L. J. 112; 9 O. & A. L. R. 587; (1924) A. I. R. (O.) 1.
513	Kapur Chand v. Kanhaiya Lal ..	21 A. L. J. 641; (1924) A. I. R. (A.) 34.
517	Yaqub Beg v. Rasul Beg ..	10 O. L. J. 86; (1923) A. I. R. (O.) 254.
528	Manphul Singh v. Hamid Ali Khan ..	21 A. L. J. 416; (1923) A. I. R. (A.) 576.
529	Tara v. Emperor ..	21 A. L. J. 585; 45 A. 633; 24 Cr. L. J. 785.
533	Jageshar v. Emperor ..	9 O. & A. L. R. 293; 24 Cr. L. J. 789.
534	Bishen Singh v. Emperor ..	24 Cr. L. J. 790.
535	Raghudatt v. Emperor ..	9 O. & A. L. R. 517; 24 Cr. L. J. 791.
536	Cheta Mahto v. Emperor ..	2 Pat. 459; 4 P. L. T. 727; 24 Cr. L. J. 792.
539	Emperor v. Rameshwar Tewari ..	9 O. & A. L. R. 526; (1923) A. I. R. (O.) 195; 10 O. L. J. 299; 24 Cr. L. J. 795.
542	Krishna Chandra Bhowmik v. Emperor ..	37 C. L. J. 535; (1923) A. I. R. (C.) 562; 24 Cr. L. J. 798.
543	Sant Ram v. Emperor ..	9 O. & A. L. R. 324; 24 Cr. L. J. 799.
544	Dalsher v. Emperor ..	9 O. & A. L. R. 547; 24 Cr. L. J. 800.
545	Abdul Aziz v. Lakhmi Chandra ..	37 C. L. J. 494; (1923) A. I. R. (C.) 676.
546	Shyam Lal v. Radhe Shyam ..	10 O. L. J. 139; (1923) A. I. R. (O.) 208.
547	Birendra Kishore v. Trailakhya Nath Roy ..	37 C. L. J. 521; (1923) A. I. R. (C.) 673.
549	Fatch Singh v. Jagannath Bakhsh Singh ..	10 O. L. J. 132; (1923) A. I. R. (O.) 242; 10 O. & A. L. R. 74.
552	Giris Chandra v. Bhabataran Shakari ..	37 C. L. J. 524; (1923) A. I. R. (C.) 667.
553	Ashiq Ali v. Ghulam Sarwar ..	9 O. & A. L. R. 521.
555	Saradakripa Lala v. Bepen Chandra Pal ..	37 C. L. J. 528; (1923) A. I. R. (C.) 679.
557	Dutt Prasad Singh v. Sri Narain ..	21 A. L. J. 340; (1923) A. I. R. (A.) 503.
558	Nilkanth v. Mahabir Singh ..	9 O. & A. L. R. 207; 26 O. C. 345.
561	Bhagwan Ramanuj v. Ramkrishna Bose ..	(1923) A. I. R. (P. C.) 184; 26 C. W. N. 722 **P. C.**
563	Rup Kishore v. Kanhaiya Lal ..	10 O. L. J. 141; (1923) A. I. R. (O.) 22[illegible]; 26 O. C. 266.
571	Chaturbhuj v. Gobind Ram ..	21 A. L. J. 348; 45 A. 407.
573	Ganga Ratan v. Chandika Prasad ..	9 O. & A. L. R. 319.
575	Habibullah v. Gola Asmoter Khatun ..	37 C. L. J. 395; 27 C. W. N. 720; (1923) A. I. R. (C.) 612.
577	Mir Khan v. Sharfu ..	5 L. L. J. 163; (1923) A. I. R. (L.) 5[illegible]0.
582	Ajodhya Singh v. Khusro Begam ..	9 O. & A. L. R. 321.
583	Muhammad Jan v. Duli Chand ..	3 L. L. J. 473.

584	Radhakrishna Ayyar v. Sundaraswamier ..	36 C.L. J. 450; 16 L. W. 18; 31 M. L. T. 31; 45 M 475; 43 M. L J. 323; 27 C. W. N. 1; (1922) A. I. R. (P.C.) 257; 20 A. L. J. 937; 49 I. A. 211 **P. C**
589	Naman v. Ratan Singh ..	4 L. 102; 5 L. L. J. 253.
591	Isup Ali v. Gour Chandra Deb ..	37 C. L. J. 184; (1923) A. I. R. (C.) 496.
596	Raghunathaswami Iyengar v. S. Gopal Rao ..	(1922) M. W. N. 652; 16 L. W. 682; 43 M. L. J. 622; (1923) A. I. R.(M.) 135; 32 M.L.T. 1.
597	Sripat Singh Dugar v. Hariram Goenka ..	31 M. L. T. 38; 26 C. W. N. 739; (1922) A. I. R. (P. C.) 51; 4 U. P. L. R. (P. C.) 68; 16 L. W. 447; (1922) M. W. N. 671 **P. C.**
600	Sri Narain v. Liquidator Union Bank of India ..	4 L. 109; 5 L. L. J. 569.
601	Rakhal Chandra Chatterjee v. Rohini Kumar Chatterjee ..	37 C. L. J. 399; 27 C. W. N. 549, (1923) A. I. R. (C.) 650.
603	Chulam Nabi v. Basheshar Mal ..	4. L. L. J. 298; (1922) A. I. R. (L.) 407.
604	Medai Dalavoi Thirumalaiyappa Mudalier v. Nainar Tevan ..	16 L. W. 478; 4 U. P. L. R. (P. C.) 92; (1922) A I R. (P. C.) 307; (1922) M. W. N. 804. 27 C. W. N. 365; 21 A. L. J. 282; 31 M. L; T. 149 **P. C.**
608	Juanendra Nath Ghosh v. Kumar Jogendra Narain Sinha ..	2 (Pat.) 247; (923) A. I. R. (Pat.) 384.
609	Alagu Pillai v. Veluchami ..	(1923) M. W. N. 331, 509; 32 M. L. T. 369; 18 L. W. 26; 45 M. L. J. 76; (1923) A. I. R. (M.) 576.
612	Chaudrakisore Datta Majumdar v. Upendra Chandra Choudhuri ..	37 C. L. J. 319; (1923) A. I. R. (C.) 563.
616	Oppenheim v. Mahomed Haneef ..	45 M. 496; 26 C. W. N. 642; 16 L. W. 33; 30 M. L. T. 291; 4 U. P. L. R. (P. C.) 36; (1922) A. I. R. (P. C.) 120; (1922) M. W. N. 3 6; 43 M. L. J. 422; 24 Bom. L. R. 1245; 30 C. L. J. 444 **P. C.**
619	Ramcharan Singh v. Sheo Dutta S ngh ..	2 Pat. 260; (1923) A. I. R. (Pat.) 380; 4 P. L, T. 666.
621	Gopala Chetty v. Vijayaraghavachariar ..	45 M. 378; 30 M. L. T. 283; (1922) A. I. R. (P. C.) 115; (1922) M. W. . . 386; 16 L. W. 200; 26 C. W. N. 977; 43 M. L. J. 305; 24 Bom. L. R. 1197; 20 A. L. J. 862; 36 C. L. J. 308 **P. C.**
626	Inderbansi Kuer v. Satnarain Singh ..	4 P. L. T. 373; (1923) Pat. 216; (1923) A I. R. (Pat.) 521.
630	Charu Chandra Pramanik v. Nahush Chandra Kundu ..	35 C. L. J. 35; (1923) A. I. R. (C.) 1; 50 C. 49.
639	Diyal Kaur v. Mehtab Kaur ..	3 L. L. J. 458.
640	Makhan Lal v. Natthi ..	21 A. L. J 382; (1923) A. I. R. (A.) 509.
642	Narsingh Thakur v. Bishun Pargash Singh ..	1 P. L. R. 258; (192) A. I. R. (Pa .) 441.
644	Gobinda v. Nandu ..	(1922) A. I. R. (L.) 217.
647	Sheo Nandan v. Balgobind Misra ..	21 A. L. J. 697.
649	Jaldhari Rai v. Muhammad Abdul Kabir ..	1 P. L. R. 24 ; (1923) A. I. R. (Pat.) 470; 4 P. L T 667.
653	Durgo v. Prem Singh ..	*Lahore High Court.
656	Rekhab Das v. Sheobal ..	21 A. L. J. 393; (1923) A. I. R. (A.) 495; 45 A. 4 6.
660	Sachindra Nath Roy v. Maharaj Bahadur Singh ..	4 U. P. L. R (P. C.) 57; 30 M. L. T. 96; 24 Bom. L. R. 659; (1922) M. W. N. 338; 26 C. W. N 858; (1922) A I. R. (P. C.) 187; 49 C. 203; 48 I. A. 335 **P. C.**
666	Prag Narain v. Jwala Prasad ..	21 A. L. J. 339; (1923) A. I. R. (A.) 458; 45 A 450.
6 8	Fulbati Kumari v. Maharaj Kumar Rao Moheshwari Prashad Singh ..	(1923) Pat. 161; 4 P. L. T. 173; (1923) A. I. R. (Pat) 453; 2 Pat. 685.
6 9	Basanta Kumar Roy v. Manjuri Dassi ..	*Calcutta High Court.

681	Chhajju v. Jhabba ..	*Allahabad High Court.
682	Debi Parshad v. Bhago ..	5 L. L. J. 187.
684	Phul Chand v. Surji ..	(1923) A. I. R. (A) 457.
685	Kartar Singh v. Labh Singh ..	5 L. L. J. 190; (1923) A. I. R. (L.) 355.
687	Umrao Beg v. Mukhtar Beg ..	21 A. L. J. 308; 45 A. 401; (1923) A. I. R. (A.) 494.
688	Uttam Singh v. Rutan Devi ..	5 L. L. J. 217; (1924) A. I. R. (L.) 2°.
692	Dwarka Das-Ajodhiya Prasad v. Lachmi Narain-Girdhari Lal ..	*Allahabad High Court.
693	Shah Muhammad Maudood v. Rameshwar Singh Bahadur ..	1 P. L. R. 281; (1923) A. I. R. (Pat.) 530.
695	Mahadeo Prasad v. Bissessar Prasad ..	2 Pat. 488; 4 P. L. T. 707.
703	Kachi Reddi v. Narayana Reddi ..	18 L. W. 29; (1923) M. W. N. 510; (1924) A. I. R. (M.) 44.
703	Karan Singh v. Dal Chand ..	*Allahabad High Court
705	Ramjit Ahir v. Emperor ..	2 Pat. 3 9; (1923) A. I. R (Pat.) 413; 1 P. L. R. 236; Cr. 24 Cr. L. J. 801.
708	Naini Mal v. Emperor ..	24 Cr. L. J. 804.
710	Chote Lal Modi v. Emperor ..	1 P. L. R. 137 Cr.; (1923) A. I. R. (Pat.) 542; 24 Cr. L. J. 806.
712	Mahadeo v. Emperor ..	9 O. L. J 597; 9 O. & A. L. R. 60; (1923) A. I. R. (O.) 112; 24 Cr. L. J. 808.
713	Jharu Lal v. Madan Das ..	2 Pat. 257; (1923; A. I. R. (Pat.) 410; 24 Cr. L. J. 809.
715	Mohammad Yunis Khan v. Gulab ..	9 O. & A. L. R. 448; (1923) A. I. R. (O.) 172 24 Cr. L. J. 811.
715	Mata Palat v. Emperor ..	(1923) A I. R. (A.) 479; 24 Cr. L. J. 811.
716	Jamalud in v. Emperor ..	24 Cr. L. J. 812.
717	Ritlal Singh v. Emperor ..	24 Cr. L. J. 813.
718	Balda Pasi v. Nasir Ali Khan ..	9 O. & A. L. R. 457; 24 Cr. L. J. 814.
719	Kiran Sarkar v. Emperor ..	24 Cr. L. J. 815; 5 P. L. T. 15; 2 P. L. R. 10 Cr.
721	Fakir Chand v. Nanug Ram ..	*Allahabad High Court.
745	Girdhari Singh v. Bhupal Singh ..	45 A. 456; (1923) A. I. R. (A.) 516.
746	Devi Prasad v. Secretary o. State for India ..	21 A. L. J. 454; 45 A. 554.
747	Indrajit Pratap Bahadur Sahi v. Amar Singh ..	21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277 P. C.
753	K. B. Dutt v. Taraprasanna Roy Chaudhry ..	(1923) Pat. 280; 2 Pat. 909; 5 P. L. T. 11.
755	Ganesh Din v. Lachman Singh ..	*Allahabad High Court.
756	Muiz- d-Din v Mo ammad Ikhlaq ..	21 A. L. J. 516.
757	Jai Singh Gir v. Sita Ram Singh ..	21 A. L. J. 333; (1923) A. I. R. ( ) 349.
758	Shyam Sunder Rai v. Jagarnath Misra ..	1 P. L. R 373; (1923) Pat. 203; (1923) A. I. R. (Pat.) 590; 2 Pat. 925.
760	Sahu Govind Prasad v. Kundan ..	*Allahabad High Court.
760	Kartik Chandra Chatterji v. Nagendra Nath Roy	5 P. L. T. 41.
761	Kausilla Kuer v. Sukhdei ..	21 A. L. J. 452; (1923) A. I. R. (A.) 579.
763	Ahmadullah v. Abdul Rahim ..	21 A. L. J. 545; 45 A. 592; (1924) A. I. R. (A.) 26.
765	Venkata Row v. Tuljaram Row ..	20 A. L. J. 833; 26 C. W. N. 646; 30 M. L. T. 272; 45 M. 298; 4 U. P. L. R. (P. C.) 33; (1922) A. I. R. (P. C.) 69; (1922) M. W. N. 392; 43 M. L. J. 298; 24 Bom. L. R. 1191; 36 C. L. J. 319 P. C.
768	Niamat-Ullah v. Safut-un-Nissa Bibi ..	*Allahabad High Court.
769	Muhammad Amirul Hasan v. Muhammad Jewad Hussain ..	5 P. L. T. 13.
770	Reily v. A Y Rajkumari ..	36 C. L. J. 245; (1922) A. I. R. (C.) 493.
776	Aisha Bibi v. Chhajju Mal ..	*Allahabad High Court.
777	Ramakrishna Annavi v. Pichandi Chettiar ..	(1923) M. W. N. 564.
778	Yad Ram v. Sunder Singh ..	21 A. L. J. 313; (1923) A. I. R. (A.) 392; 45 A. 125 F. B.
781	Ram Lal Malik v. Deodhari Rai ..	2 Pat. 771; 5 P. L. T. 7.
784	Shamsher Singh v. Ram Kali ..	9 O. & A. L. R. 424.

785	Secretary of State for India v. Radhika Prasad ..	44 M. L. J. 685; 46 M. 259; 18 L. W. 210; (1923) A. I. R. (M.) 667.
792	Mathura Singh v. Sheo Mohan Prasad ..	9 O & A. L. R. 437; 10 O. L. J. 337.
793	Ananda Chandra Chakravarti v. Broja Lal Singh	36 C. L. J. 356; (1923) A. I. R. (C.) 142; 50 C. 292.
802	Husaini v. Muhammad Zamir Avedi ..	9 O. & A. L. R. 410; 26 O. C. 319.
804	Ramaswami Aiyar v. Subramania Aiyar ...	16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M.) 147; 46 M. 47.
811	Bindeshri Pande v. Sheo Ratan Pande ..	9 O. & A. L. R. 443.
812	Hussain Sahib v. Hammad Saheb ..	16 L. W. 812; 312 M. L. T. 180; (1922) M. W. N. 562; (1923) A. I. R. (M.) 43.
813	Dwarka v. Idu ..	9 O. & A. L. R. 445; 26 O. C. 361.
814	Eas Indian Railway v. Makhanlal-Bindesri Prasad ..	21 A. L. J. 515; 45 A. 575; (1923) A. I. R. (A.) 605.
815	Palti v. Nirdhan Gope ..	1 P. L. R. 390; 4 P. L. T. 650.
816	Mathura Singh v. Kandhai Pathak ..	9 O. A. L. R. 465.
817	Har Prasad v. Raghubar Dayal ..	21 A. L. J. 541; 45 A 628.
818	Nanhu v. Ram Dayal ..	9 O. & A. L. R 460.
820	Waziri Begam v. Sashi Bhusan Rai ..	4 P. L. T. 546; (1923) Pat. 293; 2 Pat. 874.
821	Darshan Singh v. Ratan Lal ..	9 O. & A. L. R. 463.
822	Abdullah Khan v. Muhammad Maqbul Husain ..	21 A. L. J. 538; 45 A. 565; (1923) A. I. R. (A.) 603.
824	Nathu Ram v. Ghanshyam ..	(1923) A. I. R. (A.) 519.
825	Ramrup Ghoshain v. Mahabir Shah ..	2 Pat. 833.
827	Gupta Nand v. Behari Lal ...	21 A. L. J. 567.
828	Mahabali Dasin v. Manu Mandal ..	*Patna High Court.
830	Raghunath Singh v. Jetto Singh ..	(1923) A. I. R. (A.) 613.
831	Fyzabad Bank Ltd. Arrah Branch v. Ramdyal Marwari ..	4 P. L. T. 571.
834	Hari Shankar v. Ram Pyari ..	21 A. L. J. 326; (1923) A. I. R. (A.) 502; 45 A. 441.
835	Sook Lal v. Dal Chand ..	1 R. 196; (1923) A. I. R. (R.) 256.
836	Kesho Saran v. Khairati Lal ..	21 A. L. J. 248; (1923) A. I. R. (A.) 310; 45 A 359.
838	Mahadeo Singh v. Dhobi Singh ..	(1923) Pat. 283; 4 P. L. T. 721; 2 Pat. 916.
839	Lalta Prasad v. Darshan Singh ..	*Allahabad High Court.
841	Ishwari Prasad Narayan Deo v. Chota Nagpur Banking Association ..	*Patna High Court.
842	Bishun Narayan v. Bibi Ramji ..	*Allahabad High Court.
843	R. S. Bion v. Sheogulam Lal ..	*Patna High Court.
845	Krishna Dass v. Ram Ugrah Singh ..	21 A. L. J. 500; (1923) A. I. R. (A.) 549.
847	Rambhanjan Singh v. Pashupat Rai ..	2 Pat. 784.
849	Abdul Wahid Khan v. Abdullah Khan ..	21 A. L. J. 529; 45 A. 656; 24 Cr. L. J. 817; (1924) A. I. R. (A.) 1.
855	Mandar v. Emperor ..	24 Cr. L. J 823.
856	Avadayappa Mudaliar, *In re* ..	18 L. W. 181; 24 Cr. L. J. 824; (1924) A. I. R. (M.) 40.
857	Wahari Mander v. Emperor ..	(1923) A. I. R. (Pat.) 527; 24 Cr. L. J. 825.
858	Umed v. Emperor ..	24 Cr. L. J. 826.
860	Dwarka Singh v. Emperor ..	25 O. C. 142; (1922) A. I. R. (O.) 254; 24 Cr. L. J. 828.
861	Maniruddin v. Emperor ..	24 Cr. L. J. 829.
862	Deenabandhu Rajaguru v. Vishwarasarayi Lachanna Dora ..	(1923) M. W. N. 634; 24 Cr. L. J. 830.
863	Debi Singh v. Emperor ..	24 Cr. L. J. 831.
865	Jhari Koeri v. Bijai Singh ..	21 A. L. J. 563; 45 A. 613.
867	Sia Shachari Peari v. Ram Kishori Kuer ..	2 Pat. 796.
869	Uman Shanker v. Aisha Khatun ..	*Allahabad High Court.
873	Bindeshri Prasad Tewari v. Badal Singh ..	21 A. L. J. 228; (1923) A. I. R. (A.) 394; 45 A. 369.
877	Ramnandan Parbat v. Deni Sahi ..	1 P. L. R. 366; 5 P. L. T. 26.
879	Ragha Mal v. Abdus Sattar ..	(1923) A. I. R. (A.) 565.
881	Keshawa Prasad Singh v. Secretary of State for India ..	*Patna High Court.

K. UNIVERSITY
Accession No 75443

894	Gajraj Singh v. Sri Thakurji Maharaj Radha Rawanji ..	*Allahabad High Court
896	Kon.halattammal v. Soundarathachi ..	18 L. W. 256; 45 M. L. J. 481; 33 M. L. T. 80; 46 M. 873; (1923) M. W. N. 902.
905	Nasir Khan v. Itwari ..	1 A. L. J. 667; 9 O. & A. L. R. (A.) 645.
906	Mahomed Solaiman v. Kumar Birendra Chandra Singh ..	50 C. 243; (1922) A. I. R. (P. C.) 405; 44 M. L. J. 388; 32 M. L. T. 115; 27 C. W. N. 749; 37 C. L. J 561 **P. C.**
911	Mathura Prasad v. Anandi Kunwar ..	21 A. L. J. 498.
912	Nath Sahai v. Imam Reza ..	*Patna High Court.
913	Certain First Grade Advocates, *In the matter of* ..	1 R. 142; (1924) A. I. R. (R.) 1 **F. B.**
914	Dhirja v. Mithan Lal ..	(1923) A. I. R. (A.) 562.
916	Bibby Brothers v. Charles R. Cowie & Co. ..	1 R 146.
918	Mithu Lal v. Sri Lal ..	*Allahabad High Court.
919	Official Assignee v. Mohamed E. Naikwarah ..	1 R. 153; 2 Bur. L. J. 248.
922	Sri Ram v. Mani Ram ..	21 A. L. J. 569.
923	Jugal Keshwar-Bholanath v. Kishori Lal-Behari Lal ..	*Patna High Court.
924	Kesho Dass v. Hanuman Panday ..	21 A. L. J. 576; 45 A. 640.
925	Krishnadas Acharjee Chowdhury v. Samsan Ali Sheikh ..	37 C. L. J. 139; (1923) A. I. R. (C.) 431.
927	Beti Mahalakshmi Bai v. Badan Singh	21 A. L. J. 604; 45 A. 649.
929	Hemendra Lal Singh Deo v. Fakir Chandra Datta	50 C 650; 27 C. W. N. 621; (1923) A. I. R. (C.) 626.
931	Jagesor Pande v. Deo Dat Pande ..	21 A. L. J. 608; 9 O. & A. L. R. (A.) 879; 45 A. 654.
933	Maung Po Maung v. Ma Pyit Ya ..	1 R. 161; 2 Bur. L. J. 791 (1923) A. I. R. (R.) 180.
938	Bibi Nasiban v. Eknam Narayan Singh ..	4 P. L. T. 606.
939	Tikkan Ram v. Lal ..	(1923) A. I. R. (L.) 301.
939	Mahabir Prasad v. Parsandi ..	21 A. L. J. 345; 45 A. 410; (1923) A. I. R. (A.) 532.
941	Jainarain Ramjash v. Sitaram Marwari ..	(1923) Pat. 175; (1923) A. I. R. (Pat.) 520.
943	Parshadi Lal v. Laiq Singh ..	21 A. L. J. 701.
944	Zamindar Garu of Nuzvid v. Government Pleader	45 M. L. J. 721.
945	Ponnusami Odayar v. Ramasami Thathan ..	45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 46 M. 758; 24 Cr. L. J. 833; (1924) A. I. R. (M.) 15 **F. B.**
947	Beni v. Emperor ..	1 P. L. R. 117 Cr; (1923) A. I. R. (Pat.) 536; 24 Cr. L. J. 835; 5 P. L. T. 46.
949	Arunachalam Chetty v. Emperor ..	45 M. L. J. 543; (1923) M. W. N. 876; 24 Cr. L. J. 837.
950	Eran Khan v. Emperor ..	50 C. 658; 24 Cr. L. J. 838; (1924) A. I. R. (C.) 47.
952	Ayarvali Pokker, *In re* ..	45 M. L. J. 305; (1923) M. W. N. 758; 18 L. W. 899; 24 Cr. L. J. 840.
954	U Damayadaya v. Emperor ..	1 R. 211; (1923) A. I. R. (R) 212; 24 Cr. L. J. 842.
957	Nand Kishore Missir v. Kalika Missir ..	(1923) A. I. R. (Pat) 539; 24 Cr. L. J. 845.
958	Alaga Pillai v. Emperor ..	24 Cr. L. J. 846.
959	Dharma Singh v. Emperor ..	45 M. L. J. 230 18 L. W. 612; 46 M. 766; (1923) M. W. N. 893; 24 Cr. L. J. 847; (1924) A. I. R. (M.) 30.
960	Emperor v. Annawdin ..	1 R 218; 2 Bur. L. J. 246; (1923) A. I. R. (R.) 231; 24 Cr. L. J. 848.
961	Radhika Raman v. Satnarain Koeri ..	*Patna High Court.
964	Radha Krishun Shukul v. Nokh Lal Shukul ..	21 A. L. J. 488; (1993) A. I. R. (A.) 566.
966	Venkataramana Aiyar v. Coimbatore Mercantile Bank Ltd. ..	(1923) M. W. N. 568; 18 L. W. 304.
968	Sambasadasiva Chinna Rayal Varu v. Bandar Maddulappa ..	(1923) M. W. N. 524; (1924) A. I. R. (M.) 73.
969	Paleshwari Prasad v. Shankar Dayal ..	*Allahabad High Court.
970	Maung Gyi v. Maung On Gaing ..	1 R 186.
971	Inder Deo Rai v. Ram Charitter Rai ..	(1923) A. I. R. (A.) 560.

973	Kishun Prasad Sahu v. Hakim Chaudhury ..	*Patna High Court.
975	Bireswar Ghose v. Panchcouri Ghose ..	37 C. L. J. 45; 27 C. W. N. 587; (1923) A. I. R. (C.) 538.
991	Balkishan v. Raghubar Dayal ..	45 A. 81; (1923) A. I. R. (A.) 409.
993	Durga Prasad v. G. I. P. Ry. and E. I. Ry. ..	(1923) Pat. 284; 5 P. L. T. 42.
995	Munna Lal v. The Collectoer of Shahjahanpur ..	45 A 96; (1923) A. I. R. (A. 470.
996	Nursing Dass Kothari v. Chuttoolal Misser ..	50 C. 615; 27 C. W. N. 639; (1923) A. I. R. (C.) 641.
999	Mohan Lal v. Prasadi Lal ..	45 A. 46; (1924) A. I. R. (A.) 11.
1001	Sasi Kanta Acharjya v. Salim Sheikh ..	50 C. 626; 27 C. W. N. 987; (1923) A. I. R. (C.) 624.
1003	Putievu Kamraju v. Chunduri Gunnayya ..	45 M L. J. 240; 18 L. W. 233; (1923) M. W. N. 756.
1004	Iqbal Haidar Khan v. Wasi Fatima Bibi ..	45 A 53; (1923) A. I. R (A.) 358.
1006	Venkatasubramania Aiyar v. Usuff ..	45 M. L. J. 59; 18 L. W. 314; (1923) A. I. R. (M.) 708.
1010	Ahidannessa Bibi v. Isuf Ali Khan ..	50 C. 610; 27 C. W. N. 941.
1012	Meenakshi Vethiar Amma v. Cheriya Parvathi Nethiar ..	(1923) M. W. N. 657.
1014	Gopi Nath Shukul v. Sat Narain Shukul ..	(1923) A. I. R. (A.) 384.
1017	Hayatunnessa Chowdhurani v. Achia Khatun ..	50 C. 743.
1018	Rajagopala Aiyangar v. Soundara Raja Aiyangar	(1923) M. W. N. 636; 45 M. L. J. 476.
1020	Maung Chit Hlaing v. N. A. R. M. Chetty ..	*Rangoon High Court.
1021	Chand Mall Babu v. Ban Behari Bose ..	50 C. 718.
1024	Goberdhan Das v. Makundi Lal ..	21 A. L. J. 342; (1923) A. I. R. (A.) 435; 45 A. 438.
1026	Kannathayaparkum Puthulath Amina Umma v. Anandravan Cheriya Rayarappan Nappiar ..	(1923) M. W. N. 518; (1923) A. I. R (M.) 706.
1027	Ma Zan Nyein v. Maung Kyaw Zan ..	1 R. 189; (1923) A. I. R. (R.) 258.
1029	Surjimull Murlidhar Chandick v. Ananta Lal Damani ..	45 M. L J. 399; 18 L. W. 485; (1923) M. W. N. 743; 46 M. 948.
1032	Abinash Chandra Roy v. Fulchand Chaudhuri ..	50 C. 737.
1033	Banwari Rai v. Chethru Lal Rai ..	*Patna High Court.
1037	Ma Lun Me v. Ma Kin ..	2 Bur. L. J. 67; (1923) A. I. R. (R.) 155.
1038	Bhairab Chandra Dutt v. Kali Kumar Dutt ..	37 C. L. J. 491; (1923) A. I. R. (C. 606.
1039	Ahmad Husain v. Muhammad Fasihullah ..	21 A. L. J. 319; (1923) A. I. R. (A.) 455; 45 A. 432.
1041	Makbul Ahmad v. A. J. L. Allen ..	50 C. 689; 27 C. W. N. 649; (1923) A. I. R. (C.) 657; 24 Cr L. J. 849.
1042	Nga Waik v. Emperor ..	1 R. 209; 2 Bur. L. J. 76; (1923) A. I. R. (R.) 251; 24 Cr. L. J. 850.
1043	Sarat Chandra Ghose v. Emperor ..	37 C. L. J. 171; (1923) A. I. R. (C.) 408; 24 Cr. L. J. 851.
1044	Parakuzhiyil Ayamad v. Emperor ..	18 L. W. 350; 24 Cr. L. J. 852.
1046	Shiboo v. Emperor ..	45 A 17; (1922) A. I. R. (A.) 488; 24 Cr. L. J. 854.
1047	Rangi Sah v. B. N. W. Railway Co. ..	4 P. L. J. 402; 1 P. L. R. 154 Cr.; (1923) A. I. R. (Pat.) 540; 24 Cr. L. J. 855.
1049	Ashiq Husain Khan v. Emperor ..	45 A. 75; (1923) A. I. R. (A.) 333; 24 Cr. L. J. 857.
1050	Emperor v. Nga Po Chit ..	1 R. 199; 2 Bur. L. J. 241; (1923) A. I. R. (R.) 227; 24 Cr. L. J. 858.
1054	Emperor v. Dulia ..	45 A. 58; (1923) A. I. R. (A.) 360; 24 Cr. L. J. 862.
1054	Bansidhar Marwari v. Emperor ..	24 Cr. L. J. 862.

TABLE

OF

Cases Applied, Approved, Considered, Disapproved, Dissented from, Distinguished, Explained, Followed, Not Followed, Overruled and Relied upon in Volume 74 of Indian Cases, 1923.

A.

Page.

Abbubakar Sahib v. Mohidin Sahib, 20 M. 10; 7 Ind. Dec. (N. S.) 7. (*Relied on*) .. 975

Abda Begam v. Muzaffar Husen Khan, 20 A. 129; A. W. N. (1897) 218; 9 Ind. Dec. (N. S.) 443. (*Relied on*) .. 149

Abdul Basit v. Ashfaq Hussin, A. W. N. (1908) 211; 4 M. L. T. 172. (*Overruled*) .. 411

Abdul Gaffar v. Nur Jahan Begum, 29 Ind. Cas. 347; 37 A. 434; 13 A. L. J. 686. (*Relied on*) .. 1010

Abdul Hussein Khan v. Bibi Sona Dero, 43 Ind. Cas. 306; 45 C. 450; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 12 S. L. R. 104; 45 I. A. 10 (P. C.). (*Followed*) .. 225

Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Limited, 41 Ind. Cas. 598; 44 C. 929 (F. B.); 21 C. W. N. 877; 26 C. L. J. 49. (*Relied on*) .. 335

.. 497

Abdul Majid v. Ksherode Chandra Pal, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809. (*Dissented from*) .. 346

Abdul Rahman v. Lal Behari, A. W. N. (1885) 151. (*Relied on*) .. 894

Abdul Rahman Shah v. Shahana, 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188. (*Relied on*) .. 380

Abeda Khatun v. Majubad Chowdhury, 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304. (*Followed*) .. 1001

Abhiram Goswami v. Shyama Charan Nandi, 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.) (*Followed*) .. 555

Adhar Mani Dassi v. Monmotha Nath Bose, 6 C. W. N. 279. (*Relied on*) .. 975

Afiman v. Hamid-ud-din Husain, 51 Ind. Cas. 799; 58 P. W. R. 1919. (*Followed*) .. 403

Afzal Begam v. Akbari Khanam, 28 Ind. Cas. 857; 37 A. 326; 13 A. L. J. 444. (*Followed*) .. 894

Ahinsa Bibi v. Abdul Kader Saheb, 25 M. 26 at p. 35. (*Relied on*) .. 1032

Ahmad Khan v. Parmanand, 43 Ind. Cas. 350; 8 P. R. 1917 Rev; 7 P. W. R. 1917 Rev. (*Dissented from*) .. 194

A—contd.

Page.

Ahmed v. Shaik Essa, 17 B. 657; 9 Ind. Dec. (N. S.) 431. (*Distinguished*) .. 1020

Ahsanullah Khan v. Mansukh Ram, 25 Ind. Cas. 350; 36 A. 403 at p. 405; 12 A. L. J. 511; 15 Cr. L. J. 598. (*Followed*) .. 849

Ajodhya Prasad v. Badarul Husain, 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427. (*Relied on*) .. 401

Akora Suth v. Boreani, 11 W. R. 82; 2 B. L. R. (A. C. J.) 199; 4 Mad. Jur. 286; 1 Ind. Dec. (N. S.) 781. (*Followed*) .. 815

Ali Husain v. Amin Ullah, 15 Ind. Cas. 337; 34 A. 536; 10 A. L. J. 153. (*Distinguished*) 558

Alimunnissa Chowdhurani v. Shama Charan Roy, 32 C. 749; 1 C. L. J. 176; 9 C. W. N. 466. (*Dissented from*) .. 781

Alla Bakhsh v. Madho Ram, 23 A. 22; A. W. N. (1900) 183. (*Distinguished*) .. 1027

Amarnath Sah v. Achan Kuar, 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. S.) 637 (P. C.). (*Relied on*) 612

Ambica Dat Vyas v. Nityanund Singh, 30 C. 687. (*Relied on*) .. 1025

Ambika Prasad Singh v. Whitwell, 6 C. L. J. 111. (*Relied on*) .. 979

Anant Das v. Udai Bhan Pargas, 19 Ind. Cas. 76; 35 A. 187; 11 A. L. J. 214. (*Overruled*) .. 411

Anant Singh v. Kalka Singh, 48 Ind. Cas. 526; 5 A. L. J. 665. (*Dissented from*) .. 301

Angan v. Ram Pirbhan, 18 Ind. Cas. 146; 10 A. L. J. 531; 14 Cr. L. J. 2; 35 A. 78. (*Followed*) .. 715

Annamalai Chetty v. Mrs. Basch, 65 Ind. Cas. 1000; 11 L. B. R. 217; 23 Cr. L. J. 216; (1922) A. I. R. (L. B.) 17. (*Relied on*) .. 1050

Armour v. Armour, 1 A. L. J. 318. (*Considered*) .. 166

Arunachala Aiyar v. Ramsami Aiyar, 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J. 517; 16 M. L. T. 397. (*Followed*). .. 416

Arur Singh v. Todar Mal, 49 Ind. Cas. 501; 22 P. W. R. 1919. (*Relied on*) .. 17

Asgar Ali v. Troilokya Nath Ghose, 17 C. 631; 8 Ind. Dec. (N. S.) 960; (F. B.). (*Followed*) .. 1017

A—concld.

Page.

Ashbury v. Watson, (1885) 30 Ch. D. 376; 54 L. J. Ch. 985; 54 L. T. 27; 33 W. R. 882. (*Relied on*) .. 966
Ashraf Ali v. Mahammad Nurajjama, 49 Ind. Cas. 355; 23 C. W. N. 115. (*Distinguished*) .. 403
Aswini Kumar Aich v. Sarada Charan Basu, 37 Ind. Cas. 253; 24 C. L. J. 79. (*Distinguished*) .. 1001
Atar Singh v. Thakar Singh, 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.) (*Followed*) .. 685
Attorney-General v. Eshar Linoleum Co. Ltd., (1901) Ch. D. 647; 70 L. J. Ch. 808; 85 L. T. 414; 50 W. R. 22; 66 J. P. 71. (*Relied on*) .. 25
Azim-ud-din v. Emperor, 21 Ind. Cas. 163; 6 Bur. L. T. 191; 14 Cr. L. J. 563; 7 L. B. R. 68. (*Followed*) .. 79

B.

Babban Singh v. Jaimangal Singh, A. W. N. (1906) 86. (*Followed*) .. 827
Babu Sat Narain Prasad v. Ram Kumar, Sel. Dec. No. 3 of 1910. (*Followed*) .. 681
Bachchi v. Hachchi, 28 A. 747; 3 A. L. J. 513; A. W. N. (1906) 219 .. 971
Bachchu Singh v. Secretary of State for India in Council, 25 A. 187; A. W. N. (1903) 13. (*Relied on*) .. 389
Bachu Lal v. Kandhai Lal, 6 O. C. 16. (*Relied on*) .. 813
Badri Das v. Inayat Khan, 22 A. 404; A. W. N. (1900) 132; 9 Ind. Dec. (N. S.) 1305. (*Not followed*) .. 1021
Badri Prasad v. Gopal Behari Lal, 50 Ind. Cas. 752; 41 A. 553; 17 A. L. J. 789. (*Distinguished*) .. 964
Bai Atrani v. Deepsing Baria, 33 Ind. Cas. 35?; 40 B. 86; 17 Bom. L. R. 1007. (*Relied upon*). .. 335
Bai Full v. Alesang Pahadsang, 26 B. .. 203; 3 Bom. L. R. 730. (*Distinguished*) .. 1027
Bai Harkha, *In re*, 26 B. 667; 10 Ind. Dec. .. (N. S.) 1013. (*Followed*). .. 896
Bai Manigavri v. Narondas Calliandas, 15 B. 549; 8 Ind. Dec. (N. S.) 371. (*Distinguished*) .. 517
Baijnath Prasad Singh v. Tej Bal Singh, 38 Ind. Cas. 894; 14 A. L. J. 913; 38 A. 590. (*Distinguished*) .. 869
Baijnn Doobey v. Brij Bhookun Lal, 1 C. 133; 24 W. R. 306; 2 I. A. 275; 3 Suth. P. C. J. 207; 3 Sar. P. C. J. 541; 1 Ind. Dec. (N. S.) 86 (P. C.). (*Distinguished*) .. 865
Balabux Ladhuram v. Rukhmabhai, 30 I. A. 130 at p. 137; 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.). (*Followed*) .. 462
Baldeo Parshad v. Baideo Singh, 3 O. C. 323. (*Distinguished*) .. 558

B—contd.

Page.

Baldeo Singh v. Meghu Singh, 74 Ind. Cas. 202; (1919) Pat. 386. (*Distinguished*) .. 458
Balhari Pande v. Shiva Sampat Pande, 18 A. L. J. 40. (*Overruled*) .. 411
Balkishen Das v. Ram Narain Sahu, 30 I. A. 139 at p. 151; 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489 (P. C.). (*Followed*) .. 462
Balmer Lawrie Co. v. Jadu Nath Banerjee, 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N. 1202. (*Distinguished*) .. 626
Balwant Singh v. Rev. Rockwell Clancy, 14 Ind. Cas. 629; 34 A. 296; 39 I. A. 109; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422 (P. C.). (*Followed*) .. 367
Bara Estate Limited v. Anup Chandra, 41 Ind. Cas. 337; 2 P. L. J. 663; 2 P. L. W. 71; (1917) Pat. 342. (*Relied on*) .. 1014
Baroda Kanta Basu v. Chandra Kanta Ghose, 6 C. W. N. 706; 29 C. 682. (*Relied on*) .. 279
Basant Singh v. Mahabir Pershad, 19 Ind. Cas. 340; 40 I. A. 86; 35 A. 273; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301 (P. C.). (*Relied on*) .. 793
Basir Sheikh v. Fazle Karim Biswas, 28 Ind. Cas. 703; 19 C. W. N. 290. (*Relied on*) .. 14
Bechai Singh v. Shami Nath Tewari, 10 Ind. Cas 454. (*Dissented from*) .. 558
Beg v. Allah Ditta, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.). (*Followed*) .. 589
Behari Lal v. Mohan Singh, 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268. (*Distinguished*) .. 382
Beni Ram v. Ram Lal, 13 C. 189; 6 Ind. Dec. (N. S.) 625. (*Followed*) .. 309
Bepin Behari Saha v. Abdul Barik, 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446. (*Relied on*) .. 380
Betana v. Kedar Nath, 37 Ind. Cas. 400; 3 O. L. J. 583; (*Relied on*) .. 401
Bethune v. Bethune, (1891) P. 205; 60 L. J. P. 18; 63 L. T. 259. (*Considered*) 166
Bhagwan Dayal v. Param Sukh Dass, 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179. (*Followed*) .. 309
Bhagwat Dayal Singh v. Debi Dayal Sahu, 35 I. A. 48; 35 C. 420; 7 C. L. J. 335; 10 Bom. L. R. 230; 12 C. W. N. 393; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. T. 49 (P. C.). (*Relied on*) .. 612
Bhairo Prasad v. S. P. C. Dass, 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R. (A.) 118. (*Relied on*) .. 802

B—contd.

Page.

Bharat Indu v. Asghar Ali Khan, 73 Ind. Cas. 453; 21 A. L. J 135; 45 A. 148. (*Followed*) .. 7
Bharath Singh v. Dharam Singh, 21 Ind. Cas. 193; 17 O. C. 14. (*Relied on*) .. 558
Bhavirisetti Gopala Krishnayya v. Pakanati Pedda Sanjeeva Reddy, 55 Ind. Cas. 333; 11 L. W. 184; (1920) M. W. N. 152; 38 M. L. J. 228. (*Dissented from*) .. 760
Bhawani Koer v. Darsan Singh, 11 Ind. Cas. 450; 14 C. L. J. 354. (*Relied on*) 1021
Bhimaji v. Rajabhai Hussain Sahib, 59 Ind. Cas. 842; 43 M. 808; 12 L. W. 114; 39 M. L. J. 239; 28 M. L. T. 295. (*Distinguished*) .. 309
Bholanath Dass v. Prafulla Nath Kundu Chowdhury, 28 C. 122; 5 C. W. N. 80. (*Distinguished*) .. 130
Bhubaneswar Prasad Singh v. Tilakkdhari Lal, 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.). (*Dissented from*) .. 380
Bhubon Mohun Pal v. Nunda Lal Dey, 26 C. 324; 3 C. W. N. 399; 13 Ind. Dec. (N. S.) 811. (*Relied on*) .. 975
Bhura v. Banarsi Das, 30 Ind. Cas. 481; 113 P. W. R. 1915; 174 P. L. R. 1915. (*Relied on*) .. 484
Bibee Solomon v. Abdool Azeez, 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446. (*Distinguished*) .. 603
Bijoy Kumar Addya v. Rama Nath Barman, 43 Ind. Cas. 715. (*Relied on*) .. 626
Bilaso v. Dina Nath, 3 A. 88; 5 Ind. Jur. 489; 21 Ind. Dec. (N. S.) 61 (F. B.). (*Followed*) .. 81
Bindeshuri Singh v. Pandit Balraj Sahai, 10 O. C. 49. (*Distinguished*) .. 503
Bindeshuri Singh v. Pandit Balraj Sahai, 10, O. C. 49. (*Followed*) .. 360
Biraj Mohini Dasi v. Chinta Moni Dasi, 5 C. C. W. N. 877. (*Distinguished*) .. 603
Birj Mohun Thakur v. Rai Uma Nath Chowdhury, 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.). (*Followed*) .. 760
Bishun Chand v. B joy Singh, 11 Ind. Cas. 399; 13 C. L. J. 588; 15 C. W. N. 648; 8 A. L. J. 587; 13 Bom. L. R. 440; (1911) 2 M. W. N. 418; 21 M. L. J. 652; 10 M. L. T. 335 (P. C.) . (*Relied on*) .. 975
Bishun Pragash Narayan Singh v. Achaib Dusadh, 66 Ind. Cas. 82; 1 Pat. 459; (1922) A. I. R. (Pat.) 215; 3 P. L. T. 807. (*Distinguished*) .. 961
Brij Indar Singh v. Kanshi Ram, 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.). (*Followed*) .. 253
Brij Lal v. Jaishi Ram, 30 Ind. Cas. 500; 106 P. W. R. 1915; 172 P. L. R. 1915. (*Dissented from*) .. 484

B—concld.

Page.

Brojendra Coomar v. Bromoye Chowdhurani, 4 C. 885; 3 C. L. R. 520; 2 Shome L. R. 177; 2 Ind. Dec. (N. S.) 560. (*Relied on*) 1029
Brojo Gobind Shaha v. Goluck Chunder Shaha, 9 C. 127; 4 Ind. Dec. (N. S.) 737. (*Relied on*) .. 1029
Buddhoo Lal v. Mewa Ram, 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558. (*Dissented from*) .. 344
Budhu v. Bur, 84 P. R. 1895. (*Dissented from*) .. 589
Budhu Mandal v. Mait Mandal, 30 C. 1077. (*Relied on*) .. 922

C.

Cassamally Jairajbhoy Peerbhoy v. Sir Currimbhoy Ebrahim, 12 Ind. Cas. 225; 36 B. 214; 13 Bom. L. R. 717. (*Followed*) .. 142
Chan Hang Kiu v. Supreme Court of Hong Kong, 4 Ind. Cas. 539; 13 C. W. N. 685; 6 M. L. T. 9; 19 M. L. J. 324; 11 Cr. L. J. 277 (P. C.). (*Followed*) .. 542
Chandan Singh v. Emperor, 43 Ind. Cas. 438; 40 A. 103; 16 A. L. J. 11; 19 Cr. L. J. 150. (*Dissented from*) .. 858
Chandarsang Versabhai v. Khimabhai Raghabhai, 22 B. 718; 11 Ind. Dec. (N. S.) 1061. (*Distinguished*) .. 1027
Chandi Pershad v. Evans, 22 C. 123; 11 Ind. Dec. (N. S.) 83. (*Followed*) .. 534
Chandi Pershad v. Evans, 22 C. 123; 11 Ind. Dec. (N. S.) 83. (*Relied on*) .. 856
Chandrika Bakhsh Singh v. Raghunath Kunwar, 18 Ind. Cas. 284; 16 O. C. 105. (*Followed*) .. 553
Chhadami Lal v. Shyama Charan, 24 Ind. Cas. 12. (*Relied on*) .. 757
Chhajju v. Khyali Ram, 14 Ind. Cas. 175; 9 A. L. J. 678. (*Relied on*) .. 894
Chhajmal Das v. Sirya, A. W. N. (1906) 254; 3 A. L. J. 625. (*Relied on*) .. 321
Chintamanibhatla v. Rani Saheba of Wadhwan, 55 Ind. Cas. 538; 47 I. A. 6; 43 M. 541; 38 M. L. J. 393; 11 L. W. 451; 18 A. L. J. 367; (1920) M. W. N. 315; 22 Bom. L. R. 541; 2 U. P. L. R. (P. C.) 77; 28 M. L. T. 457; (P. C.). (*Relied on*) .. 612
Chintamon Singh v. Emperor, 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146. (*Not approved*) .. 108
Chiddith v. Tulsi Singh, 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467. (*Distinguished*) .. 1001
Chitambar v. Krishnappa, 26 B. 543; 4 Bom. L. R. 249. (*Relied on*) .. 975
Chodavarapu Narayana Row v. Chennuru Venkatasubba Row, 55 Ind. Cas. 377; 38 M. L. J. 77; (1920) M. W. N. 129; 27 M. L. T. 264. (*Relied on*) .. 309
Chunder Caunt Mookerjee v. Jodoonath Khan, 3 C. 468; 1 C. L. R. 470; 1 Ind. Dec. (N. S.) 883. (*Relied on*) .. 246
Chuni Lal v. Kala Khan, 67 Ind. Cas. 596; 4 L. L. J. 171; (1922) A. I. R. (L.) 61; 34 P. W. R. 1922. (*Relied on*) .. 17

C—concld.

Page.

Chuni Lal Jethabhai v. Barot Dahyabhai Amulakh, 32 B. 14; 9 Bom. L. R. 1138. (*Relied on*) .. 330

Chuttan v. Hazari Lal, 30 Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1916; 46 P. L. R. 1916. (*Followed*) .. 589

Collector of Masulipatam v. Cavaly Vencata Narrainapah, 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631. (*Followed*) 639, 644

D

Dakhni Din v. Syed Ali Asghar, 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995. (*Overruled*) .. 411

Dalganjan Singh v. Kalka Singh, 22 A. 1; A. W. N. (1899) 11; 9 Ind. Dec. (N. S.) 1035 (F. B.). (*Followed*) .. 315

Damodar Das v. Sheoram Das, 29 A. 730; 4 A. L. J. 587; A. W. N. (1907) 245. (*Approved*) .. 411

Darbari Mal v. Moola Singh, 56 Ind. Cas. 139; 42 A. 519; 18 A. L. J. 628; 2 U. P. L. R. (A.) 160. (*Not followed*) .. 1021

Dattar Kaur v. Ram Rattan, 58 Ind. Cas. 603; 1 L. 292; 2 L. L. J. 333; (F. B.). (*Followed*) .. 194

Debendra Prasad Ghose v. Paresh Nath Mitter, 4 C. L. J. 1 9. (*Distinguished*) .. 547

Debi Bakish Singh v. Habib Shah, 19 Ind. Cas. 26; 35 A. 330; 7 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 19; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 556; 25 M. L. J. 145; 16 O. C. 194; 40 I. A. 151 (P. C.). (*Followed*) .. 416

Debi Mangal Prasad Singh v. Mahadeo Prasad Singh, 14 Ind. Cas. 1000; 34 A. 231; 9 A. L. J. 253; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 124; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.). (*Followed*) .. 81

Deoniyal Lal v. Judeep Narain Singh, 3 C. 193; 1 C. L. J. 49; 4 I. A. 247; 3 Sar. P. C. J. 739; 3 Suth P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.). (*Followed*) .. 301

Deotas Bibee Begum v. Nawab Syud Asgur Ali Khan, 15 B. L. R. 167; 23 W. R. 453. (*Disapproved*) .. 493

Dhokali Koer v. Kedar Nath, 15 Ind. Cas. 427; 16 C. W. N. 333; 39 C. 704. (*Followed*) .. 493

Dhanalan Prasad v. Jank Singh, 39 Ind. Cas. 346; 44 C. 573; 15 A. L. J. 154; 32 M. L. J. 2 9; 21 C. W. N. 73; 1 P. L. W. 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 2 9; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 3 (P. C.). (*Relied on*) .. 209

Dhani Singh v. Emperor, 14 Ind. Cas. 649; 3 A. L. J. 1 9; 13 Cr. L. J. 9 . (*Dissented from*) .. 858

Dhanlal Ishwar v. Fulchand Chhagan, 22 B. 555; 11 Ind. Dec. (N. S.) 1021. (*Distinguished*) .. 107

D—concld.

Page.

Dhrupad Chandra Koley v. Harinath Singh Roy, 45 Ind. Cas. 660; 27 C. L. J. 563; 22 C. W. N. 826. (*Distinguished*) .. 961

Dianatullah Beg v. Wajid Ali Shah, 6 A. 438; A. W. N. (1884) 153; 4 Ind. Dec. (N. S.) 99. (*Distinguished*) .. 679

Digambar Das v. Harendra Nairain Pandey, 5 Ind. Cas. 165; 14 C. W. N. 617; 11 C. L. J. 226. (*Distinguished*) .. 246

Dina Nath Nag v. Sashi Mohan Dey Tarafdar, 31 Ind. Cas. 16; 22 C. L. J. 219; 20 C. W. N. 550. (*Followed*) .. 552

Dinabandhu Jana v. Chintamoni Jana, 26 Ind. Cas. 697; 19 C. W. N. 476. (*Relied on*) .. 649

Dulabdass v. Ma Win, 59 Ind. Cas. 965; 3 U. B. R. (1920) 27. (*Dissented from*) .. 1050

Durga Parshad v. Hajari Singh, 11 Ind. Case. 116; 33 A. 799; 8 A. L. J. 1025; (F. B.). (*Followed*) .. 914

E

East Indian Railway Co., v. Kishen Lal Tirkhamal, 73 Ind. Cas. 986; 21 A. L. J. 438; 9 O. & A. L. R. 531; 45 A. 530. (*Relied on*) .. 814

Edward Hitchinson Pollard, *In re*, (1868) 2 P. C. 106; 5 Moo. P. C. (N. S.) 111; 16 E. R. 457. (*Followed*) .. 542

Emir Bakish Kazi v. Emperor, 45 Ind. Cas. 258; 45 C. 825; 22 C. W. N. 646; 27 C. L. J. 377; 19 Cr. L. J. 498. (*Relied on*) .. 445

Emperor v. Bhola Singh, 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130. (*Dissented from*) .. 858

——— v. Dost Mahammad, 28 A. 98; A. W. N. (1905) 202; 2 A. L. J. 599; 2 Cr. L. J. 517. (*Dissented from*) .. 849

——— v. Gulab, 47 Ind. Cas. 805; 40 A. 186; 16 A. L. J. 731; 19 Cr. L. J. 953. (*Followed*) .. 858

——— v. Harka, 16 A. W. N. (1906) 193; 4 Cr. L. J. 88. (*Referred to and Distinguished*) .. 69

——— v. Purshottam Kara, 26 B. 418; 4 Bom. L. R. 38 (*Relied on*) .. 863

——— v. Ram Newas, 21 Ind. Cas. 663; 35 A. 305; 11 A. L. J. 804; 14 Cr. L. J. 615. (*Followed*) .. 858

——— v. Ram Prasad, 36 Ind. Cas 867; 12 N. L. R. 146; 18 Cr. L. J. 35. (*Followed*) .. 66

——— v. Sullivan, 24 A. 511; A. W. N. (1902) 142. (*Relied on*) .. 1041

Empress v. Grish Chunder Talukdar, 5 C. 614; 5 C. L. J. 364; 2 Ind. Dec. (N. S.) 998. (*Not approved*) .. 108

——— v. Sahai Rae, 3 C. 623; 2 C. L. R. 304; 1 Ind. Dec. (N. S.) 980. (*Relied on*) .. 533

Evans v. Evans, (1790) 161 E. R. 466; 1 Hag. Con. 35. (*Considered*) .. 165

F

Page.

Fakhur Ali v. Sahib Nur, 20 Ind. Cas. 3; 254 P. L. R. 1 13; 159; P. W. R. 1913. (*Relied on*) .. 255

Fanindra Deb Raikat v. Rajeswar Das, 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 6 0; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.). (*Relied on*) .. 294

Fateh Chand v. Kishen Kunwar, 16 Ind. Cas. 67; 39 I. A. 247; 34 A. 579; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 17 C. L. J. 1 (P. C.). (*Relied on*) .. 793

Fatema Begam v. Imdad Ali, 58 Ind. Cas. 560; 18 A. L. J. 351; 2 U. P. L. R. (A.) 83. (*Dissented from*) .. 249

Fazal Hussain v. Muhammad Sharf, 24 Ind. Cas. 464; 36 A. 471; 12 A. L. J. 800. (*Followed*) 322, 339

Fitzroy v. Cave, (1905) 2 K. B. 364; 74 L. J. K. B. 829; 93 L. T. 499; 54 W. R. 17; 21 P. L. R. 612. (*Distinguished*) .. 1003

Framji Cursetji v. Goculdas Madhowji, 16 B. 338; 8 Ind. Dec. (N. S.) 703. (*Followed*) .. 251

G

Gajadhar Singh v. Kishen Jiwan Lal, 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734. (*Followed*) .. 373

Gajapati Rajah v. Suryanarayana, 22 M. 111; 8 Ind. Dec. (N. S) 8. (*Followed*) .. 968

Ganendra Nath Roy Chowdhury v. Surja Kanta Roy Chowdhury, 15 Ind. Cas. 39; 17 C. W. N. 462. (*Relied on*) .. 1014

Ganesha Roy v. Tuljia Ram Row, 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.). (*Distinguished*) .. 964

Ganpat Lal v. Bindasini Prashad Narayan Singh, 56 Ind. Cas. 274; 47 I. A. 91; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 24 C. W. N. 954; 28 M. L. T. 330; 47 C. 924 (P. C.) (*Distinguished*) .. 1003

Ganpat Rai v. Munni Lal, 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54. (*Relied on*) .. 484

Gauri v. Hinga, 59 Ind. Cas. 575; 23 O. C. 349. (*Relied on*) .. 380

Gaya Loan Office Ltd. v. Awad Behari Lal, 37 Ind. Cas. 507, 1 P. L. J. 420; 3 P. L. W. 51. (*Followed*) .. 358

Gayan Singh v. Atta Hussain, 60 Ind. Cas. 817; 19 A. L. J. 83; 43 A. 320. (*Distinguished*) .. 375

Genu Tukaram Tapkir v. Narayan Raghu Tamhane, 59 Ind. Cas. 258; 45 B. 117; 22 Bom. L. R. 1147. (*Distinguished from*) 304

George Langridge v. Grace Atkins, 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856. (*Followed*) .. 74

Ghasiram Mandal v. Asirbad Mahto, 9 Ind. Cas. 69; 13 C. L. J. 670; 15 C. W. N. 259. (*Relied on*) .. 922

G—concld.

Page.

Ghulam Khan v. Muhammad Hassan, 29 C. 167; 6 C. W. N 2 6; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1903 (P. C.). (*Relied on*) .. 414

Gnanendra Kumar Rai Chowdhury v. Shyam Sunder Jen, 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398. (*Distinguished*) .. 1017

Gobind Lal v. Baldeo Singh, 24 Ind. Cas. 931; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914. (*Followed*) .. 577

Gokal Chunder Mitra v Ram Lal Goshain, 21 C. 554; 10 Ind. Dec. (N. S) 1000. (*Followed*) .. 769

Gokaldas Gopaldas v. Puranmal Premsukhdas, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.). (*Followed*) .. 503

Gokaran Singh v. Mangli, 66 Ind. Cas. 673; 8 O. L. J. 407. (*Followed*) .. 162

Ganesh Das v. Shiva Lakshman, 30 C. 583; 7 C. W. N. 414 (F. B.). (*Relied on*) .. 626

Gopal Chundra Mukerji v. Nobobar Kunu, 15 Ind. Cas. 53; 16 C. W. N. 1029. (*Followed*) .. 587

Gopal Lall Seal v. Manick Lall Seal, 24 C. 288; 12 Ind. Dec. (N. S.) 859. (*Not approved*) .. 108

Gopal Sah v. Janki Koer, 23 C. 217; 12 Ind. Dec. (N. S.) 145. (*Not followed*) .. 174

Gowri Koer v. Audh Koer, 10 C. 1087; 5 Ind. Dec. (N. S.) 726. (*Followed*) .. 781

Great Indian Peninsular Railway Company v. Messrs. Jitan Ram Nirmal Ram, 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat, 82; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442. (*Distinguished*) .. 431

Guggilapu Peddaya, *In re*, 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 12 Cr. L. J. 41. (*Followed*) .. 719

Gujju Lall v. Fatteh Lall, 6 C. 171; 6 C. L. R 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 11 (F. B.). (*Distinguished*) .. 225

Gulabchand Paramchand v. Fulbai Harichand, 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649. (*Followed*) .. 107

Gulusam Bivi v. Ahmadsa Rowther, 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284. (*Doubted*) .. 812

Gur Bakhsh Singh v. Chutta Singh, 47 Ind. Cas 960; 5 O. L. J 471. (*Relied on*) .. 299

Gurupathappa v. Narasingappa, 7 M. 174; 2 Ind. Dec. (N. S) 707. (*Relied on*) .. 299

H

Haji Abdul Rahman v. Haji Noor Mahomed, 16 B. 141; 8 Ind. Dec. (N. S) 570. (*Dissented from*) .. 246

Haji Khan v. Baldeo Das, 24 A. 90; A. W. N. (1901) 188. (*Distinguished*) .. 901

Hanuman v. Emperor, 21 Ind. Cas. 1065; 35 A. 560; 11 A. L. J. 926; 14 Cr. L. J. 685. (*Followed*) .. 858

Hanuman Prasad v. Muhammad Ishaq, 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229. (*Distinguished*) .. 409

H—concld.

Page.

Harpershad v. Ram Chander, 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A.) 139; 44 A. 37; (1922) A. I. R. (A.) 174. (*Distinguished*) .. 320
Hazari Lal v. Ram Narain, 27 Ind. Cas. 420; 17 O. C. 379. (*Followed*) .. 503
Hem Kunwar v. Amba Prasad, 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. S.) 1324. (*Distinguished*) .. 1027
Hindley v. Joynarain, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288. (*Relied on*) .. 746
Hira Lal v. Giribala Debi, 34 Ind. Cas. 444; 23 C. L. J. 429. (*Relied on*) .. 793
Hira Lal Ghose v. Chundra Kanta Ghose, 26 C 539; 3 C. W. N. 403; 13 Ind. Dec. (N. S.) 946 (*Relied on*) .. 975
Hollins v. Verney, (1884) 13 Q. B. D. 304; 53 L. J. Q. B. 430; 51 L. T. 753; 33 W. R. 5; 41 J. P. 580. (*Distinguished*) .. 922
Hukum Chand Boid v. Pirthichand Lal Chowdury (Tuscurn Boid), 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 262 L. T. 131; 10 C. L. W. 416; 46 I. A. 52 (P. C.). (*Followed*) 41
Hulasi v. Maiku, 5 A. 236; A. W. N. (1883) 5; 3 Ind. Dec. (N. S.) 214 (*Distinguished*) .. 279
Hungsha Majillya v. Tincowri Das, 8 C. W. N. 230. (*Relied on*) .. 975
Hussain Khan v. Emperor, 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546. (*Followed*) .. 1046

I.

Imrat Ali v. Sheikh Amjad Ali, 39 Ind. Cas. 292; 2 P. L. J. 67; 3 P. L. W. 404; 18 Cr. L. C. 452 (*Relied on*) .. 1047
Imtiaz-un-nissa v. Anwar-ul-lah, 20 A. 233; A. W. N. (1898) 97; 9 Ind. Dec. (N. S.) 637 (*Followed*) .. 896
Indur Chander Singh v. Radhakishore Ghose, 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N. S.) 782 (P. C.) (*Relied on*) .. 309
Ishan Chandra Dhupi v. Nishi Chandra Dhup, 41 Ind. Cas. 387; 29 C. L. J. 1; 22 C. W. N. 853 (*Relied on*) .. 793
Ishar Kuar v. Raja Singh, 9 Ind. Cas. 608; 94 P. L. R. 1911; 29 P. R. 1911; 124 P. W. R. 1911. (*Followed*) .. 589
Ishri v. Gopal Saran, 6 A. 351; A. W. N. (1884) 125; 4 Ind. Dec. (N. S.) 51. (*Dissented from*) .. 558
Izzatunnissa Begam v. Pertab Singh, 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1143; 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203; (P. C.). (*Relied on*) .. 209

J.

Jadunandan Singh v. Emperor, 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37. (*Followed*) .. 855
Jagannatha Chariar v. Seenu Bhattachariar, 51 Ind. Cas. 869; 42 M. 618; 36 M. L. J. 361; (1919) M. W. N. 240. (*Relied on*) .. 793

J—contd.

Page.

Jaggar Nath Pande v. Jokhu Tewari, 18 A. 223; A. W. N. (1896) 43; 8 Ind. Dec. (N. S.) 856. (*Relied on*) .. 558
Jagjiwan Haribhai v. Kalidas Mulji, 60 Ind. Cas. 901; 45 B. 664; 23 Bom. L. R. 81. (*Followed*) .. 379
Jagra v. Kalpi, 33 Ind. Cas. 270; 2 O. L. J. 750. (*Dissented from*) .. 553
Jai Chand v. Girwar Singh, 52 Ind. Cas. 366; 17 A. L. J. 814; 41 A. 669. (*Relied on*) .. 879
Jainath Pathak v. Kalka Upadhya, 13 Ind. Cas. 643; 34 A. 285; 9 A. L. J. 238. (*Relied on*) .. 647
Jainti Prasad v. Bechu Singh, 15 A. 65; A. W. N. (1893) 29; 7 Ind. Dec. (N. S.) 758 (*Dissented from*) .. 358
Jalim Singh Sri Mal v. Choonee Lal Jahurry, 11 Ind. Cas. 540; 15 C. W. N. 882. (*Relied on*) .. 793
Jamna v. Nain Sukh, A. W. N. (1887). 116; 9 A. 493; 5 Ind. Dec. (N. S.) 766 (*Discussed and Distinguished*) .. 498
Jamna v. Sarjit, 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919. (*Relied on*) .. 14, 1027
Jamna Das v. Uma Shanker, 25 Ind. Cas. 158; 36 A. 308; 12 A. L. J. 411. (*Distinguished*) 307
Jan Ali v. Ram Nath, 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21. (*Followed*) .. 403
Janga Singh v. Lachmi Narain, 57 Ind. Cas. 488; 23 O. C. 254; 7 O. L. J. 378; 2 U. P. L. R. (O.) 171. (*Dissented from*) .. 558
Jaun Beebee v. Abdollah Barbar, (1838) Fulton 345; 1 Ind. Dec. (O. S.) 848. (*Followed*) .. 142
Jawhara v. Akbar Husain, 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390 (F. B.) (*Followed*) .. 403
Jesa Bhatha, *In re*, 55 Ind. Cas. 857; 22 Bom. L. R. 190; 21 Cr. L. J. 377; 44 B. 385. (*Relied on*) .. 539
Jhamman v. Farrukhabad, Sel. Dec. No. 2 of 1910. (*Followed*) .. 197
Jhunku Lal v. Bisheshar Das, 46 Ind. Cas. 71; 16 A. L. J. 495; 40 A. 612. (*Followed*) 112
Jiban Krishna Roy v. Brojo Lal, 30 C. 550; 5 Bom. L. R. 428; 7 C. W. N. 425; 30 I. A. 81; 8 Sar. P. C. J. 444 (P. C.). (*Distinguished*) .. 865
Jiwan Das v. Emperor, 30 P. R. 1904 Cr; 1 Cr. L. J. 1078. (*Relied on*) .. 1042
Jiwan Sahai v. Kalyan Mal, A. W. N. (1906) 220. (*Distinguished*) .. 1020
Jiwan Singh v. Har Kaur, 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914. (*Dissented from*) .. 685
Jogendra Nath Mookerjee v. Emperor, 33 C. 1; 10 C. W. N. 158; 2 C. L. J. 128; 2 Cr. L. J. 615. (*Followed*) .. 957
Jogendra Nath Rai v. Baldeo Das, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735. (*Followed*) 1018
Jogesh Chandra Roy v. Makbul Ali, 60 Ind. Cas. 984; 47 C. 979; 25 C. W. N. 857. (*Followed*) .. 555
Jogeshwar Narain Singh v. Roy Radha Raman 16 Ind. Cas. 543. (*Followed*) .. 218

J—concld.

Page.

Jotendromohun Tagore v. Ganendromohun Tagore, 18 W. R. 359 at p. 371 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.). (*Explained*) 563
Joy Gobind Laha v. Monmomotha Nath Banerjee, 33 C. 580. (*Distinguished*) .. 1027
Joy Lal & Co. v. Monmotha Nath Mullick 35 Ind. Cas. 3; 20 C. W. N. 365. (*Followed*) 273
Juggi Lal v. Ganga Prasad, 10 Ind. Cas. 182; 14 O. C. 124. (*Distinguished*) .. 861
Jugmohandas v. Sir Mangaldas, 10 B. 528; 5 Ind. Dec. (N. S.) 742. (*Distinguished*).. 563
Jugul Kishore v. Jotindra Mohun, 16 C. 985; 11. I. A 66. 8 Ind. Jur. 485; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.). (*Followed*) .. 865

K.

Kachi Madar Labhai, *In re*, 10 Ind. Cas. 619; 10 M. L. T. 47; 21 M. L. J. 795; (1911) 2 M. W. M. 9; 12 Cr. L. J. 323. (*Dissented from*) .. 1054
Kadirvelu Nainar v. Kuppuswami Naicker 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 790; 23 M. L. T. 372; (1918) M. W. N. 514; 8 L. W. 103 (F. B.) (*Followed*) .. 278
Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutty, 24 C. 339; 12 Ind. Dec. (N. S.) 893. (*Followed*) .. 58
Kali Dayal Bhattacharjee, v. Nagendra Nath, 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44. (*Relied on*) .. 14
Kali Kishore Roy v. Dhununjoy Roy, 3 C. 228; 1 Ind. Dec. (N. S.) 733. (*Relied on*).. 225
Kallati Kunju Menon v. Palat Erracha Menan, 2 M. H. C. R. 162 at p. 163. (*Followed*) .. 27
Kalyan Mal v. Samad, 18 Ind. Cas. 244; 35 A 157; 11 A. L. J. 118. (*Followed*) .. 914
Kamala Dasi v. Tarapada Mukerji, 14 Ind. Cas. 1006; 15 C. L. J. 498. (*Followed*).. 486
Kamini Sundari v. Abdul Halim, 47 Ind. Cas. 420; 28 C. L. J. 254. (*Distinguished*) .. 1001
Kamta Prasad v. Sayed Ahmad, 1 Ind. Cas. 799; 6 A. L. J. 451; 31 A. 373. (*Not Followed*) .. 1021
Kanni Ammal v. Amma Kannu Ammal, 23 M. 504; 10 M. L. J. 253; 8 Ind. Dec. (N. S.) 754. (*Followed*) .. 58
Kapuria Mal v. Wali Muhammad, 65 Ind. Cas. 250; 2 L. 294; 23 P. L. R. 1922; 4 L. L. J. 354; (1922) A. I. R. (L.) 142; (*Dissented from*) .. 558
Kasam v. Jorawar Singh, 68 Ind. Cas. 573; 49 I. A. 358; 31 M. L. T. 46; 16 L. W. 223; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.). (*Followed*) .. 220
Kazi Hassan v. Sagun Balkrishna, 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec. (N. S.) 651. (*Followed*) .. 403
Kesar Kunwar v. Kashi Ram, 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634. (*Followed*) .. 320

K—concld.

Page.

Kesho Prasad Singh v. Chandrika Prasad Singh, 68 Ind. Cas. 394; 2 Pat. 217; 3 P. L. T. 797; (1923) A. I. R. (Pat) 122. (*Relied upon*) .. 865
Kesho Prasad Singh v. Sheopargash Ojha, 64 Ind. Cas. 248; 19 A. L. J. 749; 44 A. 19; 3 U.P. L. R. (A.) 117; (1922) A. I. R. (A.) 301 (F. B.) (*Followed*) .. 924
Kesho Prasad Singh v. Tribhuan, 39 Ind. Cas. 611; 2 P. L. J. 276; 1 P. L. W. 409; (*Distinguished*) .. 961
Kesho Ram v. Peare Lal, 71 Ind. Cas. 761; 21 A. L. J. 209; (1923) A. I. R. (A.) 443. (*Followed*) .. 918
Kessowji Issur v. Great Indian Peninsula Railway, Co. 34 I. A. 115; 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435; (P. C.). (*Distinguished*) .. 747
Khetal v. Emperor, 73 Ind. Cas. 62; 21 A. L. J. 143; (1923) A. I. R. (A.) 352; 45 A. 300 (*Followed*) .. 529
Khosal Chandra Roy Chowdhury v. Ukiladdi, 3 Ind. Cas. 47; 14 C. W. N. 114. (*Distinguished*) .. 130
Khub Ram v. Surat, 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917 (*Followed*) .. 1
Khurshed-un-nissa v. Alim-ul-nissa, 17 Ind. Cas. 868; 10 A. L. J. 421. (*Followed*) .. 745
Khwaja Muhammad Khan v. Muhammad Ibrahim, 26 A. 490; A. W. N. (1904) 99. (*Followed*) .. 307
King-Emperor v. Mangal, 6 O. C. 199. (*Relied on.*) .. 539
Kodai Singh v. Jai Sri Singh, 13 A. 189; 7 Ind. Dec. (N. S.) 118 (F. B.) (*Followed*) .. 745
Kong Lone v. Ma Kay, 4 L. B. R. 13; 6 Cr. L. J. 125. (*Relied on.*) .. 1050
Koylash Chundra Ghose v. Sanatun Chung Barooie, 7 C. 132 at p. 135; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur. 642; 3 Ind. Dec. (N. S.) 635. (*Relied on*) .. 922
Krishna Charan Barman v. Sanat Kumar Das, 34 Ind. Cas. 699; 44 C. 162; 25 C. L. J. 24; 21 C. W. N. 740., (*Relied on*) .. 1021
Krishna Dhone v. Bhagaban Chandra, 34 Ind. Cas. 188, (*Distinguished*) .. 1003
Kristo Coomar Nag v. Mahabat Khan, 5 C. 595; 2 Ind. Dec. (N. S.) 986. (*Relied on*).. 279
Kristo Gobind Majumdar v. Hem Chunder Chowdhury, 16 C. 511; 8 Ind. Dec. (N. S.) 337. (*Dissented from*) .. 865
Kulsumunnisa v. Khaslat Hussain, 50 Ind. Cas. 179; 17 A. L. J. 345; 1 U. P. L. R. (A.) 149. (*Distinguished*) .. 297
Kunj Lal v. Banwari Lal, 48 Ind. Cas. 711; 4 P. L. J. 394. (*Relied on*) ..649
Kuppuswamy Aiyar v. Muthuswamy Aiyar, 27 Ind. Cas. 891; (1915) M. W. N. 31; 1 L. W. 1068. (*Considered*) .. 344
Kuppuswami Chettier v. Rajagopala Iyer 70 Ind. Cas. 324; 42 M. L. J. 303; 15 L. W. 348; 45 M. 466; (1922) M. W. N. 113; (1922) A. I. R. (M.) 79. (*Not followed*) .. 40

L

Page.

Lachhan Kunwar v. Manorath Ram, 22 C. 445; 22 I. A. 25; 5 M. L. J. 1; Rafique and Jackson's P. C. No. 136; 6 Sar. P. C. J. 523; 11 Ind. Dec. (N. S.) 297 (P. C.) (*Followed*) 869
Lachhman Prasad v. Pran Nath, 65 Ind. Cas. 339; 8 O. L. J. 585; (1922) A. I. R. (O.) 108. (*Relied on.*) .. 299
Lachhmi Narain v. Emperor, 19 Ind. Cas. 712; 16 O. C. 81; 14 Cr. L. J. 280. (*Followed*) .. 443
Lachman Lal v. Kanhaya Lal, 22 C. 609; 22 I. A. 51; 6 Sar. P. C. J. 558; 11 Ind. Dec. (N. S.) 405 (P. C.). (*Followed*) .. 811
Lachman Prasad v. Jamna Prasad, 10 A. 162; A. W. N. (1887) 295; 6 Ind. Dec. (N. S.) 109. (*Relied on.*) .. 1014
Lachman Prasad v. Shitaba Kunwar, 59 Ind. Cas. 639; 43 A. 177; 18 A. L. J. 1008; 2 U. P. L. R. (A.) 386. (*Followed*) .. 914
Lachmi Narain v. Muhammad Yusuf, 59 Ind. Cas. 903; 42 A. 540; 18 A. L. J. 688; (*Relied on*) .. 17
Lakhi Narain v. Sri Ram Chandra Bhunya, 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146. (*Distinguished*) .. 961
Lakhmi Chand Rewachand v. Kachubbai Gulabchand, 11 Ind. Cas. 559; 35 B. 339; 13 Bom. L. R. 517. (*Distinguished*) .. 1027
Lakho Bibi v. Salamat Ali, 20 A. 337; A. W. N. (1898) 59; 9 Ind. Dec. (N. S.) 576. (*Distinguished*) .. 1020
Lakhshmi Doss v. Roop Laul, 36 M. 169; 17 M. L. J. 19; 2 M. L. T. 4 (F. B.). (*Distinguished*) .. 517
Laksman Sahu v. Gokhul Maharana, 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat) 415 (*Followed*) .. 969
Laksman Sahu v. Gokhul Maharana, 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat) 415. (*Relied upon*) .. 839
Lal Singh v. Collector of Etah, 25 Ind. Cas. 398; 12 A. L. J. 485; 36 A. 331. (*Distinguished*) .. 389
Lala v. Abdus Samad, 17 Ind. Cas. 320; 16 O. C. 94. (*Relied on*) .. 299
Lali v. Murlidhar, 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; 1 C. W. N. 730; 33 I. A. 97; (P. C.) (*Relied on*) .. 294
Lodd Govinddass Krishnadass v. Rukmani Bhai, 21 Ind. Cas. 302; 38 M. 438; 14 M. L. T. 310; 1 L. W. 529. (*Distinguished*) 777
Luckhee Narain Banerjee v. Ram Kumar, 15 C. 564; 7 Ind. Dec. (N. S.) 960. (*Relied on*) .. 1047
Lutawan v. Lachiya, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 (F. B.). (*Followed*) .. 834
Lutwan v. Lachya, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57. (*Relied on*) .. 401
Lutchmeeput Singh v. Sadaulla Nushyo, 9 C. 698; 12 C. L. R. 383; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115. (*Relied on*) .. 25

M

Page.

Mackay v. Dick, (1881) 6 App. Cas. 251; 29 W. R. 541. (*Followed*) .. 609
Macnaghten v. Mahabir Pershad Singh, 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C) (*Followed*) .. 838
Madan Lal v. Bhagwan Das, 21 A. 235; A. W. N. (1899) 41; 9 Ind. Dec. (N. S.) 859. (*Followed*) .. 277
Madho Ram, *In the matter of the petition of*, 21 A. 181; A. W. N. (1899) 15; 9 Ind. Dec. (N. S.) 825. (*Relied upon*) .. 11
Mahaboob Begum Sahiba v. Lal Begum Sahiba, 62 Ind. Cas. 652; 4 L. W. 445. (*Relied on*) .. 1020
Mahadeo Sahai v. Secretary of State for India in Council, 65 Ind. Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1. (*Dissented from*) .. 344
Maharaja of Bhartpur v. Rani Kanno Dei, 23 A. 181; 3 Bom. L. R. 51; 5 C. W. N. 137; 28 I. A. 35; 7 Sar. P. C. J. 792 (P. C.). (*Relied on*) .. 246
Maharajah of Bobbili v. Sree Rajah Narasaraju Peda Baliara Simhulu Bahadur Garu, 36 Ind. Cas. 682; 39 M. 640; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 909; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.). (*Relied on*) .. 608
Mahnin Zi v. Ma Hnin Ye, S. J. L. B. 22; (*Dissented from*) .. 9
Malkarjun v. Narhari, 25 B. 331; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 339; (P. C.). (*Distinguished*) .. 1003
Mandoth Veetil Chappan v. Puthanpurayil Ranu, 15 Ind. Cas. 587; 37 M. 420; 13 M. L. T. 118. (*Distinguished*) .. 1026
Mangat Ram v. Devi Chand, 20 P. R. 1906; 69 P. L. R. 1906; 44 P. W. R. 1906. (*Relied upon*) .. 639
Manick Chand Mahata v. Corporation of Calcutta, 66 Ind. Cas. 600; 48 C. 916. (*Distinguished*) .. 8
Manna v. Rang Lal. 39 Ind. Cas. 859. (*Followed*) .. 349
Manna Lal v. Sardar Singh, 45 Ind. Cas. 342; 20 O. C. 332. (*Distinguished*) .. 816
Manohar Tambekar, *In re*, 4 B. 26; 2 Ind. Cas. (N. S.) 528. (*Relied on*) .. 255
Manoo Chaudhry v. Munshi Chaudhry, 43 Ind Cas. 393; 3 P. L. J. 188; 5 P. L. W. 97. (*Followed*) .. 642
Masihunnissa v. Kaniz Sughra, 60 Ind. Cas. 975; 43 A. 377; 19 A. L. J. 139; 3 U. P. L. R. (A.) 30. (*Relied on*) .. 1014
Mathura Prasad Singh v. Ram Prasad Tewary, 60 Ind. Cas. 523; at p. 524; 2 P. L. T. 340. (*Relied upon*) .. 596
Maung La Pe v. Maung Lu Gale, 2 U. B. R. (1897-1901) 418. (*Relied on*) .. 9
McEacharn v. Colton, (1902) A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594. (*Relied upon*) 555

M—contd.

Page.

Mehdi Husain v. Sughra Begam, 25 A. 206; A. W. N. (1903) 15. (*Distinguished*) .. 1027
Merali Visram v. Sheriff Devji, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017. (*Relied on*) .. 401
Mi Sa U v. Nga Pyan, 2 U. B. R. (1904-06) Evidence p. 3. (*Relied on*) .. 47
Mi Se Baw v. Mi Min Ya, 4 Ind. Cas. 1084; 2 U. B. R. (1907-09), Evidence p. 19. (*Relied on*) .. 47
Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri, 13 Ind Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1922) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 39 I. A. 1 (P. C.). (*Relied on*) .. 309
Mohammad Abdul Jalil Khan v. Mohammad Ubedullah Khan, 62 Ind. Cas. 725; 19 A. L. J. 227: 43 A. 416. (*Followed*) .. 142
Mohammad Hussain Sahib v. Mohammad Abdul Rahim Beg Sahib 67 Ind. Cas. 492; 42 M. L. J. 272; (1922) M. W. N. 74; 15 L. W. 241; (1922) A. I. R. (M.) 8, (*Relied on*) .. 35
Mohammad Ibrahim Rowthar v. Shaikh Ibrahim Rowther, 67 Ind. Cas. 115; 49 I. A. 119; 30 M. L. T. 185; 26 C W. N. 793; 35 M. 308; (1922) A. I. R. (P. C.)59: 43 M. L J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944 (P. C.). (*Followed*) .. 225
Mohan Shaha v. Lakshu Karikar, 6 Ind. Cas. 16. (*Relied on*) .. 777
Mohendro Nath Das Gupta v. Emperor, 29 C. 387; 6 C. W. N. 550. (*Not approved*) .. 108
Mohesh Chunder Chuttopadhya v. Umatara Deby, 16 C. 638; 8 Ind. Dec. (N. S.) 421. (*Followed*) .. 547
Mohima Chunder Biswas v. Tarini Sunkar Ghose, 19 C. 487; 9 Ind. Dec. (N. S.) 769. (*Followed*) .. 896
Molu Mal v. Sri Ram, 63 Ind. Cas. 33; 2 L. 227; 3 U. P. R. (L.) 99. (*Followed*) .. 451
Monmohan Pandey v. Bidhu Bhusan Ray Chowdhury, 48 Ind. Cas. 309; 28 C. L. J. 268. (*Relied on*) .. 14
Mool Chand v. Alwar Chetty, 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449. (*Relied on*) .. 1021
Mool Chand v. Murari Lal, 21 Ind. Cas. 702; 36 A. 8; 11 A. L. J. 979. (*Relied on*) .. 802
Mool Raj v. Na'dar Mal, 55 Ind. Cas. 315; 18 A. L. J. 208; 2 U. P. L. R. (A.) 54; 42 A. 260 (*Distinguished*) .. 486
Motanhoy v. Mulji, 29 Ind. Cas. 223; 42 I. A. 103; 39 B. 399; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 12 L. W. 524; (1915) M. W. N. 522 (P. C.). (*Relied on*) .. 793
Moulvie Mohamed Shamsool Hooda v. Shewukram, 21 A. 7; 22 W. R. 409; 4 B. L. R. 226; 3 Sar. P. C. J. 495; (P. C.). (*Followed*) .. 503
Mubaruk Husain v. Bihari, 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199 (*relied on*) .. 1014

M—concld.

Page.

Muhammad v. Manavikarama, 69 Ind. Cas. 513; 45 M. 882; 43 M. L. J. 317; 16 L. W. 434 (1922) M. W. N. 604; (1923) A. I. R. (M.) 13. (*Followed*) .. 905
Muhammad Abid v. Muhammad Asghar, 8 A. 64; A. W. N. (1886) 2; 4 Ind. Dec. (N. S.) 1068. (*Relied on*) .. 299
Muhammad Asghar Ali Khan v. Mohammad Imtiaz Ali, A. W. N. (1898) 200. (*Followed*) .. 918
Muhammad Bakur Ali v. Chalhai Mahton, 52 Ind. Cas. 290; 4 P. L. J. 712. (*Relied on*) .. 941
Muhammad Husain v. Abdul Ghafur, 65 Ind. Cas. 102; 3 L. 1; 8 P. W. R. 1922; (1922) A. I. R. L. (L.) 111. (*Followed*) .. 122
Muhammad Husain v. Emperor, 18 Ind. Cas 641; 15 O. C. 321; 14 Cr. L. J. 81. (*Referred to and distinguished*) .. 69
Muhammad Ismail v. Chattar Singh, 4 A. 69; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 634 (F. B.). (*Relied on*) .. 577
Muhammad Muzamilullah Khan v. Mithulal, 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 901; (F. B.). (*Followed*) .. 325
Muhammad Rustam Ali Khan v. Municipal Committee of Karnal City, 56 Ind. Cas. 1; 47 I. A. 25; 1 P. W. R. 1920; 13 P. L. R. 1920; 38 M. L. J. 455; 1 L. 117; 11 L. W. 579; 18 A. L. J. 466; 22 Bom. L. R. 563; 2 U. P. L. R. (P. C.) 87; 28 M. L. T. 1; (P. C.). (*Relied on*) .. 25
Muhammad Sadiq v. Ghause Muhammad, 7 Ind. Cas. 200; 33 A. 101; 7 A. L. J. 914. (*Followed*) .. 640
Muhammad Sadiq Khan v. Misri Lal, 64 Ind. Cas. 524; 19 A. L. J. 843; (1922) A. A. I. R. (A.) 432. (*Relied on*) .. 816
Muhammad Sharif v. Bande Ali, 11 Ind. Cas. 474; 34 A. 36; 8 A. L. J. 1052 (F. B.) (*Followed*) .. 656
Mungul Prasad Dichit v. Grija Kant Lahiri, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.) (*Followed*) .. 130
Municipal Committee v. Gurthi Lengayya, S. J. L. B. 405. (*Relied on*) .. 34
Munnu Lal v. Ghulam Abbas, 6 Ind. Cas 78; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.) (*Relied on*) .. 409
Musaji v. Mohammad Walayatullah Khan, 6 O. C. 216; (*Followed*) .. 445
Muthia Moopan, *In re*, 21 Ind. Cas. 159; 36 M. 315; 14 Cr. L. J. 559. (*Distinguished*) .. 719
Muthiah Chettiar v. Bava Sahib, 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969. (*Followed*) .. 458
Muthiyalu Chengappa v. Burada Gunta, 60 Ind. Cas. 135; 43 M. 855; 39 M. L. J. 567; 12 L. W. 6 6; 28 M. L. T. 272; (1921) M. W. N. 29. (*Followed*) .. 58
Muthukumara Chetty v. Anthony Udayan, 24 Ind. Cas. 120; 38 M. 867; 15 M. L. T. 361; 29 M. L. J. 617. (*Distinguished*) .. 1003

N

Page.

Nabadwipendra Mookerjee v. Madhu Suden Mandal, 16 Ind. Cas. 741; 18 C. W. N. 473. (*Relied on*) .. 793
Nabikishore v. Upendrakishore, 65 Ind. Cas. 305; 35 C. L. J. 116; 26 C. W. N. 322; 20 A. L. J. 22; (1922) M. W. N. 95; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.). (*Relied on*) .. 612
Nafar Chandra Chatterjee v. Kailash Chandra Mondal, 62 Ind. Cas. 510; 25 C. W. N. 201. (*Relied on*) .. 793
Naganada Davay v. Bapu Chettiar, 27 M. 424; 14 M. L. J. 69. (*Relied on*) .. 1050
Nagindas v. Ghelabhai, 56 Ind. Cas. 449; 44 B. 673; 22 Bom. L. R. 322 (*Relied on*) .. 746
Nalluri Chenchiah *In re*, 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296; 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356; 20 Cr. L. J. 379. (*Dissented from*) .. 445
Nanabhai v. Trimbak, (1878) P. J. 195. (*Relied on*) .. 793
Nanda Kumar Howladar v. RamJuban Howladar, 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457. (*Relied on*) .. 964
Nanda Lal v. Jagat Kishore, 36 Ind. Cas. 420; 43 I. A. 249; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177. (P. C.). (*Relied on*) .. 612
Narain Das v. Dilawar, 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250. (*Followed*) .. 969
Narain Das v. Dilawar, 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250. (*Relied upon*) .. 839
Narayan v. Ranga, 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.) 477. (*Relied on*) .. 793
Narayana Kutty Goundan v. Pechiammal, 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 353; 22 M. L. J. 364. (*Distinguished*) .. 416
Narayana Mudaly v. Emperor, 31 M. 131; 7 Cr. L. J. 425. (*Relied on*) .. 863
Narendra Bahadur Singh v. Ajudhya Prasad 5 Ind. Cas. 443; 13 O. C. 28. (*Followed*) .. 573
Narendra Nath Barari v. Abhoy Charan Chattopadhya, 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364 (F. B.). (*Followed*) .. 922
Narsingh Sahai v. Sheo Prasad, 42 Ind. Cas. 855; 40 A. 1; 15 A. L. J. 835 (F. B.). (*Distinguished*) .. 330
Natha v. Mian Khan, 2 Ind. Cas. 552; 6 A. L. J. 649. (*Followed*) .. 971
Natha Singh v. Chuni Lal, 47 Ind. Cas. 364; 69 P. R. 1918, 112 P. W. R. 1918; 117 P. L. R. 1918. (*Distinguished*) .. 122
Nathu v. Kundan Lal, 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182. (*Dissented from*) .. 571
Nathu v. Kundan Lal, 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182. (*Relied on*) .. 18
Navunni v. Ramaswami Patter, 52 Ind. Cas. 738; 10 L. W. 169 (*Distinguished*) .. 309
Navunni v. Ramaswami Patter, 52 Ind. Cas. 738; 10 L. W. 169. (*Relied on*) .. 309

N—concld.

Pages

Nemai Chand Kanji v. Deno Nath Kanji 2 C. W. N. 691. (*Relied on*) .. 975
Nepen Bala Debi v. Siti Kanta Banerjee, 8 Ind. Cas. 41; 12 C. L. J. 459; 15 C. W. N. 158. (*Relied on*) .. 793
Nilkanta Singh v. Queen-Empress, 20 C. 469; 10 Ind. Dec. (N. S.) 317. (*Distinguished*) .. 863
Nilmoni Dey v. Hira Lal Das, 43 Ind. Cas. 452; 27 C. L. J. 100. (*Relied on*) .. 626
Nilu Roy v. Asirbad Mandal, 60 Ind. Cas. 809; 33 C. L. J. 232; 25 C. W. N. 129. (*Followed*) .. 820
Ningawa v. Ramappa, 28 B. 94; 5 Bom. L. R. 708. (*Relied on*) .. 970
Nizamuddin Shah v. Bohra Bhim Sen, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85. (*Followed*) .. 373
Nobin Chundra Chuckerbutty v. Mohamed Uzir Ali, 3 C. W. N. 292. (*Relied on*) .. 255
Nugent v. Nugent, (1907) 2 Ch. 292; 76 L. J. Ch. 614; 97 L. T. 279; 23 T. L. R. 660. (*Relied on*) .. 209
Nugent v. Nugent, (1908) 1 Ch. 546 at p. 548; 77 L. J. Ch. 271; 98 L. T. 354; 24 T. L. R. 296. (*Relied on*) .. 209
Nund Kumar Shaha v. Shurnomoyi, 15 C. 162; 7 Ind. Dec. (N. S.) 692. (*Relied on*) 1029

O

Ottaprakal Thazath v. Charichai Pallikal, 55 Ind. Cas. 760; 43 M. 393; 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N. 279; 27 M. L. T. 169. (*Distinguished*) .. 1026

P

Pakhwanti Dai v. Indra Narain Singh, 23 C. 201; 12 Ind. Dec. (N. S.) 134. (*Followed*) .. 896
Panchaman Bose v. Chandi Charan Misra, 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874. (*Followed*) .. 480
Paras Ram v. Gian Chand, 50 Ind. Cas. 36; 48 P. W. R. 1919. (*Relied on*) .. 484
Parmanand Raot v. Gobardhan Sahai, 28 A. 676; A. W. N. (1906) 198; 3 A. L. J. 604. (*Dissented from*) .. 558
Partab Singh v. Bhabuti Singh, 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 40 I. A. 182 (P. C.). (*Distinguished*) .. 964
Pasumarti Payidanna v. Ganti Lakshminarasamma, 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525. (*Followed*) .. 458
Patali Singh v. Emperor, 47 Ind. Cas. 73; (1918) Pat. 288; 5 P. L. W. 157; 19 Cr. L. J. 877. (*Distinguished*) .. 717
Patterson v. Patterson, (1850) 3 H. L. C. 308 at p. 328; 88 R. R. 101; 10 E. R. 120. (*Considered*) .. 166
Pedda Anjinigadu, *In re*, 64 Ind. Cas. 282; (1921) M. W. N. 514; 22 Cr. L. J. 762; (1922) A. I. R. (M.) 353; 13 L. W. 695. (*Followed*) .. 949

P—concld.

Page.

Peter Der Crosse, The, (1876) 1 P. D. 414; 34 L. T. 749; 3 Asp. M. C. 195. (*Relied on*) 916
Pitam Sing v. Tota Singh, 29 A. 301; 4 A. L. J. 184; A. W. N. (1907) 74. (*Followed*) 40
Pitamber Ratansi v. Jagjivan Hansraj, 13 B. 131*n*; 13 Ind. Jur. 267*n*; 7 Ind. Dec. (N. S.) 88. (*Distinguished*) .. 107
Poole v. Huskinson, (1843) 11 M. and W. 827; 152 E. R. 1039; 63 R. R. 782. (*Relied on*) .. 25
Prankissen Bagchee v. Monmohinee Dassee, 17 W. R. 33. (*Distinguished*) .. 961
Proceedings, 6th January 1872, 7 M. H. C. R. App. 1. (*Relied on*) .. 255
Prosser v. Edmond, (1835) 1 Y. and C. 481; 41 R. R. 322; 160 E. R. 196. (*Distinguished*) 1003
Prosunno Kumar Sanyal v. Kali Das Sanyal, 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 899 (P. C.). (*Distinguished*) .. 351
Purmananddas Jiwandas v. Dharsey Virji, 10 B. 101; 5 Ind. Dec. (N. S.) 452. (*Followed*) .. 480
Purna Chandra Mandal v. Anukul Biswas, 2 Ind. Cas. 844; 36 C. 654 at p. 657. (*Followed*) .. 517

Q

Qamar-ud-din Ahmad v. Jawahir Lal, 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.). (*Distinguished*) .. 279
Queen v. Punamalai Nadan, 5 M. 199; 1 Weir 80; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 139. (*Followed*) .. 65
Queen-Empress v. Durga, 16 A. 84 (F. B.); A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55. (*Relied on*) .. 705
——— v. Maganlal, Rat. Un. Cr. C. 530; Cr. Rg. No. 63 of 1890. (*Followed*) .. 72
——— v. Niddha, 14 A. 38; A. W. N. (1891) 176; 7 Ind. Dec. (N. S.) 397. (*Relied on*) .. 1042
——— v. Rahim Bakhsh, 20 A. 206; A. W. N. (1898) 21; 9 Ind. Dec. (N. S) 494. (*Relied on*) .. 539

R

Radha Madhab Paikara v. Kalpataru Roy, 16 Ind. Cas. 811; 17 C. L. J. 209. (*Relied on*) .. 975
Radha Madhub Samonta v. Sasti Ram Sen, 26 C. 826; 13 Ind. Dec. (N. S.) 1129. (*Followed*) .. 416
Radhakrishna Ayyar v. Sundaraswamier, 74 Ind. Cas. 584; 16 L. W. 18; 31 M. L. T. 31; 45 M. 475; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 297; 20 A. L. J. 937; 36 C. L. J. 459 (P. C.). (*Relied on*) 596
Ragaubir Rai v. Madho, 41 Ind. Cas. 908; 15 A. L. J. 623; 39 A. 605. (*Followed*) 502
Raghubar Dayal v. Chandan, 10 O. C. 23. (*Followed*) .. 553

R—contd.

Page.

Raghunandan Pershad v. Emperor, 32 C. 80; 8 C. W. N. 779; 1 Cr. L. J. 775. (*Followed*) .. 857
Raja of Kalahasti v. Maharaja of Venkatagiri, 21 Ind. Cas. 389; 38 M. 387; 14 M. L. T. 320; 25 M. L. J. 198. (*Followed*) .. 838
Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz, 26 M. 686 (F. B.). (*Distinguished*) .. 416
Rajani Kant Nag v. Jageshwar Singh, 20 C. 254; 10 Ind. Dec. (N. S.) 172. (*Followed*) .. 547
Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11; 3 C. W. N. 660; 14 Ind. Dec. (N. S.) 8. (*Followed*) .. 218
Ralla v. Budha, 50 P. R. 1893 (F. B.). (*Distinguished*) .. 589
Ram Adhar v. Ram Shankar, 26 A. 215; A. W. N. (1903) 236. (*Followed*) .. 549
Ram Brichh Ram v. Tarak Tewari, 33 Ind. Cas. 805; 14 A. L. J. 589. (*Relied on*) .. 409
Ram Chandra Naik Kalia v. Raghunath Saran Singh Deo, 46 Ind. Cas. 101; 16 A. L. J. 530. (*Relied on*) .. 626
Ram Dhan Das v. Ramji Das, 50 Ind. Cas. 215. (*Relied on*) .. 484
Ram Kissen Joydoyal v. Pooran Mull, 56 Ind. Cas. 571; 31 C. L. J. 259; 47 C. 733. (*Relied on*) .. 793
Ram Pershad v. Harbans Singh, 6 C. L. J. 158. (*Followed*) .. 831
Ram Sagar Mondal v. Alek Naskar, 67 Ind. Cas. 177; 49 C. 682; 26 C. W. N. 442; 35 C. L. J. 247; 23 Cr. L. J. 353. (*Relied on*) 849
Ram Sarup v. Jasodha Kunwar, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72. (*Followed*) .. 359
Ram Sarup v. Josada Kunwar, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72. (*Relied on*) 813
Ram Singh v. Girraj Singh, 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252. (*Distinguished*) 88
Rama Kanta Das Mahapatra v. Shamanand Das Mahapatra, 1 Ind. Cas. 754; 36 C. 590; 6 A. L. J. 364; 13 C. W. N. 581; 9 C. L. J. 497; 11 Bom. L. R. 530; 19 M. L. J. 239; 36 I. A. 49; 6 M. L. T. 84; (P. C.). (*Relied on*) .. 225
Ramakkal v. Ramasami Naicker, 22 M. 522; 9 M. L. J. 101; 8 Ind. Dec. (N. S.) 373. (*Followed*) .. 58
Ramasamy Chetty v. Karuppan Chetty, 31 Ind. Cas. 216; 29 M. L. J. 551. (*Relied on*) .. 209
Ramaswami Aiyar v. Subramania Aiyar, 74 Ind. Cas. 804; 46 M. 47; 16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M.) 147. (*Relied on*) .. 931
Rambilas, *In re*, 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 29 M. L. J. 175; 15 Cr. L. J. 688. (*Followed*) .. 74
Ramcharan v. Lachman Pershad, 9 Ind. Cas. 667. (*Overruled*) .. 411
Ramgulam Singh v. Sheo Deonarain Singh, 51 Ind. Cas. 152; 4 P. L. J. 287. (*Dissented from*) .. 380

R—concld.

Page.

Ramman Lal v. Ram Gopal, 47 Ind. Cas. 987; 5 O. L. J. 629; 21 O. C. 200. (*Considered and explained*) .. 353
Ranga Srinivasa Chari v. Gnanaprakasa-Mudaliar, 30 M. 67; 2 M. L. T. 36. (*Distinguished*) .. 1027
Ratan Lal v. Muhammad Hamidullah Khan, 60 Ind. Cas. 899; 19 A. L. J. 47; 2 U. P. L. R. (A.) 403. (*Followed*) .. 112
Ravaneshwar Prasad Singh v. Chandi Prasad Singh, 12 Ind. Cas. 931; 38 C. 721 (*Relied on*) .. 612
Ravaneshwar Prasad Singh v. Chandi Parsad Singh, 36 Ind. Cas. 499; 43 C. 417 (P. C.). (*Relied on*) .. 812
Rewa Mahton v. Ram Kishen Singh, 13 I. A. 106; 14 C. 18; 4 Sar. P. C. J. 746; 10 Ind. Jur. 428; 7 Ind. Dec. (N. S.) 13 (P. C.) (*Followed*) .. 873
Ridnamma v. Venkata Ramappa, 3 M. H. C. R. 268. (*Distinguished*) .. 58
Rodger v. Comptoir D'Exscompte de Paris, (1871) 3 P. C. 465; at p. 475; 7 Moo. P. C. (N. S.) 314; 40 L. J. P. C. 1; 24 L. T. 111 19 W. R. 449; 17 E. R. 120. (*Followed*) 873
Rojoni Kant Bagchi v. Hossain-ud-din Ahmad, 4 C. W. N. 538. (*Relied on*) .. 975
Rulra Partap Singh v. Skandar Khan, 39 Ind. Cas. 598; 10 O. C. 104. (*Followed*) 429
Russell v. Russell, (1897) A. C. 395; 66 L. J. P. 122; 75 L. T. 249; 61 J. P. 756. (*Considered*) .. 166

S

Saheb Bakhsh Singh v. Mohammad Ali Mohammad Khan, 58 Ind. Cas. 115; 7 O. L. J. 389. (*Distinguished from*) .. 304
Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 39 A. 437 at p. 449; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.). (*Followed*) 571
Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 44 I. A. 126; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.). (*Interpreted*) .. 353
Sakina Bibi v. Amran, 10 A. 472; A. W. N. (1888) 177; 13 Ind. Jur. 114; 6 Ind. Dec. (N. S.) 317. (*Relied on*) .. 382
Salih Mohammad v. Mehr Singh, 51 Ind. Cas. 399; 1 P. R. 1919 Rev. (*Approved of*) .. 194
Samnatha Mudali v. South Indian Railway Company, 6 M. 420; 2 Ind. Dec. (N. S.) 572. (*Relied upon*) .. 300
Sangat Bakhsh Singh v. Rawat Dijdeo Bakhsh Singh, 67 Ind. Cas. 968; 25 O. C. 30; (1922) A. I. R. (O.) 82. (*Followed*) .. 88
Santa Singh v. Waryam Singh, 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914. (*Explained*) .. 451

S—contd.

Page.

Saraj Kumera Acharji v. Umed Ali, 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 19; (1922) A. I. R. (C.) 251. (*Distinguished*) .. 1001
Sardari Lal v. Ram Lal, 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920. (*Relied on*) .. 14
Sarup v. Lala, 42 Ind. Cas. 589; 15 A. L. J. 757; 39 A. 707 (F. B.). (*Distinguished*) 768
Sarvothama Row v. Chinnasami Pillai, 49 Ind. Cas. 729; 42 M. 507; 36 M. L. J. 157; 9 L. W. 379; 25 M. L. T. 291; (1919) M. W. N. 432 (*Not followed*) .. 416
Sat Narain Singh *In the matter of the petition of*, 13 A. 392; 5 Ind. Jur. 602; 2 Ind. Dec. (N. S.) 204. (*Relied on*) .. 863
Satgur Prasad v. Raj Kishore Lal, 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451, 2 U. P. L. R. (P. C.) 55; (1920) M. W. N 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.). (*Relied on*) .. 869
Satis Chandra v. Ram Dayal, 59 Ind. Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31. (*Relied on*) .. 975
Satish Chandra v. Nishi Chandra Dutta, 54 Ind. Cas. 431; 46 C. 975. (*Followed*) .. 458
Satish Chandra Mukerjee v. Ahara Prasad Mukerjee, 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329 (F. B.). (*Relied on*) .. 941
Satish Kanta Roy v. Satis Chandra Chatterjee, 55 Ind. Cas. 689; 30 C. L. J. 475; 24 C. W. N. 662. (*Relied on*) .. 793
Satish Ranjan Das v. Mercantile Bank of India, 48 Ind. Cas. 322; 45 C. 702. (*Followed*) .. 1021
Seager v. Hukma Kessa, 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837. (*Relied on*) .. 1050
Secretary of State v. Chelikani Rama Rao, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.). (*Relied on*) 879
——— v. Jiwan and Abdullah, 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380; (1923) A. I. R. (A.) 426. (*Relied on*) .. 81
——— v. Pemaraju Venkayya, 35 Ind. Cas. 254; 40 M. 910 at p. 915; 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575. (*Followed*) .. 416
Seshadri Aiyangar v. Ranga Bhattar, 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 580; 10 M. L. T. 14. (*Relied on*) .. 793
Seyud Tuffuzzool Hossein v. Rughoonath Pershad, 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701. (*Followed*) .. 416
Shahzadi Begam v. Secretary of State, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.). (*Followed*) .. 187
Shamim-ud-din v. Amir Hussain, 4 Ind. Cas. 777; 12 O. C. 381. (*Followed*) .. 344

S—contd.

Page.

Shamshad Ali Khan v. Mohammad Ali Khan, 47 Ind. Cas. 200; 21 O. C. 172. (*Followed*) 360
Sheikh Ali Ahmad, *In the matter of*, 1 Ind. Cas. 209; 31 A. 294; 6 A. L. J. 215; (*Relied on*) .. 255
Sheo Gobind Singh v. Dhanukdhari Singh, 21 Ind. Cas. 774; 19 C. W. N. 1291. (*followed*) .. 760
Sheo Gulam v. Badri Narain Lal, 19 Ind. Cas. 560; 11 A. L. J. 798; (*Relied on*) .. 931
Sheo Karan Singh v. Parbhu Narain Singh, 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347. (*Relied on*) .. 582
Sheo Ram v. Ram Bharosey, 69 Ind. Cas. 660; 9 O. L. J. 444; 26 O. C. 71; 4 U. P. L. R. (O.) 97; (1923) A. I. R. (O.) 9. (*Followed*) .. 40
Sheobalak Rai v. Bhagwat Panday, 15 Ind. Cas. 486; 40 C. 105; 13 Cr. L. J. 486; 16 C. W. N. 1052. (*Followed*) .. 258
Sheobaran Mahto v. Bhogea, 46 Ind. Cas. 884; 3 P. L. J. 639. (*Distinguished*) .. 815
Sheoraj Singh v. Kameshar Nath, 24 A. 282; A. W. N. (1902) 63. (*Followed*) .. 130
Shivbai Babya Swami v. Yesu Cheoo Nayakin, 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925. (*Distinguished*) .. 458
Shivnath Singh v. Manohar Lal, 22 Ind. Cas. 245; 16 O. C. 261. (*Distinguished*) .. 409
Shivubai Rajaram Shete v. Shiddheswar Martand Hedg, 61 Ind. Cas. 590; 25 B. 1009; 23 Bom. L. R. 405. (*Followed*) .. 943
Simhachalam v. Rati Kanta Laha, 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762. (*Followed*) 74
Sipahi Singh v. Emperor, 71 Ind. Cas. 234; 20 A. L. J. 900; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 106; 45 A. 130. (*Followed*) .. 858
Sital Das Babaji v. Pertap Chunder Sarma, 3 Ind. Cas. 408; 11 C. L. J. 2. (*Relied on*) 793
Sital Prasad v. Asho Singh, 69 Ind. Cas. 677; Pat. 175; (1922) Pat. 326; (1922) A. I. R. (Pat.) 651. (*Followed*) .. 943
Sital Prasad v. Parbhu Lal, 10 A. 535; A. W. N. (1881) 221; 6 Ind. Dec. (N. S.) 360. (*Distinguished*) .. 517
Sitaram Ravaji v. Khandu Mairala Sinde, 59 Ind. Cas. 480; 45 B. 105; 22 Bom. L. R. 1155. (*Relied upon*) .. 865
Sivasailam Iyer v. Ramakrishna Aiyar, 26 Ind. Cas. 18; (1914) M. W. N. 788. (*Followed*) .. 5
Skinner v. Naunihal Singh, 19 Ind. Cas. 267; 40 I. A. 105; 35 A. 211; (1913) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 25 M. L. J. 111 (P. C.). (*Relied on*) .. 793
Smith v. Andrews, (1891) 2 Ch. D. 678; 65 L. T. 175. (*Relied on*) .. 25
Smith Limited v. Great Western Railway Company, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359. (*Followed*) .. 431
Sohawan v. Babu Nand, 9 A. 26 at p. 27; A. W. N. (1886) 284; 5 Ind. Dec. (N. S.) 446. (*Followed*) .. 827

S—contd.

Page.

Somasundaram Chettyar v. Rama Krishna Kadir Velasami Naicker, 22 Ind. Cas. 774; (1914) M. W. N. 107; 15 M. L. T. 102. (*Relied on*) .. 1020
Sreeman Chunder Dey v. Gopaulchunder Chuckerbutty, 11 M. I. A. 28; 7 W. R. P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11. (*Distinguished*) .. 747
Sri Ram v. Firm Sobha Ram-Gopal Rai, 67 Ind. Cas. 513; 20 A. L. J. 315; (1923) A. I. R. (A.) 213; 4 U. P. L. R. (A.) 153; 44 A. 521. (*Distinguished*) .. 353
Sridhar Rao v. Ram Lal, 1 Ind. Cas. 555; 31 A. 7; A. W. N. (1908) 251; 5 A. L. J. 633. (*Relied on*) .. 309
Srinivasa Aiyar v. Sesha Iyer, 41 Ind. Cas 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282. (*Followed*) .. 107
Srinivasa Chariar v. Evalappa Mudaliar, 68 Ind. Cas. 1; 31 M. L. T. 1; 16 L. W. 247; 45 B. 565; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.) (*Distinguished*) .. 35
Srinavasa Chariar v. Evalappa Mudaliar, 68 Ind. Cas. 1; 31 M. L. T. 1; 16 L. W. 247; 54 B. 565; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.). (*Relied on*) .. 35
Srinivasa Thathacharlu v. Noolamma, 55 Ind. Cas. 436; 11 L. W. 246, (1920) M. W. N. 340. (*Relied upon*) .. 90
Sripal Singh v. Jagdish Narayan Radha Lal, 56 Ind. Cas. 313; 23 O. C. 396; 7 O. L. J. 219; 2 U. P. L. R. (O.) 77. (*Relied on*) 400
St. Nazaire, Co., *In re*, (1879) 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854. (*Relied on*) 416
Stanhope v. Stanhope, (1886) 11 P. D. 103; 55 L. J. P. 36; 54 L. T. 996; 34 W. R. 646; 50 J. P. 276. (*Followed*) .. 250
Stephen Aviet v. King-Emperor, 4 L. B. R. 25; 6 Cr. L. J. 135. (*Relied on*) .. 1050
Stuart Skinner v. Orde, 2 A. 241 at p. 249; 4 C. L. R. 331; 6 I. A. 126; 4 Sar. P. C. J. 31; 3 Suth. P. C. J. 627; 1 Ind. Dec. (N. S.) 685 (P. C.). (*Distinguished*) .. 835
Subbammal v. Krishna Aiyer, 22 Ind. Cas. 399; 26 M. L. J. 479. (*Distinguished*) .. 58
Subbarama Aiyar v. Mariya Pillai, 24 Ind. Cas. 667; 16 M. L. T. 52; 1 L. W. 493; 15 Cr. L. J. 559; (1914) M. W. N. 798. (*Followed*) .. 447
Subbaraya Reddiar v. Rajagopala Reddiar, 23 Ind. Cas. 579; 38 M. 887; 15 M. L. T. 240; (1914) M. W. N. 376. (*Followed*) .. 416
Subbaroya Chetti v. Subramania Iyer, 48 Ind. Cas. 833; (1918) M. W. N. 786. (*Followed*) .. 35
Subbe Goundan v. Krishnamachari, 68 Ind. Cas. 869; 45 M. 449; 39 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112. (*Relied on*) .. 931
Subramania Iyer v. Rajeswara Sethupathi, 38 Ind. Cas. 627; 40 M. 1016. (*Followed*) 155

S—concld.

Page.

Subraya Kamati v. Pakaya, 4 Bom. L. R. 231. (*Relied on*) .. 777
Subraya Pillai v. Subraya Mudali, 4 M. H. C. R. 14. (*Followed*) .. 1007
Sudalai Ammal v. Gomati Ammal, 16 Ind. Cas. 428; 23 M. L. J. 355; (1912) M. W. N. 908; 12 M. L. T. 288. (*Followed*) .. 58
Suffield and Watts, *Ex parte*, Brown, *In re*, (1888) 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 514; 5 Morrell 83. (*Relied on*) .. 416
Sukhdeo Jha v. Jhapat Kamat, 54 Ind. Cas. 946; 1 P. L. T. 49; (1920) Pat. 67; 2 U. P. L. R. (Pat.) 39; 5 P. L. J. 120. (*Discussed and distinguished*) .. 498
Sundar Koer v. Rai Sham Krishen, 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.). (*Relied on*) 246
Suraj Narain v. Ratan Lal, 40 Ind. Cas. 988; 20 O. C. 211 at p. 219; 21 C. W. N. 1065; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159; 44 I. A. 201. (*Considered and explained*) .. 353
Surajbali Singh v. Mohammad Nisar, 48 Ind. Cas. 220; 16 A. L. J. 879. (*Followed*) 315, 322, 339
Surendra Nath Ghose v. Hemangini Dasi, 34 C. 83. (*Distinguished*) .. 603
Surjyamoni Dasi v. Kali Kanta Das, 28 C. 371 5 C. W. N. 195. (*Considered*) .. 166

T

Talek Singh v. Jalal Singh, 5 Ind. Cas. 130; 11 C. L. J. 136. (*Followed*) .. 877
Tarakant Bannerjee v. Puddomoney Dossee, 10 M. I. A. 477 at p. 488; 5 W. R. P. C. 63; 1 Suth. P. C. J. 631; 2 Sar. P. C. J. 184; 19 E. R. 1052. (*Followed*) .. 906
Tarinee Churn Chowdhury v. Sharoda Soondaree Dossee, 3 B. L. R. (A. C. J.) 145 at p. 158; 11 W. R. 468. (*Not approved*) .. 108
Tarok ssur Roy v. Shoshi Shikhuressur Roy, 9 C. 952; 10 I. A. 51; 13 C. L. R. 62; 7 Ind. Jur. 327; 4 Sar. P. C. J. 439; 4 Ind. Dec. (N. S.) 1284 (P. C.). (*Distinguished*) 563
Tej Narain Sahu v. Dal Ram Sahu, 69 Ind. Cas. 624; 1 Pat. 699; (1922) A. I. R. (Pat.) 606; 4 P. L. T. 170; (1923) Pat. 207. (*Relied on*) .. 14
Thakur Vasonji Morarji v. Chanda Bibi, 29 Ind. Cas. 781; 37 A. 369 at p. 376; 22 C. L. J. 180; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 29 M. L. J. 130. (*Followed*) 612
Thazhe Vittil Pantheeradi Ananda Varar v. Kavaumpreth Illat Vasudevan Nambudiri 8 Ind. Cas. 357; 8 M. L. T. 249; (1910) M. W. N. 594. (*Followed*) .. 493
Thein Pe v. U Pet, 3 L. B. R. 175 (F. B.). (*Relied on*) .. 1037
Thekkedath Neelu Neithar v. Subramania Moothan, 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59. (*Followed*) .. 458

T—concld.

Page.

Thomspon v. Thompson, 15 Ind. Cas. 886; 39 C. 395. (*Considered*) .. 166
Toola Ram v. Abdul Gafur, 24 Ind. Cas. 476; 7 Bur. L. T. 67. (*Distinguished*) .. 626
Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh, 56 Ind. Cas. 32; 47 C. 500; 11 L. W. 566; 38 M.L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98; 47 I. A. 43 (P. C.). (*Distinguished*)

U

Umar Abdul Rahiman v. Gustalji, 34 Ind. Cas. 268; 20 C. W. N. 297; 3 L. W. 308; (1916) 1 M. W. N. 137; 30 M. L. J. 444 (P. C.). (*Relied on*) .. 793
Union Bank of Manchester, *Ex parte*, Jackson, *In re*, (1871) 12 Eq. 354; 40 L. J. Bk. 57; 24 L. T. 951; 19 W. R. 872. (*Relied on*) 919
United Kingdom Mutual Steamship Assurance Association v. Houston, (1896) 1 Q. B. 567; 65 L. J. Q. B. 484. (*Relied on*) .. 299

V

Vaidyanatha Aiyar v. Aiyasamy Aiyar, 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 941. (*Followed*) .. 1018
Vaithyanatham v. Gangarazu, 17 M. 9; 3 M. L. J. 132; 6 Ind. Dec. (N. S.) 6. (*Distinguished*) .. 107
Veerchand v. B. B. and C. I. Ry. Co., 29 B. 259; 6 Bom. L. R. 921. (*Relied on*) .. 746
Venkatachalapathi Aiyar v. Thavasi Servai, 51 Ind. Cas. 67; 42 M. 465; 36 M. L. J. 288. (*Relied on*) .. 246
Venkatagiri Rajah v. Venkat Rau, 21 M. 243 at p. 244; 7 Ind. Dec. (N. S.) 528. (*Followed*) .. 968
Venkataratnam v. Ranganayakamma, 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.). (*Relied on*) .. 1024
Vidayasagar v. Ratipal, 25 Ind. Cas. 752; 17 O. C. 347; 1 O. L. J. 433. (*Followed*) .. 162

W

Wagheda Rajsanji v. Sheikh Masludin, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.). (*Relied on*) .. 309
Waghela Rajsanji v. Sheikh Masludin, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.). (*Relied upon*) .. 90
Wajid Khan v. Ewaz Ali Khan, 18 C. 545; 18 I. A. 144; 6 Sar. P. C. J. 46; Rafique and Jackson's P. C. No. 123; 9 Ind. Dec. (N. S.) 364 (P. C.). (*Distinguished*) .. 517
Walian v. Banke Behari Pershad Singh, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.). (*Followed*) .. 821

W—concld.

Page.

Walian v. Banke Behari Pershad Singh, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 82; 8 Sar. P. C. J. 512; (P. C.). (*Relied on*) .. 409

Watson and Co. v. Sreekristo Bhumick, 21 C. 132; 10 Ind. Dec. (N. S.) 720. (*Distinguished*) .. 547

Wazira v. Maryan, 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918. (*Followed*) .. 589

Welsback Incandescent Gas Light Co., Ltd., *In re*, (1904) 1 Ch. 87; 73 L. J. Ch. 104; 89 L. T. 645; 52 W. R. 327; 11 Manson 47; 29 T. L. R. 122. (*Relied on*) .. 966

West v. Dobb. (1869) 4 Q. B. 634; 9 B. and S. 755; 38 L. J. Q. B. 289; 20 L. T. 737; 17 W. R. 879. (*Relied upon*) .. 555

Williams v. Earle, (1868) 3 Q. B. 739; 9 B. and S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041. (*Relied upon*) .. 555

Z

Page.

Zafaryab Ali v. Bakhtawar Singh, 5 A. 497; A. W. N. (1883) 91; 3 Ind. Dec. (N. S.) 432. (*Followed*) .. 403

Zaharia v. Debi 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861; (F. B.). (*Distinguished*) .. 411

Zapantis v. Emperor, 57 Ind. Cas. 928; 3 U. B. R. (1920) 202; 21 Cr. L. J. 688. (*Followed*) .. 65

Zulfiqar Ali v. Suraj Prasad, 68 Ind. Cas. 998; 9 A. L. J. 365; (1922) A. I. R. (O.) 221. (*Distinguished from*) .. 304

Zuool Qadar Jang Bahadur v. T. B. W. Bishop Manager, Nanpara Estate, 58 Ind. Cas. 667; 23 O. C. 216; 7 O. L. J. 523; 2 U. P. L. R. (O.) 162. (*Dissented from*) .. 249

Tit[redacted]

Author [redacted]

Accession No. [redacted]

Call No. [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

INDIAN CASES

1923.

VOLUME 74.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 369 OF 1923.
June 1, 1923.
Present:—Mr. Justice Moti Sagar.
NIDHI RAM—PLAINTIFF—APPELLANT
versus
PARSA RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 35 (2)—Execution of decree—Symbolical possession—Warrant, copy of, not affixed on property, effect of—Punjab Land Revenue Act (XVII of 1887), s. 141—Trees, whether land.

The failure to affix a copy of the warrant on property of which formal possession is to be delivered as required by r. 35 (2) of O. XXI of the Civil Procedure Code is a material defect and renders the delivery of formal possession uneffectual.

Where the law lays down a definite procedure for the delivery of possession which is purely symbolical, that procedure must be strictly followed and any omission therein must be regarded as material.

Khub Ram v. *Surat*, 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917, followed.

Trees are land within the meaning of section 141 of the Punjab Land Revenue Act, and possession of trees cannot be delivered in execution of a decree except through the Collector as provided for in that section.

Second appeal from the decree of the Senior Subordinate Judge, Karnal, dated the 20th November 1922, affirming that of the Munsif, First Class, Kaithal, District Karnal, dated the 2nd October 1922.

Mr. *Sagar Chand*, for the Appellant.
Mr. *Shmair Chand*, for the Respondent.

JUDGMENT.—This is an appeal from a pecision of the Senior Subordinate Judge of Karnal upholding a decision of the Munsif of Kaithal dated the 2nd of October 1922, dismissing the plaintiff's suit for possession of a certain number of mango trees growing on the defendant's land at Thanesar. The suit was based on the allegation that the trees originally belonged to one Nandan who got possession of them under a decree against one Udho Ram, the father of the present defendant, and that, subsequently, he had made a gift thereof in favour of the plaintiff. The defendants repudiated the claim and contended that the suit was barred by limitation, inasmuch as neither the plaintiff nor his predecessors-in-title had ever been in possession of the trees in question within 12 years prior to the date of the institution of the suit. It was further alleged that the trees belonged to the defendants and that the plaintiff had no right to sue.

The Trial Court dismissed the suit holding that it was barred by limitation. On appeal the learned District Judge upheld the decision of the Munsif on the question of limitation and held further that the gift upon which the plaintiff was relying was not a valid gift in law and that he was consequently not entitled to maintain the suit. Against this decision a second appeal has been preferred to this Court by the plaintiff through Mr. Sagar Chand, while Mr. Shamair Chand has appeared on behalf of the respondents.

After hearing the learned Counsel on both sides I am of opinion that this appeal must fail and that the plaintiff's suit should be dismissed. It appears that in 1910 Nandan obtained a decree for possession of these trees against Udho Ram, the father of the present defendants. This decree was put into execution and it is alleged that the decree-holder obtained symbolical possession of these trees in execution of his decree. On behalf of the appellant it is argued that

SURAJ NARAIN v. JANG BAHADUR.

the decree-holder, having obtained symbolical possession in October 1910, it is open to him to bring a suit for actual possession within 12 years from that date and that the present suit, which was instituted in April 1922, is within limitation. On behalf of the respondents it is pointed out that the trees are land within the meaning of section 141 of the Land Revenue Act, and that possession could not be delivered except through the Collector as provided for in that section. It is further contended that a copy of the warrant for delivery of possession was not affixed on the spot and that, consequently the requirements of law essential for symbolical possession were not complied with. In my opinion these contentions are well founded, and it must be held that the so-called symbolical possession upon which the plaintiff relies was no pessession in the eye of the law. It has been held in *Khub Ram* v. *Surat* (1) "that when the law lays down a definite procedure for the delivery of possession which is purely symbolical that procedure must be strictly followed and any omission therein must, therefore, be regarded as material" I do not think there is any essential difference between the facts of the two cases, and the principle laid down in *Khub Ram* v. *Surat* (1) is fully applicable to this case. The mere fact that the *dakhlnama* filed in the previous case was signed by Udho Ram does not make any difference, and, in my opinion, Nandan never got symbolical possession of the trees which he subsequently purported to transfer in favour of the present appellant Nidhi Ram. I think the judgment of the lower Appellate Court is correct and the suit was clearly barred by limitation. The result is that the appeal fails and is dismissed with costs throughout.

Z. K. & N. H. *Appeal dismissed.*

(1) 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS CASES NOS. 211, 212 AND 213 OF 1923.

June 1, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

SURAJ NARAIN—PETITIONER

versus

JANG BAHADUR AND OTHERS—OPPOSITE PARTIES.

U. P. Municipalities Act (II of 1916), ss. 20, 23—Election petition, presentation of—Verification, whether necessary.

In a District where the practice exists of delivering petitions intended for the Collector to a subordinate official, the presentation of an Election Petition will be good within the meaning of section 20 of the U. P. Municipalities Act, if it is handed over to that official and in fact reaches the Collector within the time fixed by that section. [p. 3, col. 1.]

An Election Petition can only be lodged by a candidate in whose favour votes have been recorded and who claims in the petition to be declared elected in the room of the person whose election is questioned or by ten or more electors. It cannot be presented by a person who though he was a candidate, did not actually go through the contest. [p. 4, col. 1.]

It is not necessary for an Election Petition to be verified in accordance with the provisions for verification of plaints. It is only after the petition has been duly presented that the procedure laid down in the Civil Procedure Code has to be followed. [p. 4, col. 2.]

Civil miscellaneous reference made by the Commissioner of Allahabad Division, dated the 23rd of April 1923.

Dr. *K. N. Katju*, for the Opposite Parties.

JUDGMENT.—The Municipal Elections were held in Cawnpore in March 1923. Suraj Narain was a candidate, as was also, one Muhammad Siddiq Hafiz. Both of these men were defeated by an opponent who secured a large number of votes. Both of these gentlemen thought they had a case for unseating their opponents and each of them proposed to proceed under the Municipalities Act, Local Act II of 1916, and lodged petitions. Section 20 prescribes the form and the manner in which the petition shall be presented, and it also defines who are the persons who are permitted by law to present a petition. Section 22 defines who is to hear petitions, and clause (2) of that section lays down how the proceedings may start by presentation.

Taking the case, first of all, of Suraj Narain,

M scellaneous Case No. 211 of 1923, the material dates and facts are as follows:— The election was held on March 20th, 1923, and on the 23rd of March Suraj Narain attended the Court of the Collector. The petition which he had with him was, as regards formal parts, in proper form, that is to say, it was headed as being a matter which would be dealt with in the Court of the Comm ssioner (it was stated to be presented "through the Collector, Cawnpore District") and recited that it was a petition under section 19 of the United Provinces Municipalities Act, II of 1916. When Suraj Narain reached the Court the Collector had not arrived, but the Joint Magistrate was sitting and the Joint Magistrate, in answer to an enquiry by the petitioner, has recorded in a letter of April 7th, that a practice does exist in that Court, which undoubtedly is for the convenience of the public, whereby petitions intended for the Collector are received by the Joint Magistrate and made over to the Collector on his arrival. Suraj Narain, relying upon that practice, in fact handed to the Joint Magistrate the petition, and the Joint Magistrate, in pursuance of that practice, handed over to the Collector the document. That was done on the 23rd of March. So that Suraj Narain who had originally 15 days within which to deliver to the proper authorities a proper petition in fact had got that petition into the hands of the proper authority, namely, the Collector, by the 23rd of March. It is suggested that we are bound to construe sections 20 and 22 so strictly as to hold that no presentation of a petition can avail the petitioner unless the petitioner himself personally comes face to face personally with the Collector, and delivers it into the Collector's hands. That undoubtedly is the safest and wisest thing to do. But the position as regards the Collector's Court at Cawnpore was that, in reliance upon the practice, Suraj Narain was content to follow that practice of handing documents intended for the Collector to the Joint Magistrate. Inasmuch as the petition reached the Collector well within time, we are of opinion that it was a proper presentation and that petition ought to have been heard and disposed of upon the merits.

The next case with which we propose to deal is that of Muhammad Siddiq Hafiz, because there is some similarity in the facts. We will deal with the case of Durga Shankar later.

The elections for this particular Ward in Cawnpore were held on the 19th of March, and that gave Muhammad Siddiq Hafiz up to the 3rd of April within which to be in time for the lodgement of his Election Petition. Fifteen days is specified by the Act, and the first broad question appears, is did he by any means whatever get into the hands of the Collector by the 3rd of April the petition? The answer is that he did not do so, and that in, our opinion, makes a material difference in this case. On the 3rd of April, which was the last day, we are told that he presented the petition to a Deputy Collector, by name Mr. Ashfaq Husain. There is not in the papers relating to this case any evidence which suggests that there was any practice whereby this Deputy Collector was authorised, or was accustomed short of actual auhorization, to receive petitions of that nature and was a recognised official channel for their transmission to the Collector. That being so, we think that the petitioner in this case took the risk. If it happened that the Deputy Collector had forwarded the document to the Collector within time and the Collector had chosen to accept it from the Deputy Collector, that might possibly have been a good presentation. We do not say that it would have been a good presentation, that matter would have to be enquired into with some care and might depend to some extent on whether we believed that there was in existence a recognised practice. However, we are satisfied that, in the absence of any evidence of that character, the petitioner when he handed the document to the Deputy Collector, who no doubt gave him an assurance that it would be forwarded to the Collector, took the risk of its reaching the Collector within time. It did not reach the Collector within time and was not received by him until the 4th of April. In these circumstances, we hold that as regards the petition of Muhammad Siddiq Hafiz that petition was not presented wit-

in time and is one which should not be entertained.

We now come to the petition of Durga Shankar. He, like Muhammad Siddiq Hafiz, handed the petition to a Deputy Collector, and again there is no evidence on this record that the Deputy Collector was a recognised channel for the transmission of these documents. We need not decide whether that petition was properly presented for this reason, that we are unable to understand how Durga Shanker comes before the Court as a petitioner. It appears that he was one of several candidates and that at a meeting it was considered desirable that there should not be so many candidates but that the choice of the two gentlemen who should contest the Ward was left to the decision of a gentleman of high standing, who was regarded by the seven candidates as being likely to make the best selection. Two gentlemen were in fact selected. Durga Shankar was amongst the five whose names were passed over and he, having the belief that a candidate who was thus declared elected could be unseated on various grounds, conceives that he has a right to come forward and raise that question. These petitions can be lodged by a candidate in whose favour votes have been recorded and who claims in the petition to be declared elected in the room of the person whose election is questioned, that is, a person who went through the contest in whose favour votes were recorded and who alleges that strict scrutiny of votes and striking off the names of people who should not have voted or by reason perhaps of disqualification of the person who has been elected that he himself will be the person who will become the elected member in the event of the petition being enquired into and upheld. That is the only one person who can present a petition, but a body of men, ten or more electors, may join together and present a petition. Durga Shankar's position in this case has no *locus standi* in the matter of law, and on that ground was incompetent to present a petition and on that ground his petition must be rejected.

Mr. Stowell, the Commissioner, also enquires whether a petition must be duly verified in accordance with the rule applicable to plaints. We think not. When the petition has been duly presented the hearing follows along the lines prescribed for a civil suit. The Act is silent as to the verification of the petition and it is only after due presentation of the petition that the civil suit procedure rules operate.

We are, therefore, of opinion that a petition need not be verified.

M. A. A. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 553 AND 554 OF 1921.

March 16, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

E. T. DHARMA RAJA—DEFENDANT No. 2—APPELLANT

versus

K. M. PETHU RAJA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit against some of several appellants—Prejudice.

O. XXIII, r. 1 of the Civil Procedure Code gives a right to a plaintiff to withdraw a suit or abandon any part of his claim and a similar previlege is inherent in an appellant. But a plaintiff-respondent cannot, when the litigation has reached the stage of an appeal, as of right, be allowed to defeat the appeal and prevent its being heard by withdrawing the suit as against the appellant. [p. 5, col 2.]

Plaintiff brought a suit to establish his right to a certain channel feeding a Government Tank and to prevent interference by Government and by other *pattadars* holding lands irrigated by the tank. The Government and the *pattadars* were impleaded as defendants. The plaintiff got a decree in the Court of First Instance. The Government did not appeal but the other defendants did so. In appeal the plaintiff applied and was allowed to withdraw the suit as against the appellants-defendants. The decree against the Government was confirmed;

Held, that the *pattadars*-defendants were materially prejudiced by the decree against the Government since it prevented the Government from using the plaint channel as a supply channel and thereby exercising its permanent right of distributing the water supply and that, therefore, the order allowing the suit to be withdrawn as against them was illegal. [p. 5, col. 2.]

DHARMA RAJA v. PETHU RAJA.

Sivasailam Iyer v. *Ramakrishna Aiyar*, 26 Ind. Cas. 18; (1914) M. W. N. 788, followed.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 28 of 1919, preferred against a decree of the Court of the Additional District Munsif, Srivilliputhur, in Original Suit No. 255 of 1919.

Messrs. *T. R. Venkatarama Sastri* and *A. Swaminath Aiyar*, for the Appellant.

The Government Pleader and Mr. *A. S. Viswanatha Aiyar*, for the Respondents.

JUDGMENT.—The dispute which has given rise to the present litigation is in connection with a channel, which is claimed by the appellants to be a *poramboke* channel feeding the Karisakulam Tank which irrigated their lands but which the respondents, who were plaintiffs in the First Court, claim to be a portion of their *patta* lands and to have no connection at all with Karisakulam Tank. The suits were brought to establish the rights of the plaintiffs in the channel and to prevent interference by Government, who are impleaded under the designation of the Secretary of State as the first defendant, as well as by the other defendants, who are *pattadars* holding lands irrigated by the Karisakulam Tank. In the First Court the plaintiffs were successful and were granted the reliefs prayed for by them. Government did not appeal, holding, as is now explained by the learned Government Pleader, that their interests were not sufficiently involved in the matter to make it worth their while to contest the decrees of the First Court in appeal. The defendants, however, did appeal; when the appeals came on for hearing, the plaintiffs-respondents claimed that they were entitled as of right to withdraw their suits as against the present defendants-appellants, and to content themselves with the decrees against Government who have not appealed. The learned Subordinate Judge accepted this plea and allowed the suits to be withdrawn and dismissed as against the present defendants-appellants, and the decrees against the Secretary of State were confirmed.

It is now contended on behalf of the appellants that the Subordinate Judge was wrong and that the plaintiffs could not claim as of right to be allowed to withdraw their suits at the stage which the litigation had reached, that they were prejudiced by the decrees of the First Court, even supposing the latter to be confined to a decree against Government, and that their appeals should have been heard and decided on their merits. We think these contentions are justified. The provision of law relied on by the plaintiffs-respondents is O. XXIII, r. 1 of the Civil Procedure Code, which provides for the withdrawal of a suit by a plaintiff and abandonment of part of his claim. This the rule gives as a matter of right and it is not disputed that a similar privilege is inherent in an appellant as regards his appeal but we have not been referred to any ruling or provision of law which would extend this privilege to a plaintiff-respondent, nor can we see any reason why when the litigation has reached the stage of an appeal, the respondent should be allowed the right to defeat the appeal and prevent its being heard by the simple process of withdrawing his suit as against the appellant. It may, of course, be argued that although this is not a right of the appellant, nevertheless it is in the discretion of the Court to allow him to do so but that will depend on considerations which, we think, have not been appreciated by the lower Appellate Court. The lower Appellate Court has held that the appellants in these cases have no right of appeal because they are not prejudicially affected by the decrees in so far as they are decrees against Government. We do not think this is so. The defendants represented themselves as holders of lands under a Government tank and the irrigation of their lands as depending on the supply of water allowed to them by Government. The effect of the decrees is to declare that a certain channel to the Government tank is not such a supply channel and to prevent Government from using it as such and exercising its paramount right of distributing the water supply therefrom. We think that they clearly are materially prejudiced by the decrees against Government and that they should have a right of appeal against them. This is in accordance with the decision

U GUNAWA *v.* U PYINNYADIPA.

in *Sivasailam Iyer* v. *Ramakrishna Aiyar* (1). It has been argued on behalf of the respondents that this is not so, because the appellant's rights have been negatived by the decision of this Court in another litigation terminating in Second Appeal No. 1198 of 1913. So what extent the decision in that appeal is conclusive of the rights of the parties in the present cases is a matter for argument; but it is a question which must be decided in the course of the hearing of these appeals. We are most anxious to express no opinion on a point which would have to be determined by the lower Appellate Court, but it is argued on behalf of the appellants that the points for decision in that case are not identical with those which may arise for consideration in these cases and in effect that the rights claimed by the plaintiffs in that case were more extensive than those which are prejudicially affected by the decrees in these cases.

This is a point which we must leave to the lower Appellate Court to determine.

The decrees of the lower Appellate Court must, therefore, be set aside and the appeals remanded to the lower Appellate Court for re-hearing and disposal on their merits. The plaintiffs-respondents will pay the defendants-appellants their costs in this Court. The costs of Government in this Court will be provided for in the final decrees. The Court-fee paid on the present appeals will be refunded to the appellants.

V. N. V. *Case remanded.*

N. H.

(1) 26 Ind. Cas. 18; (1914) M. W. N. 788.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 263 OF 1921.

January 29, 1923.

Present:—Mr. Justice Heald and Mr. Justice May Oung.

U GUNAWA AND OTHERS—APPELLANTS

versus

U PYINNYADIPA—RESPONDENT.

Arbitration—Irregularity in proceedings—Failure to object—Waiver.

A party to an arbitration having knowledge of an irregularity in the proceedings cannot lie by without objection and take his chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object. [p. 7, col. 1.]

Special second appeal against a decree of the Divisional Court, Hanthawaddy, passed in Civil Appeal No. 48 of 1921.

Mr. *Bomanji*, for the Appellants.

Mr. *Surty*, for the Respondent.

JUDGMENT.

Heald, J.—The parties, who are Burmese Buddhist monks, had a dispute about the treasures, enclosures and lands of the Malit Monastry and referred all matters so in dispute between them to the arbitration of two eminent members of their Order. Those two arbitrators after examining witnesses gave an award. Appellants, to whom the award was unfavourable, instituted a suit to have it set aside on the ground that it was the award of only one of the two arbitrators and that it was not in accordance with the agreement, the latter ground being presumably intended to mean that the arbitrators had determined some matter not referred to arbitration. This second ground seems to have been abandoned though an attempt was made to resurrect it on appeal, and the only issue on which the suit went to trial was whether the award was made, pronounced and signed by both the arbitrators and was binding on the parties.

On this issue the Trial Court found that the award was made and pronounced by both the arbitrators and was signed by one, and on behalf of the other by his representative, he being too old and too infirm actually to sign it himself.

It was, however, argued that because one of the arbitrators was absent at the second of the three sittings at which witnesses were examined the award itself was vitiated. This objection was not taken at the time of the arbitration and was not mentioned in the pleadings, and the Court held that appellants could not be allowed to take it at that stage of the proceedings.

The suit was accordingly dismissed. Appellants appealed and the lower Appellate Court on the evidence agreed with the Trial Court that the award was the

award of both arbitrators. As for the alleged failure of one arbitrator to attend one of the sittings, the lower Appellate Court referred to the Upper Burma case of *Ma Mi Tu* v. *Maung Naing* (1) and on the authority of that ruling decided that appellants must be held to have waived any objection to the irregularity by attending the subsequent sitting of the arbitrators without objection. The appeal was, therefore, dismissed.

Appellants now come to this Court in second appeal on the merits and on the ground that the award was invalid by reason of the absence of one of the arbitrators at one of the sittings.

No appeal lies against the concurrent findings of the two lower Courts that the award was in fact the award of both arbitrators, but the appeal was admitted for a consideration of the correctness of the Upper Burma ruling.

Appellants' learned Advocate cites various English authorities, but since none of them deal with the question of waiver of objections it is unnecessary to consider them in detail. It is perfectly clear and is in fact admitted by the first appellant, who alone gave evidence, that appellants went on with the arbitration without objection after the irregularity had occurred, and in my opinion there can be no doubt that by their conduct they condoned the irregularity. The law relating to such cases was carefully considered in the Upper Burma Ruling and I agree with the conclusion at which the learned Judic al Comm ssioner arrived. A party having knowledge of an irregularity cannot lie by without objection and take h s chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularitry to which he failed to object.

I, therefore, see no reason to interfere and I would dismiss the appeal with costs.

May Oung, J.—I concur.

W. C. A. *Appeal dismissed.*

(1) 2 U. B R (1897-1901), p. 14.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 16 OF 1923.

March 20, 1923.

Present:—Mr. Justice Rafique.

BHIKAM KHAN—PLAINTIFF—APPLICANT

versus

DAN SINGH—DEFENDANT—OPPOSITE-PARTY.

Execution of decree—Execution application dismissed for default—Restoration.

If an application for execution is dismissed for default, the decree-holder has no right in law to apply for the restoration of the same, and the Execution Court is not competent to entertain such an application.

Bharat Indu v. *Asghar Ali Khan*, 73 Ind. Cas. 453; 21 A. L. J. 135: 45 A. 148, followed.

Civil revision against an order of the Munsif, East Budaun, dated the 9th of July 1921.

Mr. *S. A. Haidar*, for the Applicant.

Mr. *Gulzari Lal*, for the Opposite-party.

JUDGMENT.—It appears that on the 15th January 1921 Dan Singh, the opposite party, put in an application under section 47 of the Code of Civil Procedure for cancellation of sale in favour of the applicant and recovery of the property on the allegation that the property did not belong to the judgment-debtor of the applicant. The application of Dan Singh was struck off in default on the 28th May 1921. On the 11th June 1921 Dan Singh moved the Court to restore his application that was struck off in default. Objections were taken on behalf of Bhikam Khan, the applicant before me. The learned Munsif rejected the objections and restored the application of Dan Singh on the 9th July 1921. The present application for revision is against the order of the learned Munsif restoring the application of Dan Singh which had been struck off in default.

In my opinion the applicant must succeed in view of the case-law on the subject. I would refer to the latest case on this point of our own Court, namely, that of *Bharat Indu* v. *Asghar Ali Khan* (1). This is a Division Bench case and I must follow it. I, therefore, allow the application and set aside the order of the learned Munsif dated the 9th July 1921 restoring the application of Dan Singh.

M. A. A. *Application allowed.*

(1) 73 Ind. Cas. 453; 21 A. L. J. 135; 45 A. 148.

SECRETARY OF STATE FOR INDIA *v.* AKBAR ALI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1372 OF 1921.

Frebruary 27, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

AKBAR ALI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 6 (3), declaration under, whether conclusive.

A declaration by the Collector under sub-section (3) of section 6 of the Land Acquisition Act to the effect that the land is needed or a public purpose or for a Company, as the case may be, is conclusive evidence of such purpose, and the Courts are barred from enquiring into the question.

Trustees for the Improvement of Calcutta v. *Chandra Kanta Ghosh*, 56 Ind. Cas. 32; 47 C. 500; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98; 47 I. A. 43 (P. C.); *Manick Chand Mahata* v. *Corporation of Calcutta*, 66 Ind. Cas. 600; 48 C. 916, distinguished.

Second appeal from a decree of the Officiating District Judge, Mainpuri, dated the 4th August 1921.

Mr. *L. M. Banerji*, for the Appellant.

Dr. *M. L. Agarwala*, Dr. *S. M. Sulaiman* and Mr. *N. C. Vatsh*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents, Akbar Ali and Bande Ali, for the recovery of certain land which the Collector purported to acquire on behalf of the Secretary of State for a public purpose under the provisions of the Land Acquisition Act of the year 1894. A notification was duly issued under section 6 of the Act, stating that the land was required for a public purpose, and, under section 7 of the Act, the Collector of Etawah was directed to take order for the acquisition of the land. The usual acquisition proceedings under subsequent sections of the Land Acquisition Act followed and, ultimately, the Collector took possession of the land under section 16 of the Act. Sub-section (3) of section 6 of the Act declares that a declaration under this section shall be conclusive evidence that the land is needed for a public purpose or for a Company as the case may be. The sole ground on which the suit has been decreed in the Courts below is that, in spite of this declaration, the land was not really needed for a public purpose. It is said that certain land of Bhatele Shiam Behari Lal had been acquired for the purpose of the Islamia School and under an agreement entered into between the Collector of Etawah and Shiam Behari Lal prior to the acquisition the land now in dispute was acquired in order to be given over to Shiam Behari Lal in return for his land which had been acquired. Before, however, the Courts can enter into the question whether the purpose for which the land was acquired was a public purpose or not, it must be found that they have jurisdiction to do this. In fact, the argument of the plaintiffs, which has been accepted by the Courts below is, that sub-section (3) of section 6 does not mean what in plain language it says, and that although the Statute declares in so many words that the declaration is conclusive evidence that the purpose for which the land was acquired was a public purpose, it is nevertheless open to the Courts to go into evidence and adjudicate upon the question whether it was a public purpose or not. In support of this startling proposition reliance is placed on two rulings, the ruling of the Privy Council in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), and the ruling of a Single Judge of the Calcutta High Court in an original suit, *Manick Chand Mahata* v. *Corporation of Calcutta* (2). In fact neither of these cases turns on the construction of section 6 of the Land Acquisition Act. The Privy Council case turns entirely upon the construction of certain sections of the Calcutta Improvement Act and their Lordships expressly say that during the course of the argument their attention was directed to a number of decisions upon various Acts of Parliament giving compulsory powers for the acquisition of land, but that in each case the decision must depend upon the provisions of the

(1) 56 Ind. Cas. 32; 47 C. 500; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L.R. (P. C.) 98; 47 I. A. 43 (P. C.).

(2) 66 Ind. Cas. 600; 48 C. 916.

particular Act and the purpose for which and conditions under which in such Act land may be compulsorily acquired. This case is no authority on the construction of section 6 of the Land Acquisition Act. The other case was one in which certain land had been acquired on behalf of the Improvement Trust by the Calcutta Corporation. A Notification had been issued under section 6 of the Act. Mr. Justice Greaves, who decided the case, held that however conclusive a Notification under section 6 of the Act might be, it did not prevent his enquiring into the question whether the Calcutta Corporation had statutory powers to take steps at all for the acquirement of this land. This decision also, therefore, does not touch the point before us. The language of section 6 of the Land Acquisition Act is perfectly plain and clearly bars the Courts from enquiring into the question whether the purpose for which land in respect of which a declaration under section 6 has been issued is a public purpose or not. The appeal must, therefore, be allowed and we accordingly allow it and dismiss the suit with costs in all Courts including in this Court fees on the higher scale.

M. A. A. *Appeal allowed.*

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 310 OF 1921.

July 11, 1922

Present:—Mr. Justice Maung Kin.

MAUNG SHWE LA—APPELLANT

versus

MA KYWE AND OTHERS—RESPONDENTS.

Buddhist Law—Burmese—Ancestral property—Joint estate—Onus—Presumption.

The question of the burden of proof in respect of the jointn ss or otherwise of ancestral property in the hands of Buddhist co-heirs depends on the facts of each case. [p. 10, col. 2.]

Ma Hnin Zi v. *Ma Hnin Ye*, S. J. L. B. 22, dissented from.

There is no presumption under the Buddhist Law that prope ty left by a person long deceased is part of an undivided estate among his heirs According to the circumstances of the case, it may require much or very little evidence to sufficiently prove that the property is undivided, but, when land has been in exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact. [p. 10, col. 2.]

Maung Lu Pe v. *Maung Lu Gale*, 2 U. B. R. (1897-1901) 418, relied on.

Mr. *Villa*, for the Appellant.

Mr. *P. N. Chari*, for the Respondents.

JUDGMENT.—U Yan Shin and Ma Dwe In were husband and wife. The wife died before the husband, who died sixteen years before the suit. They left four children. They were, to give them in the order of their births, Ma Shew Pu, Ma Shwe U, Maung Po Tu and Maung Po Lu. They were all dead at the time of the institution of the suit and before Letters of Administration proceedings, to which reference will be made presently.

Ma Shwe Pu was never married. Ma Shwe U married Maung Shwe La, and she died, leaving Maung Shwe La, but no children, three years before the suit. Maung Po Lu pre-deceased Ma Shwe U, leaving his children Ma Kywe and Ma Kin Tin. Po Tu left some children who need not be mentioned. Ma Kywe applied for Letters of Administration to the estate of Ma Shwe Pu, including the house in the present suit as forming part of the estate. Maung Shwe La objected on the ground that all the property included by Ma Kywe in the estate of Ma Shwe Pu, belonged to Ma Shwe U, his deceased wife.

The District Court rejected Ma Kywe's application on the ground that Shwe La's statement about the property was correct. Ma Kywe then applied to this Court, and it was held that the ground of the District Court's decision was not sound, because the point as to what the estate consisted of was not the point to be decided in considering the question, which of the two contesting parties should be granted administration.

This Court pointed out that a decision should have been arrived at by a reference to section 23 of the Probate and Administration Act. The Court then stated that Ma Kywe's father, Po Lu, died before Ma Shwe Po, and held that Ma Shwe U, having survived Ma Shwe Pu, was Ma Shwe

Pu's heir, and that the children of Po Lu were not heirs either solely or co-existing with Ma Shwe U, on the principle that the nearer in degree excludes the more remote.

During the pendency of the proceedings in this Court Ma Kywe applied for Letters of Administration to the estate of U Yan Shin and Ma Dwe In, including the house in suit as part of that estate. Subsequently, her application was granted. Maung Shwe La then filed the present suit against Ma Kywe and four others. It was for possesion of the house, and Ma Kywe and the other defendants were made parties because they were in occupation of the house. The plaintiff claimed the property to belong to the estate of Ma Shwe U, his deceased wife. The defence was that it belonged to the estate of U Yan Shin and Ma Dwe In. The following facts were admitted.

The house was built by U Yan Shin and Ma Dwe In, though it is not stated when they must have occupied it for some time. Amongst the property which they left was this house, that is to say, they died possessed of it.

Maung Shwe La's case was that there was a division of the estate of the old couple, and that the house fell to the share of Ma Shwe U. The defence say that there had been no division of that estate, and the house still remained part of it.

Mr. Chari for the defence contends that it is for the plaintiff to prove that there was a division.

The law as to the burden of proof, and what the presumption is as to the division of a Burmese Buddhist's estate, has been dealt with by me in *Maung Po U* v. *Maung Po Thin* (1). In that case I said :—

"The learned Additional Judge of the District Court held on the authority of *Ma Hnin Zi* v. *Ma Hnin Ye* (2), that the burden of proving the alleged division was on the plaintiff, and that as he had not discharged it he must fail. The ruling in that case is to the effect that the burden of proving the division of ancestral property is upon the party asserting the division. It was given by Mr. Sanford, Judicial Commissioner of Lower Burma, in 1874. No authority is cited in support of it. As a rule of English Law, it cannot be supported by any known principles of the subject. Nor can I find any authority in the *Dhammathats* in suupport of it. I am unable to see how any rule as to the burden of proof can be laid down without reference to the facts of the particular case in which the question arises. All that Mr. Sanford says in his judgment is, that he who asserts that an estate is divided must prove his assertion. Upon what facts this view is based I am not able to find in the judgment. With due respect to the learned Judge, I am bound to say that the ruling as stated boldly cannot be held to be sound, unless Buddhist Law says that ancestral land must be presumed to remain undivided until the contrary is proved. That there is no such presumption in Buddhist Law I have no doubt. No such presumption can possibly be justified, having regard to the fact that among the Burmese Buddhists the division of ancestral estate among the co-heirs is the rule, cases of co-heirs remaining in commensality being extremely rare."

In the result I held that no general rule can be laid down as to the burden of proving jointness or seperation without regard to the facts and circumstances of each particular case. I cited, with reference to the case, *Maung Lu Pe* v. *Maung Lu Gale* (3) in which Mr. Copleston, Judicial Commissioner, said :—

" There is no presumption that property left by a person long deceased is part of an undivided estate. According to the circumstances of the case, it may require much, or very little, evidence to sufficiently prove that property is undivided, but, when land has been in the exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact. "

Now, what are the facts of this case?

According to the evidence adduced by that plaintiff, Ma Shwe U and Shwe Pu got the house on a division of the estate of the old couple by " paying the price."

(1) 33 Ind. Cas. 985; 9 Bur. L. T. 164.
(2) S. J. L. B. 22.
(3) 2 U. B. R. (1897-1901) 418.

This evidence means that there was a division of property, and that the other heirs were bought out of this property by Ma Shwe U and Ma Shwe Pu. They occupied this house, and after the death of Ma Shwe U, which took place three years before the suit, her husband, Maung Shwe La, the plaintiff, paid revenue due on the house. There is also evidence to show that after the death of the old couple, Ma Shwe U applied for a grant of the house site in her name, jointly with those of her nephew, Po Tu, and niece, Ma Kin Tin. At that time the nephew and niece must have been of tender years. The real applicant for the ground was Ma Shwe U, and, more probably than not, she allowed the names of her nephew and niece to be coupled with hers, because she had some good intentions towards them at that time.

Mr. Chari contends that the fact that the names of the nephew and the niece were added, indicates that they had an interest in the property, and that there had been no division of the estate. I cannot agree.

Another point to be noticed is that Ma Kywe and the others lived in that house. I do not think that that indicates that the estate still remained in tact. The conduct of Ma Kywe in treating the house as belonging to Ma Shwe Pu, shows that it must have been well-known in the family that the property belonged to the two sisters, Ma Shwe Pu and Ma Shwe U jointly, or to either, and that this property fell to the share of Ma Shwe Pu or Ma Shwe U on a division of the property of the estate of the old couple.

It does not now matter whether the property belonged to Ma Shwe Pu or to Ma Shwe U, or to either jointly. Ma Shwe U, in her capacity as heir, would have inherited the house, and Maung Shwe La, as Ma Shwe U's widower, would have inherited it from Ma Shwe U.

There are acts of ownership on the part of either Ma Shwe U or Ma Shwe Pu, and there is long possession in favour of both, or either, and, therefore, the presumption arises that there must have been a division of the estate of the old couple because otherwise it is difficult to say how the two sisters, both or either, came to excercise acts of ownership, on the house, to the exclusion of their two brothers.

Besides the presumption, there is the evidence I have set out above. On the side of Ma Kywe there is nothing whatsoever. The other defendants depend upon Ma Kywe. They do not actually contest the suit. The position is that if Ma Kywe fails, they also fail. The appeal is, therefore, allowed with costs.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 18 OF 1923.

May 31, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

KASHI NATH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 36—Government of India Act 1915, (5 & 6 Geo. V, C. 61), s. 107—Order including person in list of touts—Power of High Court to interfere—General principles.

The High Court can only interfere with the order of a District Judge including a person's name in the list of touts, in the exercise of the general powers of superintendence conferred upon it by section 107 of the Government of India Act. [p. 12, col. 1.]

In the matter of the Petition of Madho Ram, 21 A. 181; A. W. N. (1899) 15; 9 Ind. Dec. (N. S.) 825, relied upon.

The High Court will not interfere with an order such as the above in the exercise of its powers of superintendence where the sole ground on which interference is sought is, that the decision of the District Judge is against the weight of the evidence. [p. 12, col. 2.]

But the High Court will interfere if the District Judge, in contravention of the direction given in section 36 of the Legal Practitioners Act, has included in the list of touts the name of a person to whom no notice was given to show cause why his name should not be so included. [p. 12, col. 2.]

The decision of a District Judge to include a person's name in the list of touts need not necessarily be based on direct evidence, or evidence which must be legal or relevant; it is enough if there is laid before the District Judge circumstantial evidence from which he draws the inference as against that person that he habitually acts as a tout. [p. 13, col. 1.]

KASHI NATH v. EMPEROR.

Civil miscellaneous application from an order of the District Judge, Benares, dated the 3rd October 1922.

Mr. *J. M. Banerji*, for the Applicant.

Mr. *L. M. Banerji*, for the Opposite Party.

JUDGMENT.—We have before us four applications from persons in respect of whom the District Judge of Benares has passed an order under section 36 of the Legal Practitioners Act, XVIII of 1879; that is to say, the names of each one of these four persons have been put by the District Judge in a list of persons who are proved to his satisfaction by evidence of general repute or otherwise habitually to act as touts. The word "tout" we may note is defined by section 3 of the same Act. In the case of two of the persons concerned, namely, Kashi Nath and Sarju Dat, notice was ordered to issue and the learned Government Advocate has appeared to support the order of the District Judge. The other two applications, namely, those of Abdul Hamid and Sital Pandey, were simply ordered to be laid before this Bench, to be dealt with in such manner as this Court might see fit after hearing arguments in the other two cases. The learned Government-Advocate has raised the general question of the right of this Court to interfere in revision with an order passed by the District Judge, or other competent Court, under section 36 of Act XVIII of 1879. That is a question which has more than once been before this Court; but the standard authority on the subject is the decision of a Bench of two Judges. One of them, the then Chief Justice of this Court, passed *In the matter of the Petition of Madho Ram* (1) in the year 1899. We agree with the learned Judges who decided that case, that this Court could only interfere with an order such as that now before us, in the exercise of the general powers of superintendence conferred upon it by what is now section 107 of the Government of India Act. We are satisfied that those powers are extensive enough to authorise this Court, in the exercise of its discretion, to send for the record of such a proceeding in a Subordinate Court, namely, the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper. The question remains, however, what principles this Court should lay down to govern the exercise of its discretion in this matter. The learned Judges who decided *Madho Ram's case* (1) above referred to laid down one principle of considerable importance. This was that this Court would not interfere in the exercise of its powers of superintendence where the sole ground upon which interference was asked for was, that the decision of the District Judge was against the weight of the evidence. We desire to stand by that principle. It is quite clear from the wording of section 36 of Act XVIII of 1879 that the Legislature intended to confer upon the Courts therein mentioned; including the Court of a District Judge, a very wide discretion in the matter. The District Judge is authorised to frame and publish a list of persons proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts. It has been pressed upon us that the word "touts" as used in this section, refers back to the definition in the preceding section No. 3 of the same Act. This is undoubtedly so: but what is laid down in section 36 is that the District Judge has discretion to frame and publish a list of persons who are proved to his satisfaction to behave in the manner set forth in the definition of the word "tout" in section 3. The only qualifications imposed by the Act on the exercise of this discretion are that the District Judge must be satisfied by evidence of general repute or otherwise, and further that no person's name is to be included in such a list until he has had an opportunity of showing cause against such inclusion. We may say, in this connection, that we should certainly hold it a valid ground for interference by this Court, in the exercise of its general powers of supervision, if the District Judge had disobeyed this latter direction and had included in his list of touts the name of a person who had never been allowed an opportunity of showing cause against such inclusion. We return now to the obvious fact that it was never the intention of the Legislature to allow anything of the nature of

(1) 21 A. 181; A. W. N. (1899) 15; 9 Ind. Dec. (N. S.) 829.

an appeal againt the decision of a competent Court under section 36 of Act XVIII of 1879. We cannot allow our general powers of supervision to be invoked so as, in effect, to create a right of appeal which was never intended by the Legislature. In the cases now before us it is sought to bring the matter within the scope of the revisional jurisdiction, represented as falling somewhat short of the jurisdiction exerciseable by a Court of Appeal, by representing that the record of the enquiry conducted by the District Judge discloses, as against each of the four persons whose petitions lie before us, no legal or relevant evidence to warrant the finding arrived at by the District Judge that they habitually do act as touts. The plain fact of the matter is that, as regards each of these four persons, direct evidence was wanting, but there was laid before the District Judge certain circumstantial evidence, from which the District Judge drew the inference as against each of these persons that they were habitually acting as touts. In our opinion it would be straining the powers of superintendence conferred on this Court and setting an undesirable precedent if we were to take it upon ourselves in every instance of this kind to consider whether the circumstancial evidence relied upon by a District Judge, and set forth in his order, was or was not evidence upon which we ourselves would have drawn the same inference. We think the Legislature intended that the Distict Judge should be master in his own Court to this extent. The result is, that we are not prepared to interfere in any one of the four cases before us, and each of the applications stands dismissed accordingly.

M. A. A.

Applications dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL FIRST CIVIL APPEAL NO. 162 OF 1922.

June 23, 1922.

Present:—Mr. Justice Maung Kin.

ISMAIL YACOOBJEE DOODHA—DEFENDANT—APPELLANT

versus

ABDOOLLA HAJEE ABBA & CO.—PLAINTIFF—RESPONDENT.

Rangoon Rent Act (Burma Act II of 1920), s. 9 (1)—Lease on favourable terms—Salami paid to lessor, recovery of.

At the time of the grant of a lease, the lessor, in consideration of the tenant's paying, a *salami*, agreed to take a small rent, not to turn the tenant out during a certain period, not to ask for more rent, and to make certain alterations in and additions to the premises leased. In a suit by the tenant to recover back the premium under section 9 (1) of the Rangoon Rent Act:

Held, that these agreements on the part of the landlord were conditions of the lease and formed a part and parcel of the same and that, therefore, the payment of the premium was within the contemplation of section 9 (1) of the Rangoon Rent Act and the amount was recoverable by the tenant.

Special first appeal from the judgment of the Rangoon Small Cause Court, in Civil Regualr No. 2944 of 1921, dated 11th August 1921.

Mr. *Hamlyn*, for the Appellant.

Mr. *Munshi*, for the Respondents.

JUDGMENT.—This is a case under the Rangoon Rent Act, 1920.

The plaintiffs alleged that the house in question was let to them by the defendant at the rental of Rs. 200 per month, and that at the time of the lease, which was the 6th July 1919, the plaintiffs paid the defendant Rs. 2,000 as *salami*. The plaintiffs, therefore, asked for the return of this Rs. 2,000 under the provisions of section 9, clause 2, of the said Act.

The defendant in his written statement admitted having let the premises at the rent of Rs. 200 on the date mentioned in the plaint. His case, however, is that the rent was not the proper or fair rent but a less rent; and the sum of Rs. 2,000 was received as part of the consideration of the letting of the premises at a less rent. The defendant then goes on to say that he did not receive the said sum of Rs. 2,000 as premium or *salami*, but that it was paid for the consideration mentioned in paragraph 1, *viz.*, "for receiving a less rent, and

GAJRAJ TEWARI v. BHAGIRATHI PANDE.

also by way of not requiring the plaintiffs to remove from the premises for five years, or asking for more rent, and also by way of making certain alterations for plaintiffs in the premises as to providing lavatories, etc., which defendant did in fact provide." For these reasons, he said, that there was no cause of action against him.

The learned Judge of the Court below did not take any evidence, and held on the pleadings that the payment of Rs. 2,000 was such as is contemplated by section 9 of the said Act and he decreed the suit.

The defendant has appealed, and his learned Counsel contends that evidence should have been taken and that the defence put forward by the defendant was a good one.

Section 9 provides as follows:—"(1) It shall not be lawful for any person in consideration of the grant, renewal or continuance of a tenancy of any premises, to require the payment of any fine, premium or any other like sum in addition to the rent; (2) where any such payment has been made after the 1st day of July 1919, the amount shall be recoverable by the tenant by whom it was made from the landlord, and may, without prejudice to any other method of recovery, be deducted from any rent payable by him to the landlord: Provided that nothing in this section shall apply to any payment under any written agreement entered into before the 1st day of April 1918."

Now, the defence put forward means this: The rent agreed upon was Rs. 200 per month. For that rent the lease was granted. The lessor agreed to take a small rent, not to turn the tenants out during the term of five years, not to ask for more rent, and to make certain alterations in and additions to the premises. These agreements were made by the landlord at the time of the lease. They were, therefore, conditions of the lease, and, therefore, formed part and parcel of the grant of the lease. For granting a lease to the plaintiffs under those conditions, the defendant took the Rs. 2,000 in addition to the rent. Therefore, the payment is within the contemplation of sub-section (1) of section 9 of the Act. It was made after the first day of July 1919. Therefore, it is recoverable by the tenants who made the payment. The defence has been put somewhat ingeniously, but the real thing is as I have stated above. If any of these agreements were made subsequently, the result of the case might have been different.

In my judgment the lower Court was right. This appeal is dismissed with costs.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 46 OF 1922.
April 25, 1923.
Present:—Mr. Justice Daniels.
GAJRAJ TEWARI AND OTHERS—DEFENDANTS—APPELLANTS
versus
BHAGIRATHI PANDE AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 11—Joint decree, appeal against—Some decree-holders not made party, effect of.

Where a joint decree has been given in favour of certain persons and the appellant fails to make some of them respondents, the appeal will fail not only against the persons not impleaded, but as against all the decree-holders. [p. 15, col. 1.]

Tej Narain Sahu v. *Dal Ram Sahu*, 69 Ind. Cas. 624; 1 Pat. 699; (1922) A. I. R. (Pat.) 606; 4 P. L. T. 170; (1923) Pat. 207, *Basir Sheikh* v. *Fazle Karim Biswas*, 28 Ind. Cas. 703; 19 C. W. N. 290, *Monmohan Panday* v *Bidhu Bhusan Ray Chowdhury*, 48 Ind. Cas. 309; 28 C.L.J. 268, *Jamna* v *Sarjit*, 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919 *Sardari Lal* v. *Ram Lal*, 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920 and *Kali Dayal Bhattacharjee* v. *Nagendra Nath*, 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44, relied on.

Second appeal against a decree of the Subordinate Judge, Basti, dated the 30th August 1921.

Mr. *K. Verma*, for the Appellants.

Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—In this case a preliminary objection is taken to the hearing of the appeal on the ground that it has abated. The facts are that two of the respondents, Bhagwat Pande and Chhotkan Pande, are dead and that no steps have been taken to bring their legal representatives on the record. As they admittedly died prior

GAJRAJ TEWARI v. BHAGIRATHI PANDE.

to 1st June last there is no doubt that the appeal has abated against them. The respondent contends, however, that under the circumstances of the case the appeal has abated against all the respondents. Chhotakan Pande was plaintiff No. 13 in the original array of parties and was No. 19 in the list of respondents in this Court. Bhagwat, son of Harihar Pande, is No. 7 in the list of plaintiffs-respondents attached to the memorandum of appeal. As a matter of fact, no such name appears either in the plaint or in the memorandum of appeal to the lower Appellate Court and a comparison of the names in the plaint with those in the memorandum of appeal to this Court goes to show that this name has been written by mistake for that of Hanwant Pande, son of Sheoamber Pande. The name of the latter does not appear anywhere in the array of parties to the appeal.

The decree declaring them to be owners in possession of the plots in suit has been given to the plaintiffs jointly against the defendants jointly. The plaintiffs are *Zemindars* of one village, Bitni Khurd, and the defendants *Zemindars* of another village, Dippur, and the dispute was in which of these two villages the lands in suit fall. The appellant relies on the language of clause (3) of r. 4 of O. XXII, Civil Procedure Code. That rule says that where no application to bring the legal representatives on the record is made within limitation the *suit shall abate as against the deceased defendant.* By rule 11 of the same Order the word *defendant* includes a respondent. There is, however, authority for the view that, notwithstanding the wording of this rule, where a joint decree has been given in favour of the respondents the entire appeal fails if the appellant fails to make some of the respondents a party. This has been followed by the Patna High Court in *Tej Narain Sahu* v. *Dal Ram Sahu* (1). This was held in *Basir Shekh* v. *Fazle Karim Biswas* (2) where the defendants were appealing against a decree for joint possession and failed to serve notices of appeal on two of the plaintiffs-respondents. It was also held in *Monmohan Panday* v. *Bidhu Bhusan Ray Chowdhury* (3) a case in which the legal representatives of one of the co-proprietors of a firm were not brought on the record. *Jamna* v. *Sarjit* (4) [this case has been followed in the later case of *Sardari Lal* v. *Ram Lal* (5)], is another case exactly on all fours with the present in which the proprietors of a village had obtained a joint declaratory decree declaring their interest in the land in dispute. The same view was taken in another case of a declaratory decree, *Kali Dayal Bhattacharjee* v. *Nagendra Nath* (6), in which the whole case-law on the subject is reviewed. The ground of decision was that, although O. XXII, r. 4, only provides for the appeal abating as against the deceased respondent, the result of its abating against him may be in certain cases that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy. The representatives of the deceased decree-holders against whom the appeal has abated, have obtained an unassailable decree declaring that they, jointly with the other decree-holders, are proprietors in possession of the suit land. If the appeal were allowed as against the other decree-holders the result would be two contrary declarations, one declaraing that the proprietors of the respondents' village are entitled to and in possession of the land in question, and the other declaring that they are not so entitled and in possession. It has been held in these cases that this is a state of things which the law does not contemplate and which cannot be allowed. That it would result in very serious inconveniences in practice is self-evident.

It has been suggested on behalf of the appellants that I should adjourn the case to give the appellants an opportunity of ascertaining and stating by affidavit whether there are any heirs of Chhotkan Pande. This is not a request which can be accepted.

(1) 69 Ind. Cas. 624; 1 Pat. 699; (1922) A. I. R. (Pat.) 606; 4 P. L. T. 170; (1923) Pat. 207.
(2) 28 Ind. Cas. 703; 19 C. W. N. 290.
(3) 48 Ind. Cas. 309; 28 C. L. J. 268.
(4) 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919.
(5) 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920.
(6) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44.

In the first place, it was for the appellants to bring the legal representatives on the record and they have not done so. In the second place, there must be some legal representatives even if it be, in the last resort, the Crown. This is not a case of an undivided Hindu joint family in which the right passess by survivorship. It is a case of an undivided *Zemindari* village in which the proprietors are tenants-in-common. For the reasons already given, I hold that the entire appeal has abated and I accordingly dismiss it with costs in favour of the answering respondents.

M. A. A. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REVISION NO. 101 OF 1922.
February 15, 1923.
Present:—Mr. Justice Heald.
EZEKIEL MOSES—PETITIONER
versus
THE RUSSA ENGINEERING WORKS, LTD.—RESPONDENTS.

Contract Act (IX of 1872), s. 264—Partnership, dissolution of, notified in public press—Retiring partner, liability of.

The mere publication of a notice of dissolution of a partnership in the public press is not sufficient to relieve a retiring partner from liability for goods supplied to the firm by persons having old dealings with the same.

Civil revision against a decree of the Small Cause Court, Rangoon, passed in Civil Regular No. 999 of 1922.

Mr. *Burjorjee*, for the Petitioner.

Messrs. *Lentaigne, McDonnell* and *Clifton*, for the Respondents.

JUDGMENT.—Respondents sued petitioner and one Solomon in the Small Cause Court to recover the price of goods sold and delivered.

The plaint set out that the defendants had been partners with one Sassoon in a firm known as the Sassoon Automobile & Taxi Company and that the goods were supplied to the firm in October 1921.

Solomon did not defend the suit.

Petitioner said that he retired from the partnership on the 28th of June 1921 and had no concern with its subsequent transactions. He denied respondents' allegation that they had no notice of his having left the firm.

The learned Judge in the Small Cause Court held that petitioner was liable, apparently on the ground that it was not proved that public notice of the dissolution of the partnership had been given.

No appeal lies, but peititioner asks me to interfere in revision on the ground that the learned Judge ought to have held it proved that the public notice required by section 264 of the Contract Act had been given.

I have read the lower Court's proceedings and heard the learned Advocates.

The case does not seem to have been taken very seriously in the lower Court by either party, probably because the amount in dispute was comparatively trivial and the evidence produced by both sides seems to have been about equally meagre. But even if I held that petitioner proved the publication of the advertisement which he produced, I do not think that it would help him. In a similar suit brought by another firm against the same defendants, petitioner put in the same defence as in this case and the Court, following the case of *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (1), held that in the case of old customers of a firm, as the respondents in this case were, the mere publication of a notice of dissolution in the public press was not sufficient to relieve a retiring partner from liability. That case also came before the Chief Court in revision and the learned Judge who dealt with it said that he was not prepared to differ from the view of the law taken by the Calcutta High Court and dismissed the application.

I, too, am of opinion that the ruling in the Calcutta case is good law, and I see no reason to interfere.

The application is dismissed with costs.

W. C. A. *Application dismissed.*

(1) S C. 678; 11 C. L. R. 225; 4 Ind. Dec. (N. S.) 437.

BADLU v. NARAINI.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 310 OF 1923.

June 9, 1923.

Present:—Mr. Justice Moti Sagar.

BADLU—DEFENDANT—APPELLANT

versus

Musammat NARAINI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 9 (2), O. XLIII, r. 1 (k)—Abatement of suit—Application for substitution made after expiry of limitation, nature of—Order on application—Appeal, whether lies.

Where no application is made within time to bring upon the record the representatives of a deceased plaintiff, the suit abates automatically, and an application for substitution made thereafter must necessarily be considered as an application under O. XXII, r. 9 (2) of the Civil Procedure Code, to set aside the abatement.

Lachmi Narain v. *Muhammad Yusuf*, 59 Ind. Cas. 903; 42 A. 540; 18 A. L. J. 688; *Arur Singh* v. *Todar Mal*, 49 Ind. Cas. 501; 22 P. W. R. 1919 and *Chuni Lal* v. *Kala Khan*, 67 Ind. Cas. 596; 4 L. L. J. 171; (1922) A. I. R. (L) 61; 34 P. W. R. 1922, relied on.

An order passed on such application is, therefore, appealable under O. XLIII, r. 1 (*k*) of the Civil Procedure Code.

Petition for revision of an order of the District Judge, Karnal, dated the 8th February 1923, reversing that of the Munsif, First Class, Karnal, dated the 23rd November 1922.

Mr. *M. L. Puri*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The facts of the case out of which this application for revision has arisen are shortly these. On the 22nd of March 1921 one Hans Ram brought a suit for the recovery of Rs. 1,020 against Badlu, petitioner, in the Court of Lala Gulwant Rai, Senior Subordinate Judge of Karnal. On the 19th of March 1922, while the suit was pending, Hans Ram was murdered and shortly after Badlu was arrested on the charge of murder and committed to the Sessions to take his trial under section 302 of the Indian Penal Code. He was eventually acquitted by the Sessions Judge. On the 27th of July 1922 *Musammat* Narain, the widow of Hans Ram, made an application to the effect that she should be brought on the record in place of her deceased husband. The Senior Subordinate Judge rejected this application as barred by time under Act XXVI of 1920. An appeal was preferred against this decision to the District Judge of Karnal who set aside the abatement, holding that under section 5 of the Indian Limitation Act there was sufficient cause for extending the period of limitation.

The defendant has now come up in revision to this Court and it has been argued on his behalf that no appeal lay to the District Judge from an order rejecting the respondent's application to bring the legal representative of the deceased on the record and that the order passed by him on appeal was consequently without jurisdiction. In my opinion this contention has no force and must be overruled. The application made by *Musammat* Naraini on the 27th of July 1922 for substitution of her name in place of her deceased husband was in substance an application for setting aside the abatement under O. XXII, r. 9 (2) of the Civil Procedure Code, and the order passed on her application was appealable under O. XLIII, r. 1 (*k*), of the Code of Civil Procedure. No application having been made within time to bring upon the record the representative of the deceased plaintiff, the suit abated automatically and the application for substitution made after the expiry of the prescribed period must necessarily be considered an application under O. XXII, r. 9 (2) of the Code of Civil Procedure *vide Lachmi Narain* v. *Muhammad Yusuf* (1), *Arur Singh* v. *Todar Mal* (2) and *Chuni Lal* v. *Kala Khan* (3).

I do not see any force in this petition and I dismiss it with costs.

Z. K. & N. H. *Petition dismissed.*

(1) 59 Ind. Cas. 903; 42 A. 540; 18 A. L. J. 688.

(2) 49 Ind. Cas. 501; 22 P. W. R. 1919.

(3) 67 Ind. Cas. 596; 4 L. L. J. 171; (1922) A. I. R. (L) 61; 34 P. W. R. 1922.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 120 OF 1921.

May 22, 1922.

Present:—Mr. Justice Pratt.

MAUNG PO THAIK AND OTHERS—APPELLANTS

versus

MAUNG THA BYAW AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 151—Bailor and bailee—Goods lost by bailee—Want of care—Burden of proof.

In order to escape liability for the payment of damages for the loss of goods entrusted to a bailee, the burden of proving that he took as much care of the goods as a man of ordinary prudence would, lies on the bailee.

Special second civil appeal against a decree of the Divisional Court, Hanthawaddy, in Civil Appeal No. 68 of 1921.

Mr. *Surty*, for the Appellants.

Mr. *Keith*, for the Respondents.

JUDGMENT.—Plaintiffs sued for damages for loss of paddy due to the sinking of the *sampan* hired from defendants.

The *sampan* was sunk at night whilst moored.

Plaintiffs' case was that that the sinking was due to want of proper precautions on the part of third defendant and his man in charge of the *sampan*. The defence was that the wreck was due to overloading made under protest under the instructions of plaintiffs' representative.

The Trial Court found that the *sampan* was in fact overloaded but was not satisfied that the sinking was due to this fact. The Judge came to the conclusion that no one was to blame for the sinking which he held to be an accident and being unable to assign any other reason fell back upon the act of God.

The Divisional Court found that, as a matter of fact, the *sampan* was loaded in excess of her normal carrying capacity but agreed with the Trial Court that it was not proved that overloading was responsible for loss. On the evidence it came to the conclusion that that accident was due to the *sampan* being moored too close to the bank in consequence of which it stranded, took a list and shipped water when the tide rose.

I think there is no reasonable doubt that this is the correct explanation and it seems clear that the boatmen did not take sufficient precaution and were probably both asleep when the water first obtained access to the *sampan*. The burden of proving that he took as much care of the goods entrusted as a man of ordinary prudence would under similar circumstances lies on the bailees. For this there is ample authority. I need only quote one, *Trustees of the Harbour, Madras* v. *Best & Co.* (1).

On the evidence, defendants failed to prove that they took reasonable precautions.

There was a fresh breeze blowing but there was no apparent reason why the *sampan*, if properly moored and due precaution taken, should have been swamped.

The inference is that there was a lack of care on the part of the boatmen.

It is obvious the loss cannot be atrributed to the act of God and apparently the Trial Court only gave this as the cause because it was unable to understand how the accident happened. Had the Judge realised that the burden of proof was on the defendants he would probably have come to a different conclusion.

I agree with the learned Divisional Judge that all the defendants are liable. It is not necessary to re-state his reason, which I accept.

The appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

(1) 22 M. 524; 8 Ind. Dec. (N. S.) 375.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1725 OF 1921.

April 1[illegible], 1923.

Present:—Mr. Justice Gokul Prasad.

SHANKAR SAHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BUICHU RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation by manager—Benefit of estate—Mortgage to satisfy pre-emption decree, whether binding.

Although the strict Hindu Law does not allow the manager of a Hindu joint family to alienate property for the benefit of the estate, the only warrant for a valid transfer of this kind being to

CHHAMMI LAL *v.* SUKHRANI KUNWAR.

avert distress of the family ; yet the Hindu Law, as administered by the Courts in British India, does give effect to the doctrine of the benefit to the family.

Nathu v. *Kundan Lal,* 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182, relied on.

A mortgage executed by a Hindu manager to satisfy a pre-emption decree, being for a family benefit, is binding on the family.

Second appeal from a decree of the Additional District Judge, Gorakhpur, dated the 22nd July 1921.

Mr. *Shiva Prasad Sinha,* for the Appellants.

Mr. *Lachmi Narain Tewari,* for the Respondents.

JUDGMENT.—The point raised in this case is a very simple one and under the strict rule of Hindu Law the decision would have been in favour of the appellants. It appears that the plaintiff-respondent sued for foreclosure of a mortgage which had been executed for payment of a pre-emption decree. The sons of one of the mortgagors were also impleaded and their defence was that the mortgage-bond was not for consideration and at any rate was not for legal necessity. The Munsif held that consideration had passed but that the pre-emption decree was not satisfied by the mortgage-money and, therefore, he passed a decree against the pre-empted property exempting from liability the ancestral property charged in the mortgage. The plaintiffs appealed and the defendants put in cross-objections. The lower Appellate Court came to the conclusion that the mortgage went to satisfy the pre-emption decree and that the loan was for the benefit of the estate and decreed the claim against the whole property mortgaged. The defendants come here in second appeal. As I have already stated above, there is no rule of Hindu Law which warrants the manager of a joint Hindu family to alienate property for what is called the benefit of the estate. The only warrant for a valid transfer by a member of a joint Hindu family is to avert distress of the family. However, as I have said above, the doctrine of the benefit of the family has also been introduced in the Hindu Law, and having regard to the case of *Nathu* v. *Kundan Lal* (1) which is a decision of a Division Bench by which I am bound, I must hold that the mortgage in the present case was executed for the benefit of the family and was as such binding on the family. In this view the decree of the lower Appellate Court was a correct decree. I confirm it and dismiss the appeal with costs including in this Court fees on the higher scale. I extend the time for payment to six months from this date. The decree of this Court will only be drawn up in case the respondents make good the deficiency in Court-fees for the Court below. For this purpose I allow the learned Vakil for the respondents one month's time.

M. A. A. *Appeal dismissed.*

(1) 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 50 OF 1922.

March 22, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels,

CHHAMMI LAL—DEFENDANT—APPELLANT

versus

Musammat SUKHRANI KUNWAR—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Co-sharers—Suit for profits—Gross rental—Arrears, whether can be allowed—Compensation paid in Land Acquisition proceedings, whether recoverable.

In a suit for profits against a *lambardar* it was found that the amount of arrears was probably large, the village was canal irrigated, the bulk of the tenants were occupancy tenants, and the defendant had not filed proper and correct accounts. The Court passed a decree allowing profits on the basis of gross rental:

Held, that, under the circumstances of the case, the decree was a proper one.

Where, in a suit for profits against a *lambardar,* the Court gives a decree on the basis of gross rental, it cannot allow in addition any sums collected on account of arrears of previous years.

A co-sharer cannot in a suit for profits, recover his share of the compensation paid to the *lambardar* under the Land Acquisition Act, in respect of the acquisition of a plot of land, as the amount of compensation cannot properly be treated as *sewai* income.

Second appeal from a decree of the Additional District Judge, Cawnpore, dated the 21st of November 1921.

PANDURANG *v.* KISHAN.

Dr. *S. N. Sen*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is an appeal in a suit for profits. The appellant is the defendant *lambardar*. Two points have been pressed on his behalf.

The first is, whether a decree should have been given on gross rental or on recorded collections. The lower Appellate Court finds that the amount of arrears shown is probably large, that the village is canal irrigated, that the bulk of the tenants are occupancy tenants and that the defendant has not filed proper accounts and such accounts as he has filed are clearly and admittedly wrong. On these findings it is impossible to disturb the lower Court's decree allowing profits on the basis of gross rental.

The second point pressed is, that there is an obvious arithemetical mistake in the judgment in reference to the rent of *khudkasht* land. The learned Judge says that on the basis of the *patwari's* rates, which he accepts, the rent of *khudkasht* land comes to Rs. 464 but in the calculation which he has given just below he has substituted the figure 958. It is practically admitted that a mistake has been made and we allow this plea and reduce the decretal amount by substituting Rs. 464 for Rs. 958 as the *khudkasht* rental.

Cross-objections have been filed by the plaintiff-respondent and are pressed on two points. The first is, that the lower Court, following a published ruling of this Court to which one of us was a party, has held that when it gives a decree on the basis of gross rental it cannot allow in addition any sums collected on account of arrears of previous years.

This proposition has been held in two Bench rulings of this Court and we are not prepared to dissent from it in the present case.

The other point relates to a small amount of Rs. 81-4-0 received from Government as compensation for a small area acquired under the Land Acquisition Act. The amount instead of being paid to all the proprietors was for some reasons paid to the *lambardar* who apparently has not given the plaintiff his share. Objection was taken in the lower Court that this could not properly be treated as *sewai* income recoverable in a profits suit under the Tenancy Act. As a matter of law, this contention appears to us well founded. The result is, that the appeal is allowed in regard to rent of *khudkasht* land to the extent indicated above but is otherwise dismissed.

We allow no costs to the appellant as he might have obtained amendment of the decree on the only point on which his appeal succeeded by applying to the Court below. The cross-objections are dismissed with costs.

Z. K. & N. H. *Decree modified.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 101-B OF 1922.

February 20, 1923.

Present:—Mr. Prideaux, A. J. C.

PANDURANG—APPLICANT

versus

KISHAN—NON-APPLICANT.

Promissory-note—Material alteration—Negotiable Instruments Act (XXVI of 1881), s. 87.

In suits for bond-debts brought on the basis of altered documents the plaintiff is not entitled to succeed. He cannot recover even the amount of which receipt is admitted by the defendant. A material alteration destroys the right of action on the document.

Civil revision against a decree of the Judge, Small Cause Court, Akola, dated the 29th April 1922.

Messrs. *W. A. Forbes* and *A. V. Khare*, for the Applicant.

Mr. *M. B. Niyogi*, for the Non-Applicant.

JUDGMENT.—The plaintiff sued on a simple money-bond, dated 15th April 1918, for Rs. 100 and interest and also on a pro-note. The claim on the pro-note has been decreed while that on the bond has been dismissed on the ground that the bond was originally executed for Rs. 70 and that it has been materially altered when in the plaintiff's possession, altered to a bond of Rs. 100. There seems to me good

reasons for the Small Cause Court's decis on that an alteration in the bond had been made. The alteration as to Rs. 100 and the word '*Shambhar*' is apparent to the naked eye. There is the defendant's own statement corroborated by one attesting w tness, that Rs. 70 only were advanced on the document and the other attesting w tness, one Bapu Ganaji, who appears for the plaintiff and states that the bond was for Rs. 100, wrote a letter during the pendency of the suit to the Chairman of the Co-operative Credit Society, Shelu Vetal, stat ng that this bond, dated 15th April 1918, was for Rs. 70. I accept as correct the finding that after execution there has been a material alteration in the document.

The question awaiting my decision is, whether despite this fact, the defendant having admitted receipt of Rs. 70, a decree should not pass for that sum with interest against him. It is settled law that in suits for bond-debts brought on the basis of altered documents the plaintiff is not entitled to succeed. A material alteration destroys the right of action on the document. The Court, in *Sonajee Mali* v. *Uttamchand Bania* (1), held that any mater al alteration made in a written instrument after its execution and without the privity of the party to be affected by it is fatal to its validity and the same rule of law was enunciated in *Ganpat* v. *Ramkrishna Puri* (2). The same view seems to have been taken in the H gh Courts: see *Sitaram Krishna* v. *Daji Devaji* (3), *Ganga Ram* v. *Chandan Singh* (4), *Christacharlu* v. *Karibasayya* (5), *Oodeychand Boodaji* v. *Bhaskar Jagonnath* (6), *Harendra Lal Roy* v. *Uma Charan Ghosh* (7), *Gour Chandra Das* v. *Prasanna Kumar Chandra* (8), *Amirtham Pillai* v. *Nanjah Gounden* (9), and *Lakshmammal* v. *Narasimharaghava Iyengar* (10).

I, therefore, holdthat the plaintiff is not entitled to recover on the altered bond. This application for revision fails and is dismissed with costs. The applicant will pay the non-applicant's costs. Pleader's fee Rs. 15.

N. H. *Application dismissed.*

(1) 12 C. P. L. R. 33.
(2) 5 Ind. Cas. 425; 6 N. L. R. 1.
(3) 7 B. 418; 4 Ind. Dec. (N. S.) 281.
(4) 4 A. 62; A. W. N. (1881) 118; 2 Ind. Dec. (N. S.) 631.
(5) 9 M. 399; 10 Ind. Jur. 409; 3 Ind. Dec. (N. S.) 673 (F. B.).
(6) 6 B. 371; 6 Ind. Jur. 533; Chitty's S. C. C. R. 102; 3 Ind. Dec. (N. S.) 703.
(7) 9 C. W. N. 695.
(8) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 783.
(9) 23 Ind. Cas. 464; 26 M. L. J. 257; 15 M. L. T. 204; (1914) M. W. N. 250; 1 L. W. 243.
(10) 21 Ind. Cas. 445; 38 M. 746 at p. 747; (1913) M. W. N. 833; 14 M. L. T. 398; 25 M. L. J. 572.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 742 OF 1922.
March 13, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

BINDHIACHAL RAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SITA RAM MISIR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court-fees—Mortgage-decree—Application for personal decree—Appeal—Court-fees payable—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.

A mortgage-decree contained no provision for the recovery of the balance of the decretal amount, after the sale of the mortgaged properties, from the debtor. After the sale of the properties the decree-holder made an application under O. XXXIV, r. 6 of the Civil Procedure Code, for a personal decree against the mortgagor for the balance of the decretal amount which had been ascertained as a result of the realisation by the sale, and the application was granted. The judgment-debtor appealed:

Held, that the memo. of appeal required an *ad valorem* Court-fee stamp on the amount in respect of which a personal decree had been made against the appellant.

Second appeal against a decree of the District Judge, Ghazipur, dated the 13th March 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

OFFICE REPORT.—The case out of which this appeal has arisen was not at all concerned with execution proceedings but with an application under

O. XXXIV, r. 6, of the Code of Civil Procedure praying for a simple money-decree for Rs. 874-10-5 in favour of the petitioners, Sita Ram Misir and Raj Ballan Misir. The Trial Court having allowed the petition ordered the decree to be prepared as prayed. Bindhiachal Rai and Mahendra Rai, opposite parties, then went in appeal to the lower Appellate Court but that Court, too, upholding the decree of the First Court dismissed the appeal. Thereupon the same gentlemen preferred this second appeal valuing it at Rs. 874-10-5 but paying a Court-fee of Rs. 2 only treating it as an execution second appeal. The facts given above clearly show that it cannot be treated as an execution second appeal but as a regualar second appeal and Court-fee payable should be *ad valorem* on the amount claimed, Rs. 874-10-5, which comes to Rs. 66. In both the Appellate Courts, therefore, the Court-fee payable was Rs. 132 but annas eight having been paid in lower Appellate Court and Rs. 2 here, in all Rs. 2-8-0, there is a deficiency of Rs. 129-8-0 payable by appellants for this and for the lower Appellate Court.

REEERRING ORDER.

Ryves, J.—After the appeal was filed a note was made by the Taxing Officer of the Court that there was a deficiency in the Court-fees payable both in the lower Appellate Court and in this Court. This note was shown to the learned Counsel for the appellants and signed by him on the 13th of December 1922. The deficiency in the Court-fees payable to this Court was made good but on the matter being laid before Mr. Justice Daniels on the 10th of January 1923 the learned Counsel for the appellant stated that he would contest the alleged deficiency in the Court-fees paid in the lower Court at the hearing of the appeal. It seems to me that under rule 10 of the Rules of this Court of 18th January 1898 it is not open now to the learned Counsel to dispute the accuracy of the Taxing Officer's report. This matter seems to me of importance and, as far as I know, has not been previously decided. I think it is of sufficient importance to lay before a Bench of two Judges. I direct accordingly.

JUDGMENT.—We think that, having regard to the fact that the final decree of November 1915 contained no provision for payment of the balance and for the recovery of such balance from the debtor, the mortgagee was driven to make an application under O. XXXIV, r. 6. The position, no doubt, was a difficult one but we think that we ought to look at the substance, and an application under O. XXXIV, r. 6, was in substance an application for a personal decree of the balance which had been ascertained as a result of the realisation by the sale. That amount could not be finally ascertained until the sale had been confirmed. The view that the Court below took on the matter of limitation, therefore, was right and the view that our Stamp Reporter took that this was a regular appeal was also right. The appeal is dismissed with costs including in this Court fees on the higher scale.

We exempt the respondent from any liability under which he may otherwise be for payment of the deficiency in the Court below.

The Court below must do its best to recover the deficiency from the appellant.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

REFERRED CASE NO. 14 OF 1921.

March 28, 1923.

Present:—Justice Sir William Ayling, KT., Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

THE SECRETARY TO THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS—REFERRING OFFICER

versus

M. DORAISWAMI AIYENGAR AND BROTHERS—ASSESSEES.

Income Tax Act (VII of 1918), s. 2 (12)—Registration of some members of Hindu joint family as Firm—Liability of family to super-tax on income of Firm.

The registration of some members of a Hindu joint family as a firm as defined under section 2 (12) of the Income Tax Act precludes the assessment of the family as an undivided family

SECY. TO THE CHIEF COMMR. INCOME TAX, MADRAS *v.* DORAISWAMI AIYENGAR.

to super-tax on the income derived from the business of the firm unless the firm so registered is shown to carry on its business on behalf of and for the benefit of the joint family.

Members of a joint family may engage in trade in such a way as to embark on the adventure funds of the joint family property and pledge its credit to their undertaking. On the other hand, the members of a joint family may embark on a trade without involving the funds of the joint family in it, and, in that event, their profits as traders will be self-acquisitions and the losses would not be recoverable from the joint family property, the members who actually take part in the trade may enter into a deed of partnership between themselves, or between themselves and a stranger partner, which would regulate their dealings *inter se* and with the stranger partner, but need not necessarily affect the question as to whether and how far the property of the joint family is to be regarded as involved in the venture. It is not conclusive to show that some funds of the joint family were invested in the trade; because they might have been borrowed by the trading members as a loan of a definite sum to be re-paid by the trading firm just if it was a loan from strangers. [p. 24, col. 1.]

Case stated by the Secretary to the Chief Commissioner, Income-Tax, Madras, in his letter, dated the 5th August 1921; S. T. A. No. 27, under section 6 of the Super-Tax Act of 1920 read with section 51 of the Income-Tax Act of 1918 for a decision on the questions, "whether the registration of the Brothers as a firm as defined under section 2 (12) of Act VII of 1918 precludes the assessment of the family as undivided family to super-tax on the income derived from the business of this firm, and if not whether the mere constitution of partnership between some members of the family by a formal document precludes the assessment of the income of the partnership to super-tax as part of the income of the undivided family?"

The Government Pleader, for the Referring Officer.

Messrs. *A. Krishnaswamy Aiyar* and *M. Subbaraya Aiyar*, for the Assessees.

JUDGMENT.—This is a case stated by the Chief Commissioner of Income-Tax to the High Court under section 51 of the Income Tax Act, VII of 1918 read with section 6 of the Super Tax Act 1920. The question for decision is whether the assessees who are the registered firm of M. Doraiswamy Aiyangar & Bros., are assessable to super-tax as an undivided Hindu family and the specific questions put to us are as follows:—

(1) Does the registration of the brothers as a firm as defined under section 2 (12) of Act VII of 1918 preclude the assessment of the family as an undivided family to super-tax or the income derived from the business of this firm ?

(2) If not, does the mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family?

When this case first came before us, we thought it necessary to have more information than was afforded to us by the original case stated and, therefore, referred the case back for a finding of fact as to whether the original capital of the firm was wholly or in part derived from joint family funds. The answer to that is to be found in the Commissioner's letter dated the 5th August 1922, the concluding paragraph of which runs as follows:—

"On the whole, no adequate evidence has been adduced which would enable one to record a finding as a fact whether the original capital of the firm was wholly or in part derived from joint family funds."

To that is appended the following statement:—

"It can only be inferred from the conduct of the assessees and all the circumstances of the case that appellants intended to trade as a joint family and did trade as such."

We desire to say with regard to this last statement that it is in no way relevant to anything that we referred back to the Commissioner and that we decline to treat it as a finding of fact, by which we are bound in framing our answer to the questions referred to us. It appears to us to be a deduction of law from known circumstances rather than a finding of fact but, in any event, we disregard it as being in no way called for in connection with the matter that has been referred. In any event, it is vitiated by the laxity of reasoning which led up to and is evidenced by the language in paragraph (3) of the same document in which it is said that "the four brothers practically form the joint family." A joint family consists of certain definite persons and a given individual must either be a member of it or not. The

general legal position appears to us to be beyond doubt. Members of a joint family may engage in trade in such a way as to embark on the adventure funds of the joint family and pledge its credit to their undertaking. On the other hand, the members of a joint family may embark on a trade without involving the funds of the joint family in it, and in that event, their profits as traders would be self-acquisitions and the losses would not be recoverable from the joint family property. The members who actually take part in the trade may enter into a deed of partnership between themselves or between themselves and a stranger partner, which, of course, would regulate their dealings *inter se* and with the stranger partner but need not necessarily affect the question as to whether and how far the property of the joint family is to be regarded as involved in the adventure. It is not conclusive to show that some funds of the joint family were invested in the trade, because they might have been borrowed by the trading members as a loan of a definite sum to be re-paid by the trading firm just as if it was a loan from strangers. In the present case the accounts appear to show that such a course has been pursued here and that the amounts advanced by Mr. M. Ananthachariar, the father of the assessees, and apparently the manager of the joint family of which they are all admittedly members, were treated as a mere loan for the purpose of the business to be re-paid with interest in the ordinary way and not as an indication that the business was conducted as a joint family business. But that is a question of fact and inference which is primarily at least for the determination of the Commissioner and not of this Court. We, therefore, answer the questions put to us in the only way we can answer them on the materials before us.

(1) Yes, unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the joint family.

(2) The answer is in accordance with the preceding answer.

The mere constitution of a partnership between some members of the family will not preclude the assessment in cases where the partnership is conducted on behalf of and for the benefit of the joint family.

As we have been unable on the materials before us to give a final determination of the rights of the parties we make no order as to costs.

V. N. V. *Reference answered.*

Z. K. & N. H.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 217 OF 1923.

June 1, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

SULTAN BAKSH AND OTHERS—APPLICANTS

versus

ABDUL HAMID—OPPOSITE PARTY.

U.P. Municipalities Act (II of 1916), s. 23 (e)—Municipal Election—Withdrawal of candidate after opening but before close of Poll—Declaration of election of rival candidate.

A candidate for election as a member of a Municipal Board can withdraw before the time for polling arrives, and can also do so during the polling as also after he is elected. [p. 25, col. 2.]

If out of two candidates for one seat one withdraws after the Poll opens and before the time comes for it to close, it is legal for the Returning Officer to close the Poll and declare the one remaining candidate to have been duly elected. It is not necessary that the Poll should remain open, and that in the end the Returning Officer should declare the election of the remaining candidate. [p. 25, col. 2.]

Reference made by the Commissioner, Allahabad Division, dated the 27th April 1923.

Mr. *Gulzari Lal*, for the Applicants.

Mr. *S. Raza Ali*, for the Opposite Party.

JUDGMENT.—This is a Reference to the High Court under O. XLVI of the Code of Civil Procedure read with section 23 (e) of the Municipalities Act, II of 1916. In Ward No. 4 of the Fatehgarh Municipal Elections five candidates were nominated for the Moslem Constituency. Three of them withdrew before the polling day. On that day two candidates were opposed to each other by name Omrao Khan and Abdul Hamid. There being only one seat

the Poll was duly opened and voters commenced to record their votes in favour of one or the other candidate. At some time whilst the polling was open and continuing, Omrao Khan went to the Returning Officer and told him that he no longer desired to contest the seat. Thereupon the Returning Officer, thinking that that was the determination of Omrao Khan, closed the Poll and declared that the one remaining candidate Abdul Hamid was duly elected to the one vacancy. It is suggested in the petition that the withdrawal of Omrao Khan was due to some political manœuvring: but, be that as it may, we can only deal with what were the facts relating to the procedure. The fact was that the Poll opened with two candidates for one vacancy, and before the time came for the Poll to close and votes to be counted and the Returning Officer to declare who was elected, before that time arrived there was only one candidate and that one candidate a candidate for the one vacancy. We think, in the circumstances, the Returning Officer acted with propriety and common sense and that he acted quite reasonably. Rule 36 (1) of the Municipal Rules and by-laws of this particular Municipality, provide that a Poll shall be taken on the day for the election when the number of duly nominated candidates who are entered in the schedule and who have not withdrawn their candidature before the time fixed for the Poll exceeds that of the vacancies. When you have got duly nominated candidates in excess of vacancies you have got to have an election. Rule 36 (2) provides if the number of such candidates is equal to the number of vacancies, all such candidates shall be deemed to be elected. Therefore, if there are three candidates and three vacancies, all such candidates shall be deemed to be elected; similarly two, similarly one. Now, it is true that in terms rule 36 (2) does not contemplate, nor is there any where any provision which contemplates, the withdrawal of a candidate during the few hours during which the polling is in progress; but by analogy to the duties of the Returning Officer before the opening of the Poll, we have no doubt that it was the proper course for the Returning Officer to act in conformity with rule 36 (2) and he finding only one candidate left for the one vacancy, to declare that man duly elected.

Dr. Sen, voicing no doubt to some extent the suggestion thrown out by the Commissioner, said that the Poll ought to remain open and in the end the Returning Officer should declare the remaining candidate duly elected. The difficulty about that is that if the poll remains open, votes are being recorded for a candidate who has withdrawn his candidature and is no longer one of the contestants. It is quite clear that just as a candidate can withdraw before the time for polling arrives, so he can withdraw during the polling, so also can he withdraw as soon as he is elected or he can withdraw at any time after his election. A man does not bind himself that he will not withdraw either as a candidate or as a member of a Municipality. He is entitled to withdraw at any moment. In the circumstances, we are of opinion that the Returning Officer acted in the circumstances legally and properly and rightly in accordance with his duties and dealt with the matter in a proper way. We are of opinion that his declaration that Abdul Hamid was duly elected was a proper decision and in accordance with the law. This is our answer to the Reference. The costs of this hearing, including fees actualy certified by Counsel on both sides, will be dealt with by the Commissioner in his discretion in disposing of the Election Petition.

M. A. A. *Reference answered.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2129 OF 1920.
February 8, 1923.

Present:—Justice Sir Francis Oldfield Kt., and Mr. Justice Ramesam.

USSAN KASIM SAIT—PLAINTIFF—APPELLANT

versus

THE SECRETARAY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF MALABAR, AT CALICUT—DEFENDANT—RESPONDENT.

Prescrip ion—Public, whether can prescribe

USSAN KASIM SAIT *v.* SECRETARY OF STATE FOR INDIA.

—*Easements and* profits a prendre, *acquisition of* —*Dedication*—*Proof*—*Easements Act* (*V of* 1882), *s.* 2 (b).

The public cannot prescribe for ownership. [p. 27, col. 1.]

The principle applicable to prescription by the public is the same as that recognised in connection with prescriptions for easements or *profits a prendre*. [p. 27, col. 1.]

As regards prescription of this kind the thing to be established is dedication, not user. What can be proved is that the public has acquired an easement or a *profits a prendre* by a grant, or dedication, actual, if direct evidence of one is available, or to be presumed, in case such evidence is not available; and in the latter alternative evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or dedication, which is lost, at some time was made. [p 27, col. 1.]

Smith v. *Andrews*, (1891) 2 Ch. D. 678; 65 L. T. 175, *Attorney-General* v. *Eshar Linoleum Co. Ltd.*, (1901) 2 Ch. D. 647; 70 L. J. Ch. 808; 85 L. T. 414; 50 W. R. 22; 66 J. P. 71 and *Lutchmeeput Singh* v. *Sadaulla Nushyo*, 9 C. 698; 12 C. L. R. 383; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115, relied on.

The dedication must, however, be to the public at large, and not to any section of it. [p. 27, col. 1.]

Poole v. *Huskinson*, (1843) 11 M. & W. 827; 152 E. R. 1039; 63 R. R. 782 and *Muhammad Rustam Ali Khan* v. *Municipal Committee of Karnal City*, 56 Ind. Cas. 1; 47 I. A. 25; 1 P. W. R. 1920; 13 P. L. R. 1920; 38 M. L. J. 455; 1 L. 117; 11 L. W. 579; 18 A. L. J. 466; 22 Bom. L. R. 563; 2 U. P. L. R. (P. C.) 87; 28 M. L. T. 1 (P. C.), relied on.

Second appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 901 of 1919, preferred against the decree of the Court of the Additional District Munsif, Tirur, in Original Suit No. 405 of 1917 (Original Suit No. 305 of 1917 on the file of the Court of the District Munsif, Ponnani).

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—The property in dispute in this case is a small piece of vacant ground outside the boundary wall of the plaintiff's premises, those premises having access to it and the adjoining road by a gate.

The suit by plaintiff is for a declaration of his right to the property outside his boundary wall. The Government registered the land as *poramboke* at the recent Survey; and he claims it as his *jenm* property. Issues were framed as to the sustainability of the suit for mere declaration, the defendant, the Secretary of State, denying the plaintiff's possession; as to the ownership of the property, and as to the title set up by Government by adverse possession.

The first objection to the lower Appellate Court's judgment is, that it contains no distinct finding as to title its discussion of the evidence being confined to a conclusion that the measurements in the plaintiff's documents could not be accurate, although the question whether they could be trusted as to any part of the disputed land was left open. If the measurements could not be trusted, the lower Appellate Court should have considered whether it could not act on the principle that title goes with possession and it should have decided whether the plaintiff had discharged the burden of proof, which in view of his failure to establish his alleged right in connection with the Survey, was, it is not disputed, on him. That, however, matters comparatively little. For the lower Appellate Court has in fact found in favour of the defendant's possession and against that of the plaintiff in connection with the plea of prescription and it would presumably have, if it had looked at the case in the manner suggested, applied that finding to support a conclusion in favour of the defendant's title and also against the plaintiff's right to sue only for a declaration.

Its decision on prescription is based on findings that first the public has prescribed, and second, the defendant, Secretary of State, represents the public and can have the benefit of its prescription.

As regards the first of these points, the lower Appellate Court's treatment of the evidence is summary. It mentions only that the land has been used as a cart stand and that the public has occupied it freely, the plaintiff's user by taking goods to his gateway being no more than any member of the public might have done. The case may really be stronger than appears from the judgment. In fact we have been shown evidence that there was once a pound on the site. But the stronger objections to the lower Appellate Court's findings are that if the public can prescribe at all, a piont which we return to, the lower Appellate

Court has not referred to any evidence, that those who used the land did so on behalf of the public and not in their individual capacity or to any exclusion of the plaintiff, or anything inconsistent with the continuance of his ownership, subject to a right against him of the description referred to in section 2 (*b*) of the Easements Act, V of 1882. And a right of that description is not what defendant claimed, and, if it were claimed, it could be no defence to the suit. These distinctions are exemplified by *Lutchmeeput Singh* v. *Sadaulla Nushyo*(1), where, however, the form of the plaint prayer admitted of enquiry into the existence of such a right as a defence.

In fact, however, the lower Appellate Court and the parties were wrong in considering the possibility of prescription by the public at all. For the public cannot prescribe. No doubt, no authority as regards prescription by it for ownership has been produced. But the principle applicable to such prescription will be the same as that recognised in connection with prescription for easements or *profits a prendre*. As regards prescriptions of the latter kind authority is clear: *Smith* v. *Andrews* (2) and *Attorney-General* v. *Esher Linoleum Co., Ltd.* (3), and this position is assumed in the Indian case last mentioned. As was said, in the second English case "it is necessary to remember that the thing to be established is dedication, not user. What can be proved is that the public has acquired an easement or a *profits a prendre* by a grant, or dedication, actual, if direct evidence of one is available, or to be presumed in case such evidence is not; and in the latter evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or dedication, which is lost, at some time was made." The lower Appellate Court must at the re-hearing, which we are about to direct, bear this in mind. It will also bear in mind the necessity for proof that the dedication, if any, was to the public at large and not to any section of it. *Poole* v. *Huskinson* (4) and *Muhammad Rustam Ali Khan* v. *Municipal Committee of Karnal City* (5).

There will still, however, be one more question for the lower Appellate Court to consider. In its judgment it has assumed that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State. That case was not put forward in the written statement and its sustainability is not obvious. For we know that the public, or a portion of it, sometimes prescribes or attempts to prescribe against Government. The lower Appellate Court has given no particular reasons for this part of its decision, and at the re-hearing we must ask it to consider the matter more fully, if its other findings at the re-hearing render it necessary.

The lower Appellate Court has misconceived the law at every point. We set aside its decision and remand the appeal for re-admission and re-hearing in the light of the foregoing. Costs to date here and in the lower Appellate Court will be costs in the cause and will be provided for in its decree.

Stamp value on the appeal memorandum in this Court will be refunded on application.

V. N. V.

Z. K. *Case remanded.*

(1) 9 C. 698; 12 C. L. R. 383; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115.
(2) (1891) 2 Ch. D. 678; 65 L. T. 175.
(3) (1901) 2. Ch. D. 647; 70 L. J. Ch. 808; 85 L. T. 414; 50 W. R. 22; 66 J. P. 71.
(4) (1843) 11 M. & W. 827; 152 E. R. 1039; 63 R. R. 782.
(5) 56 Ind. Cas. 1; 47 I. A. 25; 1 P.W. R 1920; 13 P. L. R. 1920; 38 M. L. J. 455; 1 L. 117; 11 L. W. 579; 18 A. L. J. 466; 22 Bom. L. R. 563; 2 U. P. L. R. (P. C.) 87; 28 M. L. T. 1 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 182, 337 AND 238 OF 1920.

August 9, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

OLIYATH VAZHAYIL ABUVAKKAR AND OTHERS—PLAINTIFFS NOS. 1 TO 28, 30 AND 31—APPELLANTS

versus

OLIYATH KUNHIKUTTIYALI AND OTHERS—DEFENDANTS NOS. 1, 2, 4 TO 1[illegible], 12 TO 34, 36 TO 39 AND 41 TO 7[illegible]—RESPONDENTS

Malabar Law—Tarwad—Thavazhi—Karnavan—

ABUVAKKAR *v.* KUNHIKUTTIYALI.

Decision against Karnavan, whether binding on members—Succession—Self-acquisitions—Law, administration of—Duty of Courts.

In the absence of fraud or collusion, a decision in a suit honestly defended by a Karnavan in his representative capacity is binding on the members of the Tarwad or the Thavazhi whom he represents. [p. 30, cols. 1 & 2.]

(Case-Law discussed.)

Under Malabar Law all acquisitions of a male member of a family undisposed of at his death form part of the family property and fall to the management of the eldest surviving male. [p. 31, col. 1.]

Kallali Kunju Menon v. *Palat Erracha Menon*, 2 M. H. C. R. 162 at p. 163, followed.

Acquisitions with the help of the funds of the acquirer's own Thavazhi owning Puthravagasam properties, become the property of the Thavazhi and the Karnavan of the whole Tarwad cannot claim them in opposition to the Thavazhi. [p. 31, col. 1.]

It is not the province of a Judge to alter the law however opposed it may be to the consciousness of the people. It is his duty to administer it as he finds it. [p. 34, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge, Tellicherry, in Original Suits Nos. 16 of 1917, 20 of 1919 and 29 of 1918, respectively.

Messrs. *K. P. M. Menon* and *K. V. Madhavan Nair*, for the Appellants.

Messrs. *C. Madhavan Nair, K. Kuttikrishna Menon, B. Pocker, V. P. Karunakara Nambiar, M. C. Sriaharan; T. S. Anantarama Aiyar* and *A. S. Venku Aiyar*, for the Respondents.

These appeals came on for hearing on the 20th, 21st, 24th and 25th July 1922, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Devadoss, J.—This is an appeal by the plaintiffs against the decree of the Subordinate Judge of Tellicherry dismissing their suit for a declaration "that the plaint properties belong to their Thavazhi and that the decrees of the Temporary Sub-Court of Tellicherry in Original Suit No. 18 of 1914 and of the High Court of Judicature at Madras in Appeal No. 96 of 1916, preferred therefrom, are not binding on the Vazhayil Thavazhi" and for incidental reliefs. The plaintiffs' case is that they and defendants Nos. 41 to 60 are members of a Thavazhi, known as Oliyath Vazhayil Thavazhi, the first defendant is the Karnavan of the Tarwad of which the plaintiffs' Thavazhi is a branch, the defendants Nos. 1 to 37 are members of the Tarwad, the plaint properties are the Puthravagasam properties of the Oliyath Vazhayil Thavazhi, the other members of the Tarwad have no interest in the properties and that the first defendant as Karnavan of the Tarwad is not entitled to be in, or to claim possession of, them. The first defendant contends that the properties belong to the Tarwad, and they never were the Puthravagasam properties of the plaintiffs' Thavazhi, that the suit is barred by reason of the decision in Original Suit No. 18 of 1914, and that the plaintiffs are not entitled to any relief. The other defendants who are not members of the plaintiffs' Thavazhi raise the same contentions as those of the first defendant.

Plaintiffs and defendants Nos. 41 to 60 are the descendants of one Nangomma. She has three sons and two daughters, (1) Pokker, (2) Kunhamed, (3) Kunhayan, (4) Kunhacha and (5) Kunhama. Defendant No. 43 is the son of Kunhama. He is the Karnavan of the plaintiffs' Thavazhi. Nangomma had an elder sister, Achotti, whose descendants are defendants Nos. 1 to 37. Defendants Nos. 38 to 40 are the descendants of Nangoma's maternal aunt Valia Aliumma. The first defendant who is the Karnavan of the Tarwad is the great-grandson of Achotti. The Subordinate Judge dismissed the plaintiffs' suit holding that although the present suit was not barred by reason of the decision in Original Suit No. 18 of 1914 yet the plaintiffs failed to make out that the properties were the Puthravagasam properties of their Thavazhi and that though they were acquired by some of the descendants of Nangomma, yet they were not impressed with the character of Thavazhi properties, and the plaintiffs were not entitled to any relief. The plaintiffs have preferred this appeal.

The first point for consideration is, whether the present suit is barred by reason of the decision in the said Original Suit No. 18 of 1914, which was brought by the first defendant herein as Karnavan of the Tarwad, for a declaration that a document executed by Koyamutti, the previous Karnavan, on 9th July 1909 in favour of the defendants Nos. 1 to 4 therein was not binding on the plaintiff or his Tarwad and for surrender of the properties to him by defendants Nos. 1 to 4. The

defendants Nos. 1 to 4 filed a written statement in which, among other contentions, they stated that they were members of a Thavazhi and that the properties in their possession were the Puthravagasam properties of the Thavazhi and that the Karnavan of their Thavazhi should be made a party, that the properties having been given to them for maintenance by the Karnavan of their own Thavazhi they were entitled to be in possession of them and that, owing to their separation from the Tarwad long ago, there was no community of interest between the first defendant's Tarwad and their Thavazhi: The 43rd defendant herein was added as the 14th defendant to that suit in his capacity as Karnavan of the Vazhayil Thavazhi. He filed a written statement and, among other things, he contended that the properties in dispute were Puthravagasam properties of the Vazhayil Thavazhi, that Nangomma and her children had separated long ago from the Tarwad and the propeties having been acquired by the members of the Thavazhi became Puthravagasam properties to wich the Thavazhi alone was exclusively entitled, that he as Karnavan was entitled to be in possession of them and also of the income, and that the plaintiffs had no sort of right to any of the properties of the Thavazhi. The Temporary Subordinate Judge of Tellicherry held that the properties were not Puthravagasam properties of the Thavazhi but belonged to the Tarwad and that the defendants Nos. 1 to 4 should surrender possession to the plaintiffs. On appeal the late Chief Justice and Seshagiri Aiyar, J., upheld the decision of the Subordinate Judge and dismissed the appeal of the defendants. It has been found by the Subordinate Judge who tried this suit that the conduct of that litigation was *bona fide*, and it is now conceded in appeal that it was so.

It is contended by Mr. Menon for the appellants that that decision in Original Suit 18 of 1914 is not *res judicata* as between plaintiffs and first defendant inasmuch as the plaintiff in that suit did not admit the existence of the Thavazhi. He further argues that though the matter now in dispute was directly and substantially in issue in the former suit, yet that suit was not between the same parties inasmuch as the 14th defendant therein was only brought on record on the objection of the defendants, and the suit as framed was not against the Thavazhi as represented by its Karnavan. No doubt, in that suit the plaintiff sued for possession of certain properties from persons who, according to his contention, were not entitled to be in possession of them. But the defendants vehemently urged that the properties belonged exclusively to their Thavazhi and that the 14th defendant was its Karnavan and, therefore, was the proper person to represent the Thavazhi. It was on the objection of the defendants Nos. 1 to 4 that the plaint was amended on 4th September 1914 and Olieth Pallikutti, the Karnavan of the Thavazhi, was added as the 14th defendant and he filed a written statement alleging among other things that the suit properties were Puthravagasam property of his Thavazhi that there was no community of interest between his Thavazhi and the Tarwad of which the plaintiff was Karnavan and that the rights, if any, of the Tarwad were barred by limitation and that the plaint properties had been given for maintenance to defendants Nos. 1 to 4 who were members of his Thavazhi and that he was, therefore, entitled to the income of the properties. It is difficult to appreciate the contention that the Thavazhi was not represented in that suit simply because the plaintiff ignored its existence when he filed his plaint though he joined issue with the defendants on the questions—whether there was a Thavazhi and whether the properties in dispute were the properties of the Thavazhi or of the Tarwad. It was held in *Vasudevan* v. *Sakanran* (1) that "a decree in a suit in which the Karnavan of a Nambudri Illom or a Marumakkattayam Tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties." The leading judgment in that case is that of Mr. Justice Shephard who observes at page 141: "Now it is conceded that, when a Karnavan sues on behalf of the family, he fully represents all its other members and

(1) 20 M. 129 (F.B.); 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90.

an adjudication therein, if there is no fraud or collusion, is binding on the whole family [*Subramanyan* v. *Gopala* (2)]. It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the Karnavan, it is not open to the party sued by him to raise any objection to the action on the ground of the non-joinder of the other members. *Byathamma* v. *Avulla*(3)"* * *"By parity of reasoning, then, it follows that a Karnavan can be sued on behalf of the family. It is difficult to see how this conclusion can be avoided, unless the argument of the defendant based on the provisions of the Civil Procedure Code were correct." It was contended in that suit that, under section 30 of the Code of Civil Procedure, all the members of the family should have been made parties. Under the old section 30, which was only an enabling section, it was not obligatory on the plaintiff to make all the members of a Tarwad parties to the suit. The learned Judge further observes: "There are instances, where even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons interested are numerous, yet the law does allow, apart from Statute, certain persons to prosecute or defend suits in their representative capacity, *e.g.*, Hindu widows with reference to reversioners; other persons having an estate analogous to that of a Hindu widow with reference to those entitled to take after such qualified owners, and so on. In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown, is eminently true in the case of a Karnavan. Consequently, he does not require the aid of section 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family" * * * "Therefore, unless there is shown in the words of Jessel, M. R., "fraud or collusion or anything of that sort or that the Court was cheated into believing that the case was fairly fought or fairly represented when in point of fact it was not," *Commissioners of Sewers of the City of London* v. *Gellatly* (4), a decision in a suit, defended by a Karnavan in his representative capacity, must be held to be binding upon all those represented by him." In *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (5) it was held by a Full Bench that "when once it is made clear that the self same right and title is substantially in issue in two suits, the precise form in which either suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, became immaterial." In *Meethala Veetil Kaitheri Kelu Nambiar* v. *Kaitheri Chathu Nambiar* (6), it was held by a Bench of this Court, that if a matter be in issue under section 11 of the Civil Procedure Code, it is enough if the decision about it is necessary for the decree and it is not further necessary that there should be an express issue about it. In Original Suit No. 18 of 1914, Issue No. 4 "whether the plaint properties belong to the Olieth Tarwad as alleged by plaintiff or to the Olieth Vazhayil Thavazhi as alleged by defendants Nos. 1 to 4 and 14, and whether there is such a Puthravagasam Thavazhi as alleged" was distinctly raised and Issue No. 7 "whether plaintiff is entitled to recover possession of the plaint properties" was also considered. It is difficult to see how it can be contended that in the previous suit the Thavazhi was not properly represented, and the question in issue in this suit was not distinctly raised. Mr. Menon's vehement contention that the suit which was brought was not against the Thavazhi and, therefore, the decision in that suit could not operate as *res judicata* has no foundatiion when it is remembered, that the defendants raised the question of the existence of the Thavazhi and had the Karnavan of the Thavazhi brought on record as the 14th defendant, and he honestly defended that suit by contending that the plaint properties were Puthravagasam properties of his Thavazhi and that, he was

(2) 10 M. 223; 3 Ind. Dec. (N. S.) 908.
(3) 15 M. 19; 5 Ind. Dec. (N. S.) 363.
(4) (1876) 3 Ch. D. 610; 45 L. J. Ch. 788; 24 W. R. 1059.
(5) 3 C. 145; 1 C. L. R. 35; 2 Ind. Jur. 349; 1 Ind. Dec. (N. S.) 682 (F. B.).
(6) 52 Ind. Cas. 258; (1919) M. W. N. 34; 9 L. W. 84; 25 M. L. T. 66.

its Karnavan and, therefore, entitled to be put in possession of them, should the Court for any reason hold that the document under which defendants Nos. 1 to 4 held them should be set aside. Whatever may have been the frame of the suit when it was filed, defendants Nos. 1 to 4 and the 14th defendant were arrayed as appellants and the plaintiffs and the other defendants as respondents in the High Court, and it is impossible to contend that the plaintiffs' Thavazhi was not a party to the appeal in the face of the records of the Appellate Court. I, therefore, hold that the plaintiff's suit is barred by reason of the decision of the Temporary Sub-Court, Tellicherry, in Original Suit No. 18 of 1914. The argument founded on the frame of the plaint cannot be urged against the Memorandum of Appeal to the High Court. The decision of the High Court in Appeal Suit No. 96 of 1916 on the points now in dispute is *res judicata* between plaintiffs and defendants.

The main contention on behalf of the appellants is, that the suit properties are Puthravagasam properties of the plaintiffs' Thavazhi, having been acquired by the sons of Nangomma with the help of funds furnished by their father Mayan Ali Nagha or by their mother Nangomma. It is further contended that even if the properties had been acquired by the sons of Nangomma without the help of the father's funds or the mother's funds, yet as the properties had been treated as the properties of the Thavazhi for a number of years they became the properties of the Thavazhi.

"It is unquestionably the Law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property and that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male" *Kallati Kunju Menon* v. *Palat Erracha Menon* (7). It is also well-settled that the acquisitions with the help of the funds of the acquirer's own Thavazhi owning Puthravagasam properties, became the property of the Thavazhi and the Karnavan of the whole Tarwad cannot claim them in opposition to the Thavazhi. In order to succeed the plaintiffs have to make out

(1) the existence of a Thavazhi;

(2) (*a*) that the plaint properties were acquired with the help of Puthravagasam funds by the members of the Thavazhi;

(?) (*b*) or that though they were acquired without the help of Puthravagasam funds yet they were impressed with the character of Puthravagasam properties;

(2) (*c*) or that the Thavazhi acquired by prescription a title adverse to the Tarwad.

The plaintiffs' case is that the plaint properties were acquired by three brothers Pokker, Kunhamed, Kunhayan, the sons of Nangomma by Mayan Ali Nagha who was said to be the Captain of a Sailing Vessel and they must have acquired the properties with the help of the funds furnished by their father. A number of documents have been filed to support the plaintiffs' contention. But none of them proves that any funds of Mayan Ali Nagha were used by the brothers for acquiring the large fortune they left at their death. Exhibit K3 is a Puramkadam deed of 1862 executed by Palikkandi Nalliyil Ammad, to Olieth Pokker. In it there is a recital that the executant's Karnavan Palikkandi Kunhi Ahmad had demised the shop to Mayan Ali Nagha on Kanom rights. This document is challenged to be a forgery. Doubts as to its genuineness were expressed in the judgment of Seshagiri Aiyar, J., in Appeal No. 96 of 1916 and nothing has since transpired to remove those doubts. Exhibit K4 is a sale-deed, dated 8th April 1866, executed by Palikundi Nelliyil Ahmed and his younger brother to Olieth Kunhammed and in it there is a reference to the document in favour of Pokker. Granting that some property was acquired by Kunhammad in 1866 for Rs. 350 with the help of his father's funds, that fact alone will not help the plaintiffs unless they can show that the properties acquired at Cannanore were acquired with the help of the income or the corpus of the property conveyed under Exhibit K4. There is no such evidence on the record. It is next urged, that the funds in the hands of the mother Nangomma were utilized for acquiring the properties and reliance is placed on Exhibits B4, B3 and K1. Exhibit B4, dated 14th October 1830, is a sale-deed of *Jan-*

(7) 2 M. H. C. R. 162 at p. 163.

mom right for Rs. 525 to Naugomma and Exhibit B3, dated 31st May 1856, is a sale-deed of another property to Nangomma for Rs. 775, Exhibit K1 is a sale-deed in favour of Nangomma, dated 4th January 1862 for Rs. 5,000 said to be taken in discharge of a debt-bond for the same amount in faovur of Kunhayan. By Exhibit K1 were conveyed the family house into which Nangomma and her children removed after the purchase. There is absolutely no evidence to show that any help was rendered to Pokker by Nangomma by supply of funds, whereas it is quite clear that Pokker began to acquire considerable properties so far back as 1849, *vide* Exhibit K21. It may be, that Pokker furnished funds for the purchase under Exhibit K1. It is easy to suppose that Pokker who began to make a large fortune wanted to put some property in the name of his mother. There is no evidence as to how Kunhayan came to lend such a large amount as Rs. 5,000 so far back as 1862. The properties conveyed under Exhibit K1 may be considered as a gift to the mother by a dutiful son who was in affluent circumstances.

It is next urged that at least for the last thirty years, *i.e.*, since 1891, the members of the Thavazhi have been asserting adverse title to the properties and, therefore, the Karnavan and the other members of the Tarwad are barred by limitation from claiming any interest in the properties. In 1891 Olieth Achotti, a grand-daughter of Achotti, the elder sister of Nangomma, and the maternal aunt of the first defendant, brought a suit for maintenance against Kunhamad, Karnavan of the plaintiffs' Thavazhi. He as the eldest member of the whole Tarwad happened to be at that time the Karnavan of the Tarwad as well. That Suit No. 475 of 1891 was evidently intended to test the rights of the members of the Tarwad to share in the income of the properties in the hands of the members of the Thavazh . Exhibit K7 is the written statement of Kunhamad. Therein he contended that the properties were the separate earn ngs of h mself, of his elder brother Pokker and his younger brother Kunhayan who were dead at the time, having been acquired with the profits of the joint trade carried on by them at Cannanore with capital furnished by their father Mayan Ali Nagha, that the plaintiff and her Thavazhi were not entitled to be maintained out of the income of those properties. He further said that he was at least entitled to 1/3rd of the properties and that the rest 2/3rds had lapsed to the family of his Thavazhi. It is significant that he did not in that statement put forth the contention that they were Puthravagasam properties and that he was only entitled to be in possession of them as the Karnavan of the Thavazhi. He refused to act as guardian of the minor members of the Tarwad not belonging to his Thavazhi and on his objection the minor members were represented by the third defendant under the orders of the lower Court. The issues in that suit were: (1) "whether the parties are members of a joint Marumakattayam Tarwad having community of property?" (2) "Whether the defendants, *i.e.*, the members of the Thavazhi, belong to a family or branch separated in interest from that of the remaining defendants?" There is evidence to show that the written statement, Exhibit K7, was drafted by very well, known legal practtioners quite familiar with Malabar Law and custom and it is not likely that if the properties were really Puthravagasam properties Kunhamad would not have mentioned that fact to the Vakils nor is it likely that they would not have questioned him about them if any materials had been placed before them to lead them to suspect that they might be Puthravagasam properties. His contention that he was entitled to 1/3rd of the properties as having jointly acquired with his two brothers is opposed to the contention that they were Puthravagasam properties. In 1891 there seem to have been a number of cases and in all of them the same contentions were put forward but till the year 1910 there is no document in evidence to show that any claim was distinctly put forward that they were Puthravagasam properties. It is next urged that the first defendant has made admissions that the Tarwad had no right to the properties and Exhibits K19 and K47 are relied on. The first defendant did not become a Karnavan till 1909 and any statement by him when he was only a junior Anandravan cannot be taken as

an admission against the interests of the Tarwad. He had no authority to represent the Tarwad or to make admissions binding on the Tarwad. It is alleged that he had a motive for making certain admissions as in Exhibit K19. Whether such statements be true or false they cannot bind the Tarwad.

It is next urged that the Tarwad did not assert its title to the properties after 1891 when its title was denied by Kunhamad. It must be remembered that Kunhamad died in 1892 and Koyamutti, his nephew, succeeded to the Karnavanship of the Tarwad. He happened to be not only the eldest male member of the Thavazhi but also of the Tarwad. Koyamutti died in 1909. After his death the first defendant, who belongs to a different Thavazhi from that of the plaintiffs, became Karnavan and the moment he became Karnavan, he began to contest the right of the 43rd defendant and others to withhold the properties from him. There can be no adverse possession against the Thavazhi inasmuch as the members of Nangomma's Thavazhi were Karnavans from 1871 to 1909. Mr. Menon relies on *Williams v. Pott* (8), to show that a person could acquire by adverse possession a lesser title than he is entitled to. His contention is that Kunhamad and Koyamutti, by asserting that the properties in their possession were Puthravagasam properties, though they were Karnavans at that time, acquired by such assert on an adverse title to the Tarwad. No doubt, in law it is quite possible for a person entitled to a larger interest by asserting a title less than the one he is entitled to for the statutory period to acquire such title. But there is no evidence to show that Kunhamad and Koyamutti ever asserted that the plaint properties were Puthravagasam properties belonging only to their Thavazhi. Whenever occasion arose, they asserted that it was the self-acquisition of Pokker and his brothers and not that they were Puthravagasam properties. If they were self-acquisitions, the law is that on their death the Tarwad becomes entitled to them.

It is further urged that several properties were given for maintenance to various members of the plaintiffs' Thavazhi and the claim of the Tarwad is barred by limitation. It is unnecessary to consider this contention seriously, when it is remembered that the plaintiffs' Thavazhi furnished Karnavans for the Tarwad continuously from 1871 to 1909. Mr. Menon's contention is that he has only to show that the family had a nucleus of property in order to succeed in the suit. There is no authority for the position that the mere fact that the mother or the father or the Thavazhi was possessed of some funds, is sufficient to make out that acquisitions by the male members of the Thavazhi were impressed with the character of Thavazhi property. I, therefore, hold that the plaintiffs have failed to prove that the properties in dispute are Puthravagasam properties.

The next contention urged by Mr. Menon is that the Full Bench decision in *Govindan Nair* v. *Sankaran Nair* (9) is bad law and is opposed to the present consciousness of the people, and that we should re-open the question by referring this case for the opinion of a Full Bench. That decision was given in 1908, and for the last 14 years it has been held to be good law notwithstanding the doubt expressed as to its soundness by Judges quite familiar with the Malabar Law and Customs, namely, Sir Sankaran Nair, J., Miller, J., and Sundara Aiyar, J., The Madras High Court has held in *Krishnan Nair* v. *Damodaran Nair* (10) that the principle of the decision in *Govindan Nair* v. *Sankaran Nair* (9) did not apply to the self-acquisitions of a female member of a Tarwad which descend to her Thavazhi. It may be that the consciousness of the people is opposed to the principle laid down, namely, that the undisposed of separate property of a male member of a Malabar Tarwad becomes the property of the Tarwad. It may be that the Malayalee Community, which is one of the most progressive communities of Southern India, feels shackled by its peculair laws and customs which are archaic and antiquated and quite unsuited to its present advancement and enlightenment. However much one may sympa-

(8) (1871) 12 Eq. 149; 40 L. J. Ch. 775.

(9) 2 Ind. Cas. 183; 32 M. 354; 6 M. L. T. 167; 19 M. L. J. 350 (F. B.).

(10) 17 Ind. Cas. 769; 38 M. 48; 13 M. L. T. 166; 24 M. L. J. 240.

thise with the present feelings of the community, it is not the province of a Judge to alter the law, however opposed it may be to the consciousness of the people. It is his duty to administer it as he finds it. I respectfully adopt the language of the learned Chief Justice in *Govindan Nair* v. *Sankaran Nair* (9): "I think this is a case in which we should act on the maxim *stare decisis*, and that if the law is to be altered it should be altered by the Legislature which can make due provision for the safeguarding of vested interests and existing titles." The decision in *Govindan Nair* v. *Sankaran Nair* (9) followed a decision of Mr. Justice Holloway in *Kallati Kunju Menon* v. *Palat Erracha Menon* (7), and seeing that the law has been uniform for the last 60 years it would not be proper to alter it by a judicial decision, when it could be done by an Act of the Legislature.

In the result, the appeal is dismissed with costs of respondents Nos. 1 to 4 and 6 to 34.

The connected Appeals Nos. 337 and 338 follow the decision in the main appeal and are dismissed with costs of first and third respondents in Appeal No. 337 and with costs of first respondent in Appeal No. 338.

Spencer, J.—I agree.

V. N. V.

Z. K. & N. H. *Appeals dismissed.*

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEALS NOS. 208, 209 AND 210 OF 1921.

June 26, 1922.

Present:—Mr. Justice Pratt.

CHAN HTOON AUNG—APPELLANT

versus

THE AKYAB MUNICIPALITY—RESPONDENTS.

Burma Municipal Act (III of 1898), ss. 51 (8), 63—Specific Relief Act (I of 1877), s. 56 (i)—Municipal Tax—Injunction.

Where a Notification of the imposition of a tax under the Burma Municipal Act has been published, a Civil Court is debarred from enquiring whether the tax has been legally imposed.

Municipal Committee v. *Gurthi Lengayya* S. J. L. B. 405, relied on.

A suit for an injunction to restrain a Municipality from imposing a tax under the Burma Municipal Act is not maintainable, but under section 63 of that Act an assessee has the right to object to the assessment before a Sub-Committee of the Municipality, and can claim a reference to the High Court on the question of his liability to, or the principle of, assessment.

Second appeals against the decree of the District Court, Akyab, in Civil Appeal No. 152 of 1920.

Mr. *Ba Dun*, for the Appellant.

Mr. *Ginwala*, for the Respondents.

JUDGMENT.—Plaintiff sued for an injunction restraining the Akyab Municipalty from imposing a scavenging tax at the rate of 6 per cent. on the annual rental value of his house.

The Trial Court refused the injunction and the appeal was dismissed in the District Court. It is admitted that if the ruling of the Special Court in *Municipal Committee* v. *Gurthi Lengayya* (1) is sound law the suit was not maintainable. The Special Court held that, where Notification of the imposition of a tax under the Burma Municipal Act has been published a Civil Court is debarred from enquiring whether the tax has been legally imposed.

Section 51 (8) of the Act, which corresponds to section 45 (9) of the old Act, provides that a Notification of the imposition of a tax under this Act shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. I see no reason to doubt the correctness of the view taken by the Special Court.

I would further point out that appellant had a remedy provided by the Act. Section 63 give him a right to object to the assessment before a Sub-Committee, and provides for an appeal from their decision to the Deputy Commissioner, as the case may be. He can also claim a reference to the Chief Court on the question of his liability to, or the principle of assessment.

Apart, therefore, from the terms of section 51 (6) of the Municipal Act, the Court would have to dismiss the suit for an injunction under section 56 (*i*) of the Specific Relief Act.

The appeal is dismissed with costs.

W. C. A. *Appeals dismissed.*

(1) S. J. L. B. 405.

SESHADU REDDI *v.* PICHI REDDI.

MADRAS HIGH COURT.

CIVIL APPEAL No. 166 OF 1921.

August 16, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

JAKKAMREDDI SESHADU REDDI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAKKAMREDDI PICHI REDDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Service inam—*Trustee, whether can hold* inam—*Resumption*—Inam *burdened with trust, nature of*—*Surplus income, disposal of*—*Removal of trustee, grounds for*—*Evidence Act (I of* 1872), *s.* 90—*Presumption, applicability of, to copies.*

There is nothing in law to prevent the trustee of a temple from being also the holder of a service *inam* in the temple. [p. 36, col. 1.]

Where an *inam* had been granted in favour of one of the ancestors of the defendant for the purpose of enjoying the land and causing the Deeparathana services to be rendered to the deity subject to the payment of a quit rent to Government:

Held, that the *inam* was one to be held by the grantee and his heirs burdened with the trust of doing certain services for the benefit of the temple, and that any surplus left over after the performance of the services accrued to the benefit of the donee and the service holder was not bound to account for his disposal of the surplus proceeds of the land. [p. 38, col. 1.]

Srinivasa Chariar v. *Evalappa Mudaliar*, 68 Ind. Cas. 1; 31 M. L. T. 1; 16 L. W. 247; 54 B. 565; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.) and *Mohamed Husain Saheb* v. *Mohamed Abdul Rahim Beg Saheb*, 67 Ind. Cas. 492; 42 M. L. J. 272; (1922) M. W. N. 74; 15 L. W. 241; (1922) A. I. R. (M.) 8, relied on.

The powers of resumption of *inams* and the discretion of exercising it in a proper case rest with the Government, and where the Government has not resumed a temple service *inam*, the properties continue to belong to the service-holder and a Court has no right to declare that a temple service *inam* should revert to the temple to be managed by the trustee as temple property. [p. 36, col. 1.]

Courts will not remove a person who has been in possesson of the office of Dharmakartha for many years and belongs to the family of the original trustees at the instance of strangers unconnected with the family unless there is clear evidence of misconduct and unless it appears to be to the clear benefit of the trust that the Dharmakartha should be removed. [p. 39, col. 1.]

So where a trustee belonging to the family of the original trustees set up private ownership in some items of the temple property in genuine ignorance and uncertainty as to his legal position while admitting the ownership of the temple in other items and no case of misappropriation was proved:

Held, that a case had not been made out for the removal of the trustee. [p. 39, col. 1.]

Srinivasa Chariar v. *Evalappa Mudaliar*, 68 Ind. Cas. 1; 31 M. L. T. 1; 16 L. W. 247; 45 B. 565; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.), distinguished.

Subbaroya Chetti v. *Subramania Iyer*, 48 Ind. Cas. 833; (1918) M. W. N. 786, followed.

Documents more than thirty years old, purporting to be true copies of the originals and coming from proper custody, can be presumed to be genuine under section 90 of the Evidence Act. [p 36, col. 2.]

Nanu Nair v. *Kantan Ashta Moorthi Nambudripad*, 29 Ind. Cas. 386; 29 M. L. J. 772; 2 L. W. 509, referred to.

Appeal against a decree of the Court of the Subordinate Judge Nellore, in Original Suit No. 61 of 1917 (Original Suit No. 47 of 1917 on the file of the District Court, Nellore).

Mr. *C. Madhavan Nair*, for the Appellants.

Mr. *T. V. Ramanatha Iyer*, for the Respondents.

JUDGMENT.

Spencer, J.—This suit was instituted under section 92, Civil Procedure Code, by the President of the Dharmarakshana Sabha of Madras which is an Institution for the protection of religious institutions and by another person, who is the second plaintiff, for the removal of the defendants from the office of trustees of the temple of Sri Chennakeswara Swami in the village of Vodur in the Nellore District and for appointing new trustees and for drawing up a scheme for the efficient management of the temple. The plaint alleged 18 different breaches of trust against the defendants, but the controversy between the parties turned chiefly upon the ownership of certain items of immoveable property, Items Nos. 1 to 8. At the time of trial it was conceded that Items Nos. 1 to 8 and 3 to 5 were temple properties to which the defendants had no claim. In respect of items Nos. 6, 7 and 2 the question at issue was whether these items were the absolute property of the temple, being endowments granted by the Government in the name of the God or whether they were service inams in the name of the manager of the temple burdened with the trust of getting certain religious duties performed. I will proceed to deal with these items in the order in which they are taken in the lower Court's judgment.

Item No. 6, Thalimanicm Inam. Exhibits

C and C (1) which are proceedings of the Inam Deputy Collector and an *inam* title-deed respectively of the years 1860 and 1861 show that this *inam* was given to an individual named Papiah for making ornaments for the deity, that when Papiah died, the *inam* came into possession of his wife Lakshmakka who got a title-deed confirming the *inam* to her and her successors free of tax, that afterwards it was alienated to a Brahmin, K. Subbrayudu by name, and that the Deputy Collector recommended that the alienee might continue to enjoy the *inam* so long as the service was efficiently performed. In 1912 a title-deed was issued for this *inam* in favour of the first defendant, Exhibit VIII, and the first defendant made two statements in 1912 marked Exhibits Q and Q (1) declaring that he was rendering the service required by making jewels for the Devastanam and that the heirs of the former *inamdar* were not traceable. In his evidence at the time of trial the first defendant deposed that the service attached to this *inam* consisted of getting jewels made by the goldsmith and paying his wages, the jewels being for the adornment of the God, but the cost of materials for the jewels was being met out of the temple income. The Subordinate Judge was of opinion for some reason which he did not explain, that a trustee cannot hold a service *inam* land. This was not the opinion of the Government who granted the title-deed in the first defendant's favour. The learned Judge observes: "I must say that this land reverted to the temple and that it should be held as temple property subject to the management of trustees especially when Government have not chosen to take any steps for resuming this land. This is my finding on this point." The power of resumption of *inams*, however clearly lies in the hands of the Government. The Government has not yet resumed this land, but it will, no doubt do so if it finds at any time that the object of the grant has failed. While the discretion of exercising its power to resume the *inam* lies with the Government, the Court cannot make any direction, as the Subordinate Judge has done, that the *inam* should revert to the temple and that the trustee should manage it and treat it as property belonging to the temple.

Item No. 7:—It appears from the Inam Deputy Collector's proceedings, Exhibit E, that a tope of Iluppa trees once stood on this item and that the temple had the right to enjoy the oil derived from those trees. The Inam Deputy Collector recommended that the *inam* should be confirmed in the name of Peddi Reddi, the father of defendants, and Subba Reddi, on condition of paying one-fourth of the full assessment, as a personal *inam*. The first defendant stated that the land had been converted to wet and that there were no Iluppa trees now standing and the Judge has directed that one acre of this land in the possession of the second defence witness should be treated as the property of the temple as that witness admitted that he was enjoying that extent for doing the service of sweeping and making wicks for the lamps of the temple and other duties. There is no basis for a finding that any portion of the land in this item belonged to the temple, for the temple was only entitled to the usufruct of the Iluppa trees which no longer exist. The only order that can be made is that the holder of the land should continue to enjoy it, subject to the trust of supplying the temple with oil according to *mamool*.

Item No. 2.—This is the most important item as it covers a wide extent of land. The first defendant has made a statement as to the loss of the original title-deeds which he alleges were stolen by the second plaintiff when he was employed under him as a clerk and there is no particular reason for disbelieving that statement which stands uncontradicted by any evidence on the plaintiff's side. Exhibits XXXI and XXXI-A purport to be true copies of the original grants signed by the defendant's grandfather, Jakkam Reddi Subha Reddi. These documents were filed in the lower Court on the 13th December 1918. There is no record of any objection having been taken before the documents were filed. As being copies of documents more than thirty years old which came from proper custody, namely the Collector's Office, the presumption arising under section 90 of the Indian Evidence Act as to their genuineness might have been made by the Court. See *Nanu Nair* v. *Kantan Ashta Moorthi Nambudripad* (1). The Subordi-

(1) 29 Ind. Cas. 386 (29 M. L. J. 772) 2 L. W. 509.

nate Judge who wrote the judgment in this case remarks that these documents were introduced subject to object ons, if any, but, unfortunately, he was not the Judge who heard the evidence and there is nothing in the B D ary to show that the documents were admitted subject to objections. It is argued that these documents are not, properly speaking, secondary evidence but I find they are. The signature of the defendant's father under the words "A true copy of the original" is some guarantee that they were compared with the original and found be be correct. The appearance also of these documents is in thier favour. Exhibit XXXI purports to be a grant of 20 gorrus of forest land to Jakkam Reddi Krishna Reddi who was the great-grandfather of the defendants for the purpose of enjoying the land and causing the Nivedya and Dheeparathana services to be rendered to Sri Chennakeswara Swami. Exhibit XXXI (*a*) purports to be a grant of 212-3/16 gorrus of forest land in favour of Jakkam Reddi Krishna Reddi and subject to the same conditions as to services to be rendered to the temple. The land covered by Exhibit XXXI (*a*) at that time was probably of very little value, but, owing to the increase in the value of cultivable land and the discovery of mica mines in this locality, it has now become very valuable. Exhibits XXXI (*b*), XXXI (*c*) and XXXI (*d*), which are documents of delivery, relating to this *inam*, confirm the conclusions arising from Exhibits XXXI and XXXI (*a*) and make their genuineness more probable. Exhibit XII, a report made by the Karnams of the village in 1824, states that that is a *kandriga* or service *inam* enjoyed by Jakkam Reddi Krishna Reddi for the purpose of making N vedya and Deeparathanam offerings and that he was getting such services done to the Swami. The Subordinate Judge refers to Exhibit I which is a *kaifiat* made by the Karnam in the village before the Collector of Nellore District in 1851. He says that the question put by the Collector pre-supposes that the *inam* was intended to be the poperty of the suit temple and that the answer given by the Karnam shows that the defendant's family were simply managing this item as Dharmakarthas: but it does not appear that the defendants were parties to this enquiry and the op nion of the Collector, whether expressed or implied, is not evidence against their title. Exhibit III is another statement made by some Karnam on some date and occasion not known. This document and Exhibit VII are not of much value so far as they confl ct with the evidence of the deeds of grant. Exhibit VII being a statement made by the uncle of the first defendant during the latter's minority, is not bindng on him as an admission. Exhibits B and B-2 are statements made by the village Official and residents of Vodur. The circumstances under whch these statements were made do not appear and being statements of persons not called as witnesses they are not evidence against the defendants. Exhibit V, the Inam Register, is an important document and in column 13 therein the name of the original grantee is given as Chennakeswara Swami Varu. In column 16 the present owner is stated to be Jakkam Reddi Pedda Reddi and Co., Managers of the temple, and in column 10 the *inam* is said to be hereditary so long as the service is performed. The title-deed for this land, which is described therein as Devadayam or Pagoda Kandriga *inam*, Exhibit VI, was granted to "the Manager for the time being of the Pagoda of Sri Chennakeswara Swami Varu" and the conditions are stated to be that a quit rent of Rs. 57-12-0 should be paid and that the *inam* should be confirmed to the said manager and his successors so long as the conditions of the grant were duly fulfilled. The *inam* statement, Exhibit XXX (*a*), records that this land was granted by Mr. Travers to Jakkam Reddi Krishna Reddi who felled the trees, cultivated the land and was performing the Nivedya and Deeparathanam services in the suit temple. In Exhibit K, which is a list of cultivation of a porton of this *inam*, it is described as Devadu Kandrigai. This is a document signed by the first defendant, and if the expression Devadu Kandrigai could be treated as an admission that the *inam* was an absolute endowment to the temple this might be utilised as an admission of his own want of title, but Devadu Kandrigai conveys no more than Devadayam *inam*. Exhibts XXXI and XXXI (*a*) suggest that this *inam* was granted to Krishna Reddi for his enjoyment of the produce subject only to the duties to be performed on behalf of the temple. In Exhibit XXXI (*a*) it recited that the

reason for the further grant of 212 gorrus was that the grantee was *unable to maintain himself* with the lesser extent of 20 gorrus. The document states that the grantee should pay every year the instalments of the *kist* to *Government* and *enjoy the produce*, and that things should be carried on in this manner as long as it might be deemed proper by the Government. The words in italics indicate that it was intended that Krishna Reddi should derive his subsistence from the produce. Therefore, the grant appears to have been one of an *inam* to be held by an individual and his heirs burdened with the trust of doing certain services for the temple. In such cases any surplus income left after the performance of the services accrues to the benefit of the donee. See *Muttevi Srinivasacharyulu* v. *Dinavahi Pratyanga Rao* (2) and *Mohamed Husain Saheb* v. *Mohamed Abdul Rahim Beg Saheb* (3). It is not necessary in such cases that the *inam*-holder should account for his disposal of the surplus produce of the land. The other exhibits in the case are of minor importance. Exhibits S, L, R, M, U, A and A (1). If there was any admission in paragraph 17 of Exhibit A (1) by the defendant's Vakil it is not proved to have been authorised by him.

We must reverse the findings of the Subordinate Judge on Issue III and hold that Items Nos. 2, 6 and 7 are not recoverable from the defendants as being the exclusive property of the temple.

Under the IVth issue it is not shown that the defendants committed any breach of trust in respect of this land as the grant does not provide for the utilisation of the surplus produce. From Exhibit K and the plaintiff's own statement it appears that a portion of the lease amount was utilised to pay off a promissory-note for the personal debt but the defendants have not been asked to explain why they took the rent to pay off a private debt and there is no substantial charge against them under this head. The Subordinate Judge found the charges (*b*), (*h*), (*p*), and (*q*) of misconduct not proved. Charge (*i*) relates to the change of Archakas. It is unimportant and it is not shown that the defendants deliberately changed any of the old practices of the temple. The other charges relate to the claim for lands with which I have already dealt. The defendants appear to have felt some doubt as to their rights in respect of these *inams* and this uncertainty can hardly be stated to have been unjustifiable having regard to the difficulty felt both by this Court and the lower Court in determining what exactly was the nature of the original grants. In his memorandum filed on 14th November 1917 the first defendant stated that Items Nos. 2 to 6 were service *inams* and that Item No. 7 was an *inam* belonging to defendant's family. In the argument it was admitted that Items Nos. 1, 8, 3, 4 and 5 belonged to the suit temple. In a statement made in 1916, Exhibit U, the first defendant admitted that Items Nos. 3, 4 and 5 belonged to the temple, that there was no other land belonging to the God and that he was its Dharmakartha, and that Item No. 2 was an *inam* for festival purposes. In Exhibit JJ the defendant's father first said that he was authorised to use the income of the Devastanam lands for the expense of the temple only and then expressed his ignorance whether he could use any of the income for his own benefit as the *patta* was in English. The defendants are not persons of much education and they seem to have been in some genuine uncertainty as to what their duties and rights were. Their uncertainty as to their legal position under the deeds of grant and other documents is not a reason for punishing them to the extent of removing them from office. The trust is not likely to be better administered by being placed in the hands of persons unconnected with the family of the founder. The defendants are interested in seeing that worship is maintained in this temple which their ancestor founded. It is not proved that they misappropriated any of the temple income. In fact, the Subordinate Judge finds in paragraph 30 of his judgement that the income derived from the temple properties must have been wholly spent for temple purposes. The credit of Rs. 32 to the tem-

(2) 64 Ind. Cas. 816; 30 M. L. T. 101.
(3) 67 Ind. Cas. 492; 42 M. L. J. 272; (1922) M. W. N. 74; 15 L. W. 241; (1922) A. I. R. (M.) 8.

ple in the accounts as income of the Manyam appears to have been calculated upon some calculation of averages and does not indicate any intention of fraud. The first defendant's account-keeping was not his strong point. The defendants may not hitherto have realised their duty of strictly accounting for every pie of the temple income. This is not a case resembling that of *Srinivasa Chariar* v. *Evalappa Mudaliar* (4) where a trustee was found to have asserted private ownership in himself to trust properties, to have strenuously resisted their recovery and to have supported this unfounded assertion by deliberate concoction of accounts. The features of this case are more like those of the case reported as *Subbaroya Chetti* v. *Subramania Iyer* (5), where we held that there was no reason to disturb the defendants who had been in possession of the office of Dharamakarthas for many years and belonged to the original family of trustees. We declined to remove them at the instance of strangers unconnected with the family unless we found clear evidence of misconduct and unless it appeared to be to the clear benefit of the trust that the Dharmakartha should be removed.

In this state of things we dissent from the lower Court's finding on Issue VII that the defendants should be removed from their office. This litigation will serve as a lesson to them to keep proper accounts of the temple income and to guard against any mixing of the temple property with their own property. Subject to the regular performance of the duties imposed in the deeds of grant, they may continue, to enjoy the properties subject to the trust so long as they are managers or Dharamakarthas of the suit temple.

The appeal is allowed and the suit dismissed. The respondents will bear their own costs both here and in the lower Court. The appellants may recover their costs from the income of the lands.

Devadoss, J.—I agree.

V. N. V.

Z. K. *Appeal allowed.*

(4) 68 Ind. Cas. 1; 31 M. L. T. 1; 16 L. W. 247; 45 B. 555; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.).

(5) 48 Ind. Cas. 833; (1918) M. W. N. 786.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 234 OF 1921.

July 12, 1922.

Present:—Mr. Justice Maung Kin.

MAUNG LUN AND ANOTHER—APPELLANTS

versus

MAUNG DUN AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Delay caused by seeking review on insufficient grounds—Sufficient cause.

Where an appeal is presented after expiry of the time prescribed therefor, and the appellant applies for exclusion of the time taken up in prosecuting an application for review, the Appellate Court should not exercise its discretion under section 5 of the Limitation Act, if the grounds of the application for review seem to be unreasonable.

Mr. *S. M. Bose*, for the Appellants.

Mr. *Barnabas*, for the Respondents.

JUDGMENT.—This appeal is time-barred by two days.

The appellant filed affidavits showing that he was busy applying for a review of the lower Appellate Court's decree when the time occupied by the review proceedings is deducted out of the time that elapsed between the appellate decree and the day on which the appeal was filed, it was found to be time-barred by two days.

On the last statement it looks as if the appeal was time-barred on account of the review proceedings, but that was not so.

The appellate decree was passed on 5th September 1921. The application for review was made on 29th October 1921. It was fixed for hearing on 16th November 1921 and was dismissed on that date. An appeal to this Court from the appellate decree was not time-barred yet on that date. The appellant still had 26 days, we have no explanation by affidavit or otherwise why he did not file this appeal within those 26 days. On this ground alone, the appeal should have been rejected as being time-barred. But the grounds of the application for review seem to be unreasonable, and for that reason this Court should not exercise its discretion under section 5 of the Limitation Act. *See Maung Po Lu* v. *Maung Kyin* (1) The appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

(1) 1 L. B. R. 313.

MARIAM BEGAM *v.* MOHAMMAD MEHDI.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 13 OF 1923.

May 3, 1923.

Present:—Mr. Simpson, A. J. C.

Musammat MARIAM BEGAM—JUDGMENT-DEBTOR—APPELLANT

versus

Saiyid MOHAMMAD MEHDI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908); Sch. I, Art. 182—Execution of decree—Application for substitution by assignee decree-holder—"Step-in-aid of execution"—Application accepted by Court, whether can be questioned subsequently.

An application made by the assignee of a decree to have his name substituted in place of the original decree-holder is a step-in-aid of execution within the meaning of Art. 182 of the Second Schedule to the Limitation Act. [p. 40, col. 2.]

Pitam Singh v. *Tota Singh*, 29 A. 301; 4 A. L. J. 184; A. W. N. (1907) 74 and *Sheo Ram* v. *Ram Bharosey*, 69 Ind. Cas. 660; 9 O. L. J. 444; 26 O. C. 71; 4 U. P. L. R. (O) 97; (1923) A. I. R. (O.) 9, followed

Kuppuswami Chettiar v. *Rajagopala Iyer*, 70 Ind. Cas. 324; 42 M. L. J. 303; 15 L. W. 348; 45 M. 466; (1922) M. W. N. 113; (1922) A. I. R. (M.) 79, not followed.

Srinivasa Aiyangar v. *Dharni Mudaly*, 17 M. L. J. 475, referred to.

Where an application to take some step-in-aid of execution is accepted by the Court, it must, even if defective, be treated as one in accordance with law so as to satisfy all the requirements of Art. 182 of the Limitation Act although notice to the judgment-debtor may not have been issued or served. The defect must be discovered at the time, otherwise as a general rule it will save limitation. [p. 41, col. 1.]

Appeal against a decree of the Fourth Additional District Judge, Lucknow, dated the 24th March 1923, upholding a decree of the Munsif, South Lucknow, dated the 22nd December 1922.

Messrs. *P. C. Gupta* and *Gulam Hasan*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This second appeal raises two questions of law. The first is whether an application by the assignee of a decree to have his name substituted is a step-in-aid of execution so as to save limitation under Art. 182 of the Limitation Act. The second is whether, if this is so, a defect in giving notice to the judgment-debtor will vitiate the application. It is unnecessary to deal with the facts, which are given fully in the judgment of the lower Appellate Court. It is sufficient to say that the application which concerns us was made on 26th April 1919 and if it was a step-in-aid of execution, limitation is saved. Both the Courts below have held that there is no bar to limitation, and I agree. There is a direct authority for the proposition in *Pitam Singh* v. *Tota Singh* (1). There is no direct authority to the contrary. The case *Kuppuswami Chettiar* v. *Rajagopola Iyer* (2) deals with the substitution of names. No doubt, there are remarks in that decision which would support the present appeal. It was held that, in order to save limitation under Art. 182, there must either be an application for execution or failing that an application made to support the application for execution. But this doctrine was negatived in a carefully reasoned decision of this Court, *Sheo Ram* v. *Ram Bharosey* (3). The Madras High Court provides no direct authority on the question. Indeed, in *Srinivasa Aiyangar* v. *Dharni Mudaly* (4) the Allahabad decision already referred to [*Pitam Singh* v. *Tota Singh* (1)], was expressly followed. It is unnecessary to refer to further authorities. I follow the decision of a Bench of the Allahabad High Court which is supported, to some extent, by a decision of my own Court, and which is not contradicted by any reported case.

On the second point, the question is raised for the first time in second appeal. It was suggested that paragraph 7 of the objections raised the point. That paragraph contains words "But there was no knowledge of proceedings either to the judgment-debtor, objector or to her minor son or to any legal guardian of the minor till the end of 1921." That objection, however, refers rather to the application of 16th July 1921 than to the application of 26th April 1919 with which we are concerned. In

(1) 29 A. 301; 4 A. L. J. 184; A.W. N. (1907) 74.

(2) 70 Ind. Cas. 324; 42 M. L. J. 303; 15 L. W. 348; 45 M. 466; (1922) M. W. N. 113; (1922) A. I. R. (M) 79.

(3) 69 Ind. Cas. 660; 9 O. L. J. 444; 26 O. C. 71; 4 U. P. L. R. (O) 97; (1923) A. I. R. (O.) 9.

(4) 17 M. L. J. 475.

the first appeal nothing was said on the subject, and the Appellate Court was under the impression that notice was duly served. In the second appeal, nothing is said in the grounds of appeal. The question is raised for the first time in argument. I should be unwilling to decide a case on a point so raised so late. Looking to the record it is impossible to hold that the judgment-debtor received notice. The judgment-debtors were two, the mother *Musammat* Mariam Begam and her son Muzaffar Husain, minor. The notice to *Musammat* Mariam Begam was returned unserved, and no attempt was made to serve the Pleader who had been appointed guardian *ad litem* of the minor. Service on his mother would not have been good service. But I am prepared to hold, nevertheless, that the application was according to law. It was accepted by the Court to which it was presented and that fact initself, goes a long way in deciding the question whether the application is in accordance with law so as to satisfy all the requirements of Art. 182. If the Court accepts the application, the applicant is entitled to suppose that his application complied with law, and as a rule in all subsequent matters it will be taken for granted that it did so. If there was any defect in the application it ought to be discovered at the time, otherwise it will, as a general rule, save limitation.

For these reasons I dismiss the appeal with costs.

G. H. *Appeal dismissed.*

N. H.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 336 OF 1921.

June 29, 1922.

Present:—Mr. Justice Duckworth.

MAUNG THIT SA—PLAINTIFF—APPELLANT

versus

MAUNG NAT—DEFENDANT—RESPONDENT.

Tort—Right, infringement of—Special damage.

Where a person is in the enjoyment of a right and another deliberately infringes that right, the person injured can succeed in an action for damages without proving special damage, *i.e.*, whether any damage has been proved to have accrued to him or not. [p. 41, col. 1.]

JUDGMENT.—There can be no dispute about the facts in this case. The parties were lessees of adjoining fisheries for 1920-21, the fishery of the plaintiff-appellant being the lower one. During 22 days of the season defendant-respondent kept erected in his fishery certain *akeses*, which may, for the purpose of this appeal, be taken to have been illegal obstruction to the passage of fish. It is quite clear from the evidence that this action on defendant-respondent's part to some extent lessened the plaintiff-appellant's catch of fish by obstructing them from such ready access to his fishery as they would otherwise have had. On this account the plaintiff-appellant sued the defendant-respondent for a sum of Rs. 1,320 by way of damages assessing his loss at 300 viss, *i.e.*, 1 boat load of fish a day at Rs. 20 per 100 viss for 22 days. The Court of first instance gave plaintiff a decree for Rs. 500 damages, basing the said amount on the fact that owing to his illegal acts the defendant obtained in all 2,500 viss of fish which he otherwise would not have got, and that 100 viss of fish were worth Rs. 20 a viss.

The Divisional Court held that, though the obstruction was illegal, there were no materials upon which to assess the damages, and accordingly dismissed the suit. It apparently held that it was necessary for the plaintiff to prove special damage. Herein the Divisional Court was in error. The cases of *Yan Gin* v. *Maung Hmon* (1) and *Nga Myat Hmwe* v. *Nga Yi* (2) make it quite clear that in such a case as this where there is a right and another deliberately infringes that right, the person injured can succeed without proof of special damages, *i.e.*, whether any damage has been proved to have accrued to him or not. In a case such as this, it is impossible for the plaintiff to prove in any exact manner the damage he had suffered and all he could do was to call evidence to show the effect of the obstruction as best he could. The

(1) 5 Bur. L. R. 43.
(2) 2 U. B. R. (1904-06), Tort, 9.

evidence called by plaintiff shows clearly enough that he did suffer *actual damage*, that his takings were reduced from 300 to 600 viss a working day. Mg San Lwin, a fisherman, puts the loss at 300 viss a day, but he is plaintiff's son and may be biassed, though it is noticeable that plaintiff and his son put the loss at a lower figure than their witnesses. The Fishery Inspector—an expert—assesses the loss at about Rs. 800 because he says that the defendant won that value of fish by means of his *akeses* at a time, when, but for them he would have got no fish at all, owing to the high state of the water. These are clearly materials for assessing the damage, and I consider that the Divisional Court was in error in dismissing the suit for the reasons stated. Though I agree that the Court of first instance was wrong in assessing plaintiff's damages entirely on the defendant's profits, there is enough evidence to show that plaintiff certainly suffered damage at least to the extent of Rs. 500. He does not now ask for more.

The appeal is allowed. The decree of the lower Appellate Court is set aside, and that of the Court of first instance restored with costs in all Courts on Rs. 500.

W. C. A.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 291 OF 1922.

May 25, 1923.

Present:—Mr. Wazir Husan, A. J. C.

BALDEO AND OTHERS—DEFENDANTS—APPELLANTS

versus

B. SHER BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 62—Novation of contract—Similarity of terms—Limitation Act (XIV of 1859), s. 15—Oudh Civil Courts Act (XXXII of 1871), ss. 29, 30—Mortgage, declaration of, by Settlement Court—Period of redemption.

The essence of the innovation of a contract lie not in the dissimilarity of the terms between the old and the new contract but in the intention of the parties to supersede the old by the new. [p. 43, col. 2.]

A suit for redemption of a mortgage based on the terms of a declaratory decree obtained in a Regular Settlement Court is maintainable. The period of limitation in the case of a decree obtained while the Limitation Act of 1859 was in force is 60 years according to section 15 of that Act, and is not affected by the provisions of sections 29 and 30 of the subsequent Act of 1871. [p. 44, col. 1.]

Bhagwan Bakhsh v. *Chandi Dat*, 1 O. C. 289, *Debi Singh* v. *Rattan Singh*, 6 O. C 239 and *Raja Partab Bahadur Singh* v. *Raja Surat Singh*, 8 O. C. 361, referred to.

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 19th July 1923, confirming a decree of the Munsif, Musafirkhana, dated the 5th January 1922.

Mr. *Haider Husain*, for the Appellants.

Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.—This is a second appeal from the decree of the Subordinate Judge of Sultanpur, dated the 19th July 1922, which affirmed the decree of the Munsif of Musafirkhana, dated the 5th January 1922, by which the claim of the plaintiff-respondent for redemption of a mortgage was allowed.

The facts of the case are very simple. On the 7th September 1868 Baiju Tewari and Jogi Tewari applied to the Court of Settlement that they were holding 15 *bighas* and 14 *biswas* of land in the village Katant Parsotampur as mortgagees. The relief which they sought was that the settlement in respect of the land be made with them in the character of mortgagees. A decree was passed with the consent of the defendants Audan Singh, Suchit Singh and Rustam Singh on the 8th September 1868. The present suit was directed to redeem the mortgage evidenced by the terms of the consent decree referred to above. The only defence with which I am now concerned is one of limitation. It is contended that the original mortgage in respect of which proceedings were taken in the Settlement Court and concluded by the decree of the 18th September 1868 was of the year 1839 and consequently the claim for redemption is barred by the provisions of section 37 of Act XIII of

BALDEO *v.* SHER BAHADUR SINGH.

1879. The Courts below have repelled this defence on the ground that the proceedings in the Settlement Court evidence a new contract of mortgage and, therefore, no question of limitation under the terms of the section mentioned before arises.

In the petition of the mortgagees dated the 7th September 1868 there is no reference of any date of the mortgage then subsisting in respect of the land to which the petition related, but a perusal of the statement of one of the mortgagees, Baiju Tewari, recorded by the Settlement Court will disclose the fact that the year of the mortgage was 1246 *Fasli*. It may be stated parenthetically that Baiju's statement is not on the record of this case but I have looked into it from a certified copy handed to me by the Counsel for the respondent, the justification for this procedure being that the whole of the Settlement Record was before the lower Courts and the learned Subordinate Judge has referred to the statement of the parties contained in the Settlement proceedings. Before the claim of the mortgagees could be decided one of the mortgagors, Audan Singh, died and the evidence relating to the pedigree shows that he had two sons, Bindeshri Singh and Kalka Singh. Kalka Singh does not seem to have appeared on the scene in the Settlement proceedings but Bindeshri Singh came in and made the statement contained in Exhibit 7. The Court of first instance admitted Exhibit 7 in evidence on the date when it was tendered but subsequently returned it as not proved. It is still on the file of the case. I am of opinion that it should not have been returned and I admit it in evidence. It is a certified copy of the statement of Bindeshr Singh in the case to which I have already referred and must be presumed to be genuine.

In the application of the 7th September 1868 the area of the mortgaged land was stated to be 15 *bighas* and 14 *biswas*. In his statement Baiju said that the original mortgage was for the entire share but that the mortgagees had for some time past been only in possession of the area stated in the application. The application further said that the amount of the mortgage-money was Rs. 214. The decree, however, fixes it at Rs. 213-14-0. Baiju, mortgagee, offered to relinquish his rights if the mortgagors would pay him then and there the mortgage-money. The decree, on the other hand, gave the mortgagors right to redeem on any *Jethi Puranmashi*. In the application of the 7th September 1868 the mortgagee stated a liability to pay *paramsana* to the mortgagors of Rs. 28-5-0. per year. The decree fixed it at Rs. 28-1-0. These variations are undoubtedly slight but they certainly lead to the inference that the parties to that litigation substituted a fresh contract of mortgage in place of the old one.

Whatever might have been the terms of the old mortgage and whether the terms on which the parties agreed in the Settlement Court were the same as of the old mortgage or not seem to me to be immaterial. If the parties agreed to substitute a new contract in place of the old, the old contract ceased to exist and the rights and liabilities of the parties must be determined with reference to the new contract. The essence of the innovation of a contract lies not in the dissimilarity of the terms between the old and the new contract but in the intention of the parties to supersede the old by the new. See the provisions of section 62 of the Indian Contract Act (IX of 1872). Both the Courts below have decided that the parties to the litigation before the Settlement Court renewed the old contract of mortgage and I accept that finding as correct. Besides, the decree passed by the Settlement Court was declaratory of the rights and liabilities of the mortgagors and the mortgagees in respect of the land which was the subject-matter of the litigation. The terms of the decree are that the plaintiff's names shall be entered in the Settlement papers as mortgagees of the 15 *bighas* and 14 *biswas*, that whenever on any *Jethi Puranmashi* the defendants pay up Rs. 213-14-0, the mortgage-money, they will be entitled to redeem, and that so long as there is no redemption the plaintiffs will pay to the defendants the sum of Rs. 28-1-0 *paramsana* annually. The present suit is, therefore, founded on the terms of the decree and all the allegations in the plaint reveal that that is the nature of the suit.

There have been a series of cases in this Court in which suits for redemption of a mortgage based on the terms of a declaratory decree obtained in the Regular Settlement Courts have been brought and allowed. See *Bhagwan Bakhsh* v. *Chandi Dat* (1), *Debi Singh* v. *Rattan Singh* (2) and *Raja Partab Bahadur Singh* v. *Raja Surat Singh* (3). At the time when the Settlement Court passed the decree under consideration, the Law of Limitation applicable to a suit for redemption was provided by the provisions of section 15 of Act XIV of 1859. This Act took effect in Oudh on the 4th July 1882. Section 15 provided that limitation for a suit for the recovery of immoveable property against a mortgagee was 60 years. Therefore, on the date when the Settlement Court declared the relationship of the mortgagors and mortgagees between the parties of that litigation on the terms stated in the decree the mortgage was a subsisting one and not extinguished by any rule of limitation. The subsequent enactment of sections 29 and 30 of Act XXXII of 1871 cannot be given the effect of superseding the decree which was passed by a competent Court. The decree passed by the lower Courts is correct.

The appeal fails and is dismissed with costs.

G. H. & N. H. *Appeal dismissed.*

(1) 1 O. C. 289.
(2) 6 O. C. 239.
(3) 8 O. C. 361.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 15 OF 1922.

June 29, 1922.

Present:—Mr. Justice Duckworth.

MA WIN AND OTHERS—APPELLANTS

versus

MA NGON AND OTHERS—RESPONDENTS.

Tort—Defamation—Imputing unchastity to woman—Special damage.

In Burma, to impute unchastity to a woman is actionable without proof of special damage. [p. 45, col. 2.]

Special second appeal from a decree of the Divisional Court, Tenasserim, in Civil Appeal No. 58 of 1921.

JUDGMENT.—There can be no doubt about the facts in this case. The appellants, or rather the first appellant, accompanied by the other two appellants, went to a *zayat* near to the first respondent's house and told her to call the other respondents. She did so. The appellants belong to some Village Female Society and seem to have deliberately selected this *zayat* for the meeting. The second respondent was asked whether she had told others that they had called her quarter a dirty quarter, upon her saying "yes," it is shown that certainly the first appellant and possibly the other two appellants, launched a stream of the most filthy and obscene abuse at the respondents, using a vulgar word "you" with a plural affix. I have no doubt whatever that the abuse was levelled at the respondents colletively, and not to any one of them, or to their quarter generally. The words used were, as near as can be now gathered, "you prostitutes, you come to our quarter, and have sexual intercourse with our quarter men, who have sharp and pointed male members. Your female organs are rotten with sphegma and filth. You do just what those men want with you." Now this was clearly shouted out, not on the spur of the moment, but after deliberation. It amounts to far more than mere vulgar abuse, and is, in my opinion, defamation. There is nothing to show that the respondents-plaintiffs are not chaste women and two of them are unmarried girls. It will naturally be presumed that they are women of good moral character.

The questions raised on appeal from the decision of the Divisional Court which, on appeal awarded the respondents a sum of Rs. 45 by way of damages, against all three appellants are, that the three plaintiffs-respondents had no right under the law to sue together in one suit; that though the question of misjoinder of parties and causes of action was waived in the lower Appellate Court, it was raised in the Court of first instance and can still be set up; that the first Court, having found that the slander in question was only uttered by the first

appellant, and there being no grounds of appeal before the Divisional Court against that finding, that Court was in error in passing a decree against the second and third appellants without going into the question, or coming to a finding as to whether they uttered the slander or not; that the lower Appellate Court having found that the second respondent was not free from blame, inasmuch as she had previously called the defendant-appellant's quarter an unclean one, should have held that, whatever words were used were mere abuse and were not defamatory, and do not *per se* give rise to any cause of action; that respondents suffered no special damages and were not entitled to any damages on the ground of pain and mental distress caused by the use of insulting and abusive language, and that the damages awarded were excessive.

In regard to the question of misjoinder of plaintiff and causes of action, as, in my opinion, the merits have not been affected, even if there was such misjoinder, section 99, Civil Procedure Code, applies. Moreover, the matter was dropped in the lower Appellate Court, and rightly so.

I agree that it is open to doubt as to what part appellants second and third took in the slander. Moreover, the Divisional Court never went into the matter properly. I think that only the first appellant can be held liable, though the other two appellants probably were abettors of what was done. As regards the next point, there is some error here--what the second respondent was asked was, whether she had repeated the allegation of appellants that respondents' quarter was an unclean or unwashed quarter, to which she replied "Yes." As I have stated, the abuse then used was clearly defamatory and implied that the respondents were unchaste, and were prostitutes of the lowest and most dirty description. This is more than vulgar abuse and it is a feeble excuse to allege that such abuse is common in Burma and India. In the case of *Sukkan Teli* v. *Bipad Teli* (1), Rampini and Woodroffe, JJ., held that to impute unchastity to a man's wife defamed both her and her husband and that the words used were not mere verbal abuse, and that the husband was entitled to damages without proof of special damage. They held that the case of *Bhoont Money Dossee* v. *Natobar Biswas* (2) did not apply to the Mofussil and they distinguished the case of *Girish Chunder Mitter* v. *Jatadhari Sadukhan* (3). This opinion was much the same as that of Irwin, J. C., in the case of *Ma Pan Ye* v. *Maung Pan Aung* (4). This view was shared independently by Saunders, J.C., in *Nga Nyo* v. *Mi Te* (5). There are many other cases also which show that, in Burma, to impute unchastity to a woman is actionable without proof of special damage. This really deals with all the remaining points raised in appeal, except as to the quantum of damages. In my opinion, as no special damage has been proved a sum of Rs. 15 to each appellant is excessive. Moreover, I have held that only the first appellant is liable. I set aside the decree of the Divisional Court, and restore that of the Court of first instance, *i.e.*, that the first appellant do pay a sum of Rs. 5 to each of the respondents, who, the appeal having been decided *ex parte*, will get no costs in this Court, but will get all costs in the two lower Courts.

The suit against appellants Nos. 2 and 3 is dismissed, but, in the circumstances of the case, I make no order as to costs, Advocate's fees, three gold *mohurs*.

W. C. A. *Appeal partly allowed.*

(1) 34 C. 481 4 C. L. J. 388.

(2) 28 C. 452; 5 C. W. N. 659.

(3) 26 C. 653; 3 C. W. N. 551; 13 Ind. Dec. (N. S.) 1019 (F. B.)

(4) 11 Bur L. R. 271.

(5) 33 Ind. Cas. 673; 2 U. B. R. (1915) 98.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 164-B OF 1922.

April 11, 1923.

Present:—Mr. Kotwal, A. J. C., and Mr. Prideaux, A. J. C.

AYUB KAREEM—APPLICANT

versus

JAFFAR AYUB AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 29

AYUB KAREEM *v.* JAFFAR AYUB.

—*Suit by trustee against manager of trust property for accounts—Sanction of Advocate-General, whether necessary.*

The suit contemplated by section 92 of the Civil Procedure Code must be a representative one, brought by the person interested therein against trustees in respect of the trust mentioned, in cases where there has been a breach of trust or, if there is none, where the directions of the Court or relief of the kind mentioned in the section itself are wanted. [p. 47, col. 1.]

A suit by a trustee against a person appointed by him to manage the trust property for compelling him to render accounts of his stewardship as manager and for possession of books and papers, the property of the trust, does not come under section 92 of the Civil Procedure Code and may be brought without the sanction of the Advocate-General. [p. 47, col. 1.]

Application for revision of an order of the Second Additional District Judge, Akola, dated the 11th September 1922, in Civil Suit No. 4 of 1922.

Mr. *G. V. Deshmukh*, for the Applicant.

Mr. *M. B. Niyogi*, for the Non-Applicants.

ORDER.—The plaintiffs in this case sued stating that one Mohammad Hasham, Memon Kachi, who died in Akola in 1903, had on the 1st December 1902 executed a Will whereby he bequeathed three-fourths of his property to relations and one-fourth to charitable purposes. He appointed executors or trustees to manage the said property. The present trustees are the plaintiffs and defendant No. 1. The first defendant and the present applicant was appointed managing trustee but has since been removed by the trustees from his appointment on the grounds that he mismanaged the trust. Plaintiffs ask for an account, for the balance, if any, found due on taking accounts from defendant No. 1 as managing trustee and for possession of all account-books, minute-books and other documents relating to the trust property. The prayer clause of the plaint runs:—

"(*a*) As accordigg to the resolution of the trustees defendant No. 1 is no more the managing trustee and Banker he may be directed to render accounts of the proper income and expenses regarding the income and to pay to plaintiff No. 1 according to the resolution of the trustees the balance found with him on proper accounts being made.

"(*b*) Defendant No. 1 may be directed to make over to plaintiff No. 1 all the account-books, proceeding books and other papers regarding the poperty of the Will.

"(*c*) Defendant No. 1 may be directed to pay Court costs of the suit.

"(*d*) Proper interest may be awarded on the amount which defendant No. 1 may be directed to pay from the date of institution of the suit until re-payment.

"(*e*) Any other relief deemed proper and legal by the Court may be granted."

The defendant No. 1 pleaded, *inter alia*, that the suit was not maintainable for want of sanction under section 92, Civil Procedure Code, and the pleadings of the parties led to the framing of the following preliminary issues:—

1. Whether the trust created by the Will, dated 29th November 1902, is partly a public and charitable trust?

2. Whether the nature of the relief claimed in the present suit does not come under any of the clauses of sub-section 1 of section 92 of the Code?

3. Whether section 92 of the Code applies to the present case?

4. Whether the suit is bad for want of sanction under section 92 of the Code and should be dismissed on this ground?

5. Whether this Court has jurisdiction to try the present suit?

The lower Court's findings may be summarised as follows:—

The trust is partly a public trust; that section 92 of the Civil Procedure Code has no application to the case for the nature of the reliefs claimed do not come under any of the clauses of section 92, sub-section (1) and the suit is not bad for want of sanction of the Advocate-General. The Court further finds that the Court had jurisdiction to try the present case. Two points are pressed before us. The first is that the suit falls within the provisions of section 92, and the second that the Court of the Additional District Judge not being the principal Civil Court of Original Jurisdiction within the meaning of section 92 and the Local Government not having empowered it to try the suit, it has no jurisdiction to try it.

We deal with the first contention first for a negative finding thereon makes any

finding on the second contention unnecessary. The suit contemplated by section 92, Civil Procedure Code, must be a representative one, brought by the person interested therein against trustees, in respect of the trust mentioned, in cases where there has been a breach of trust or if there is none where the directions of the Court or relief of the kind mentioned in the section itself are wanted.

In paragraph three of the plaint the plaintiffs mention the reasons which led them to displace defendant No. 1 as a managing trustee. They do not sue to remove a trustee or to appoint a new one. They do not ask for an order vesting any property in a trustee or directing accounts to be rendered by defendant No. 1 as a trustee and enquiries into his acts as such nor ask for the reliefs mentioned in clauses (*e*), (*f*), (*g*) or (*h*) of section 92. They ask that the first defendant as a person appointed by them to manage on their behalf be made to give an account of his stewardship as manager and for possession of books and papers, the property of the trust. It was held in *Budree Das Mukim* v. *Chooni Lal Johurry* (1) that when a person or persons sue not to establish the general right of the public of which they are a member or members but to remedy a particular infringement of their own individual right the suit is not within and need not be brought under the section. In the present case the plaintiffs do not represent the public, their rights have been infringed as trustees: *Miya Vali Ulla* v. *Sayed Bava Saheb Santi Miya* (2). In a very similar case, *Bapuji Jagannath* v. *Govindlal Kasandas Shah* (3), it was held that the suit did not come within the section, and it has been held that a suit by a trustee of a public charitable or religious trust against a co-trustee for accounts does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General: *Appana Poricha* v. *Narasinga Poricha* (4). We have no hesitation in finding that the present suit does not come within the purview of section 92 of the Code of Civil Procedure. It is, therefore, unnecessary to record a finding on the second contention raised. The result is that this application for revision fails and is dismissed with costs. The lower Court will proceed with the case. Pleader's fee Rs. 30.

G. R. D. *Application failed.*

(1) 33 C. 789; 10 C. W. N. 581.
(2) 22 B. 496; 11 Ind. Dec. (N. S.) 913.
(3) 34 Ind. Cas. 167; 40 B. 439; 18 Bom. L. R. 335.
(4) 69 Ind. Cas. 304; 45 M. 113; 41 M. L. J. 608; (1921) M. W. N. 833; 15 L. W. 18; 30 M. L. T. 1; (1922) A. I. R. (M.) 17.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 71 OF 1921.
February 28, 1922.

Present:—Mr. Justice Duckworth and Mr. Justice Pratt.

MAUNG PO LUN AND OTHERS—APPELLANTS

versus

MA E MAI AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 48—Evidence Act (I of 1872), ss. 35, 91—Partition deed, unregistered, whether admissible to prove partition—Secondary evidence whether admissible—Revenue Records, Burma, admissibility of—Burmese Buddhists—Marriage—Re-marriage of father—Partition—Administration of justice—Courts, duty of.

A partition-deed which affects property exceeding in value Rs. 100 is compulsorily registrable, and unless it is registered, it cannot, under section 48 of the Registration Act, be used as evidence of the partition, and, under section 91 of the Evidence Act, secondary evidence is excluded to prove the terms of the deed. [p. 48, col. 2.]

Revenue Records, as made in Burma, are relevant evidence under section 35 of the Evidence Act, but they are not enough, taken by themselves, to prove a fact, such as, a partition. [p. 49, col. 1.]

Mi Sa U v. *Nga Pyan*, 2 U. B. R. (1904-06) Evidence, p. 3, *Mi Se Baw* v. *Mi Min Ya*, 4 Ind. Cas. 1084; 2 U. B. R. (1907-09), Evidence, p. 19, relied on.

Amongst Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle the children of the first marriage, and where the claims of the children of the first marriage have been settled they can make no further claim. [p. 49, col. 2.]

MAUNG PO LUN v. MA E MAI.

It is the duty of the Courts to administer justice taking a broad view, and not to allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law. [p. 51, col. 1.]

Appeal from the District Court, Hanthawaddy, in Civil Suit No. 23 of 1920.

Mr. *Highnbotham*, for the Appellants.

Mr. *Kya Gaing*, for the Respondents.

JUDGMENT.

Duckworth, J.—This is a suit for the administration of the estate of U Maung Gale, deceased. By his first wife, Ma Kin he had four sons, Ko Po Cheik, Ko Lu Nge, Ko Kyaw Dun and Ko Po Lun. He then took a second wife Ma E Mai, by whom he had three children. He died on September 11th, 1919. The defendants-respondents are the widow and the three children by the second marriage. Of the four sons by the first marriage, Po Chock and Lu Nge are dead, and plaintiffs-appellants Nos. 1 and 2, Po Lun and Kyaw Dun, are the surviving two sons. The remaining plaintiff-appellants are the grandsons of the deceased by the two sons who are dead. The 7th plaintiff-appellant is the widow of Ko Lu Nge.

The defence set up by Ma E Mai was that in the year 1270, Burmese Era, there was a partition of the estate made by U Maung Gale in consequence of his second marriage, whereby the four sons by the first marriage obtained possession of a large portion of the estate, both moveable and immoveable. The said sons, it was urged, renounced all right to any further claim upon U Maung Gale's estate. The plaintiffs-appellants replied denying that there was such a partition or that they renounced any further right to inheritance, and contended that, if there was such a partition, it would not exclude them from obtaining a further share.

The learned Judge of the District Court held that it was proved that a partition of the estate, as alleged by Ma E Mai, took place in the year 1270, Burmese Era, and that, that being so, according to the Buddhist Law, the plaintiffs-appellants were precluded from obtaining any further share in U Maung Gale's estate. The suit was accordingly dismissed with costs.

Ma E Mai produced what purports to be a deed of partition, Exhibit "A," dated in Pyatho in 1270, Burmese Era, and also a previous document, Exhibit "B," dated in Wazo 1270, Burmese Era, which purports to be an agreement, whereby U Maung Gale partitioned his moveable properties amongst the four sons, they, in their turn, undertaking to make no further claim on his estate, except for their proportionate shares of the paddy land.

Now, if, as I think, Exhibit "A" is a deed of partition, inasmuch as it affects immoveable property of a value far exceeding Rs. 100 it undoubtedly was compulsorily registrable. It is true that a partition can be effected orally, but in this case it was the plea of the defence that the partition was embodied in the document and there is no doubt that this document when once drawn up would require registration. This deed is, in fact, the partition deed and I have no doubt that the learned Counsel for the appellants is correct when he argues that under section 91 of the Evidence Act, secondary evidence cannot be given to prove the partition and that under section 48 of the Registration Act the document, Exhibit "A," cannot be used as evidence of the partition.

It has been argued by the learned Advocate for the respondents that Exhibit "A" can be used to prove the fact of partition. He quotes *Bishan Das* v. *Ram Singh* (1), the decision of a single Judge at Lahore, and the case of *Chhottalal Aditram* v. *Bai Mahakore* (2) and also the Privy Council case of *Varada Pillai* v. *Jeevarathnammal* (3) in support of his contention. However, a reference to these cases shows that the question at issue in each case was whether there was some specific relationship between the parties and that this relationship was what could be proved *aliunde*.

It is settled law that a relationship, such as partnership, landlord and tenant, and so forth, may be proved apart from the documents which embody the terms of

(1) 61 Ind. Cas. 399; 3 U. P. L. R. (L) 43.

(2) 40 Ind. Cas. 83; 41 B. 466; 19 Bom. L. R. 322.

(3) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

that relationship. But in the present case, as far as I am able to understand it, the point at issue is not a question of relationship but the fact and terms of a specific partition. I think, therefore, that there is no doubt that in this case the partition deed is incapable of proof and wholly inoperative.

As regards Exhibit "B" agreement which it is not disputed is admissible in evidence, there is no sufficient evidence to prove it. The evidence of the village headman, U Po That, may be sufficient to show that he is an unreliable witness, but in view of his statements it cannot be held to prove the document. Further, the Assessment Rolls which have been filed by the defendant-respondents are relevant under section 35 of the Evidence Act. This is clear from the case of *Mi Sa U* v. *Nga Pyan* (4) which shows that Revenue Records as made in Burma are relevant evidence under section 35 of the Evidence Act. In this connection I would also refer to the case of *Ma Se Baw* v. *Mi Min Ya* (5). However, it is quite clear from these rulings that Revenue Records are not enough, taken by themselves, to prove a fact, such as a partition.

Further, it is argued by the learned Counsel for defendants-respondents that a comparison of handwriting will enable the Court to hold that Exhibit "B" agreement is proved. Now the admitted signatures of Po Lun and Kyaw Dun on the record seem to me very similar to the signatures of Po Lun and Kyaw Dun on the document, but, here again, this is not sufficient evidence to prove it. It is manifest that if Exhibit "A" is, as I have held, entirely out of the Court's view, it is impossible to make comparison of handwriting in regard to it. As the records stand, not only Exhibit "A" but Exhibit "B" must be ruled out. The learned Judge of the District Court considered that Exhibit "A" was divisible and that it was capable of proof as regards partition of moveable property, but a reference to case of *Sambayya* v. *Gangayya* (6) and the case of *Lakshmamma* v. *Kameswara* (7) seems to me to indicate that, in such a case as this, the document is indivisible, especially as by the document the plaintiff-appellant purports to renounce all further claim to any estate.

We are thus reduced to the plaintiffs-appellants' evidentiary statements that it is true that they obtained possession of 390 acres of paddy land from U Maung Gale in 1270, Burmese Era, as well as certain moveable properties, but that this was by way of gift, and not partition. In my opinion these statements of the plaintiffs-appellants raise strong presumptions against them. It is impossible to get away from the fact that U Maung Gale's first wife, the mother of Po Lun, Kyaw Dun and the two other sons who are dead, had died and that U Maung Gale married again being the possessor of a large estate, the landed portion of which consisted of over 500 acres of paddy land. It is impossible to get away from the fact that from this estate, admittedly, 390 acres of paddy land and certain valuable moveable properties passed in 1270, Burmese Era, into the possession of the four sons.

Amongst Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle the children of the first marriage. It is most unusual for a father, when he re-marries merely to make gifts, and still more unusual to include in those gifts the bulk of his landed property.

In my opinion this change of possession in favour of the four sons is very significant so that I regard it as sufficient to shift the burden on to the plaintiffs-appellants to show that they obtained these properties by means of gift. This, of course, they have not proved, firstly, by lack of evidence and, secondly, because the gifts were not made by registered deed, as required by the Transfer of Property Act.

Further, the Assessment Rolls, which were filed by the defendants-respondents can be used, I think, to counter these allegations that they obtained possession of the land

(4) 2 U. B. R. (1904-06), Evidence, p. 3.
(5) 4 Ind. Cas. 1084; 2 U. B. R. (1907-09), Evidence, p. 19.
(6) 13 M. 308; 4 Ind. Dec. (N. S.) 926.
(7) 13 M. 281; 4 Ind. Dec. (N. S.) 908.

by means of gift. The mutation of names is not disputed and the transfer of names was not made as by means of gift. Section 213, Volume I, of the Kinwun Mingy's Digest makes it clear that, where the claims of the children of the first marriage have been settled, they can make no further claim. This matter was dealt with sufficiently in the case of *Ma Sien Ton* v. *Ma Son* (8). I consider, therefore, that I am entitled to hold that in this case the inheritance claims of the four sons were sufficiently satisfied and that just as if there had been a partition they can now claim no more.

Lastly, it would be, in my opinion, most inequitable to hold otherwise, and I consider that it is part of the function of a High Court, in dealing with such cases, to look below the surface and make deductions from the probabilities.

I would, therefore, dismiss the appeal with costs.

Pratt, J.—The facts of this case are sufficiently set forth in the judgment of my learned brother.

Plaintiffs are the sons and representatives of the sons of U Maung Gale, deceased, by his first marriage.

The defendants are the widow and children of the second marriage. Plaintiffs sued to recover their share in the estate of Maung Gale and for the administration of the estate.

The defence case was that U Maung Gale partitioned his estate in consequence of his second marriage, giving each of his four sons a substantial share of land, and that they renounced all further rights to his estate.

Unfortunately, the deed of partition on which the defendants relied was inadmissible as evidence of the partition through lack of registration.

I agree with my learned brother that the rulings cited in *Bishan Das* v. *Ram Singh* (1) cannot be taken as authorities for the proposition that the fact of a partition can be proved by oral evidence when the partition has been embodied in a document which is incapable of legal proof.

In the present case the deed itself is the partition. Oral evidence of the terms of the deed is excluded by the provisions of section 91 of the Evidence Act.

Plaintiffs, however, admitted that the sons by the first marriage did receive from their father certain properties about the time of the alleged partition.

First plaintiff admitted that 12 or 13 years after his marriage with first defendant U Maung Gale made gifts of immoveable and moveable properties to his sons. He himself received 4 or 5 *ticals* of gold and 60 or 70 acres of land.

The four sons between them received about 390 acres of land out of a total of 500. The transfers of land were made by mutation of names in the Revenue Registers.

In the Assessment Rolls for 1909-10 the lands are shown as transferred to the sons of U Maung Gale by way of inheritance. These entries are undoubtedlty relevant to show how the sons came to be in possession of land whch previously belonged to Maung Gale.

Plaintiffs allege that they came in possession by way of gift, but do not rely on any deeds. Their gifts, therefore, are no more valid than a partition by unregistered deeds. The entries in the Assessment Rolls show that reports had been made that the land was made over to the sons by way of inheritance, otherwise the mutation of names would not have been made.

These entries are not proof in themselves of a partition of his estate amongst his sons by U Maung Gale, but, taken together with the admission of the sons, they do show that the sons came into possession of a large portion of their father's estate in 1909-10.

The entries that the lands were transferred to the sons by way of inheritance are of importance, when the sons have no deed of gift to rely on.

The position, therefore, is, that the sons have already admittedly received from their father a very large portion of his property during his lifetime and after his second marriage. There has been no valid gift and the Revenue Records show that the land was made over to them by way of inheritance.

(8) 30 Ind. Cas. 588: 8 L. B. R. 501 at p. 511; 8 Bur. L. T. 203 (F. B.).

Even accepting plaintiffs' statements that U Maung Gale gave them the lands as gift, his distributing such a large share of his estate amongst his sons by the first marriage obviously requires explanation.

The fact that he did so after his second marriage and that he gave a considerable area of land to each son indicates that he was distributing his property amongst them in order to satisfy their claims to a share of his estate and in order to prevent disputes as to the division of his estate on his death.

This is the most probable motive for the so-called gift and I am of opinion that, under the circumstances, the assumption is justified that the distribution admitted by plaintiffs was made in ordes to satisfy their claims as heirs to the estate.

Having already obtained the major portion of their father's estate from him during his lifetime they now after his death sue to obtain the greater part of the residue as if they had received nothing at all.

I am of opinion that they are not entitled to sue for a share unless they consent to throw into the melting pot all the landed properties which they received from their father and with respect to which there has been no legally valid gift in their favour. This is not what they wish to do.

The equ ties of the case are entirely on the side of the defendants. It is the duty of the Courts to administer justice taking abroad view and not to allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law.

I concur in the view of my learned brother that the appeal should be dismissed with costs.

W. C. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 503 OF 1921.
July 27, 1922.
Present:—Mr. Hallifax, A. J. C.
Musammat MUNGA—PLAINTIFF—APPELLANT
versus
LACHMIPRASAD—DEFENDANT—RESPONDENT.

Pleadings—Appeal, second—Adverse possession, finding of—Finding of fact or law.

A finding on the question of adverse possession is not a finding on a question of fact, but a legal inference drawn from the facts found, and its correctness may be challenged in second appeal.

Second appeal against the decree of the District Judge, Bilaspur, dated the 23rd July 1921.

Mr. *J. C. Ghosh*, for the Appellant.

Messrs. *M. R. Bobde* and *Agarwala*, for the Respondent.

JUDGMENT.—Whether the last tenant of the holding in dispute was Pothiram or his posthumous son, who lived about a month, the holding devolved on Rupa as Pothiram's widow or as his son's mother, and when she married again three years before this suit was filed it passed to the plaintiff, Munga, as Pothiram's mother or his son's grand-mother. Rupa and Munga have, however, always lived jointly in the same house on nothing but the proceeds of the cultivations of the land and are doing so to this day, but no change was made in the *jamabandi* after Rupa's marriage and her name was allowed to stand as that of the tenant. In the First Court it was held that joint possession did not constitute joint tenancy, which is true enough but irrelevant, and, therefore, that Rupa's possession was adverse to Munga's, which does not follow in the least. The learned Additional District Judge in appeal arrived at the same finding after a very confused examination of several rulings, in the course of which he expressed the opinion that the ruling in *Sonsa Chamar* v. *Puran Singh Rajput* (1) is contradicted by that in *Sarjerao* v. *Tukaram* (2) and he was bound by the latter.

(1) 16 C. P. L. R. 145.
(2) 46 Ind. Cas. 244; 14 N. L. R. 107.

MAUNG SHWE HNYIN v FUL CHAND.

The only way in which the learned Pleader for the respondent has attempted to support the judgments of the Courts below is by urging that the finding that the possession of Rupa was adverse to Munga, or at least separate from hers, is a finding of fact with which this Court cannot interfere. It is, however, not a finding of fact, but a legal inference drawn from the facts found, the chief of which is the fact that Munga's name was not substituted for Rupa's in the *jamabandi*. Their Lordships of the Privy Council took the same view in regard to a finding of acquiescence by the lessor in the erection of structures by his lessee in *Beni Ram* v. *Kundan Lal* (3). That the inference drawn is correct can hardly be argued. After Rupa's marriage Munga, who then became the tenant, allowed her and helped her to cultivate the field and to pay the rent, as she had been doing ever since the death of Pothiram. This was probably because neither of them realised that the marriage had made any difference or that Munga was thereafter the tenant and Rupa was not. But their reasons or motives cannot alter the actual nature of their possession, which was joint. Munga, the tenant, did not leave the land uncultivated nor did she leave the rent of it unpaid, as she was doing both these things jointly with her daughter-in-law. The decree of the lower Appellate Court is set aside. In place of it a decree will issue ordering that the defendant shall place the plaintiff in possession of the holdings in dispute as an occupancy tenant. The defendant-respondent will pay all the costs in all three Courts.

W. C. A. *Decree set aside.*

(3) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 191 OF 1921.

June 13, 1922.

Present:—Mr. Justice Maung Kin.

MAUNG SHWE HNYIN—APPELLANT

versus

Lala FUL CHAND—RESPONDENT.

Mortgage—Mortgage of moveable property—Possession not given—Mortgagor disposing of property—Mortgagee, rights of.

Where, in the case of a mortgage of moveable property, possession is not given, and the mortgagor disposes of the mortgaged property to a third person, the mortgagee cannot follow the property into the hands of that third person unless he can show that that person had, at the time he took the property, notice of the mortgage.

Second appeal against the decree of the Divisional Court, Myaungmya, in Civil Appeal No. 93 of 1920.

Mr. *Maung Tin*, for the Appellant.

Mr. *Day*, for the Respondent.

JUDGMENT.—The plaintiff claims that the 1st and 2nd defendants mortgaged their five head of cattle and their crops at the time standing on a piece of land. Possession of the mortgaged property was not given to the plaintiff. It is not necessary to give the other particulars of the mortgage for the purpose of deciding the point involved in this case.

The plaintiff made Maung Shwe Hnyin a party defendant on the ground that he had taken away the crops after they had been reaped. The 1st defendant admits the mortgage, the 2nd did not appear, and the case proceeded *ex parte* against him.

The defendant, Shwe Hnyin, alleged in his defence that the 1st and 2nd defendants were his servants working for him on the land in question and that the crops were his property. He made no claim to the cattle. The Trial Court held that the 3rd defendant was the owner of the crops and that the 1st and 2nd defendants, his servants, had raised the same for him, and dismissed the suit as regards the standing crops and decreed it as regards the five head of cattle. The lower Appellate Court held that the 1st and 2nd defendants were the tenants of the defendant, Shwe Hnyin, and gave a decree against the crops as well. The lower Court went into extraneous matters because the real point was missed.

The case may be put in a nutshell as follows:—The plaintiff claims a mortgage on moveable property of which he has not got possession by virtue of the mortgage. If the mortgagor chooses to dispose of the mortgaged property to a third party, the mortgagee cannot follow that property into the hands of that third person unless he can show that that party had, at the time he took the property, notice of the mortgage. The question in this case then is: Did the defendant Shwe Hnyin have notice of the mortgage at the time he took the standing crops? The lower Appellate Court has held that he had constructive notice, while admitting the evidence regarding the same to be weak.

The plaintiff's case is that after the mortgage was effected, he showed the mortgage-deed to the defendant Shwe Hnyin. This was apparently before Shwe Hnyin took possession of the property. According to his witness, Maung Now Shwe Hnyin was present on the occasion of the transaction being agreed to and Shwe Hnyin was asked to go to the Registration Office to witness the transaction. The conflict between the plaintiff and his witness is too great, and neither testimony can be accepted.

It appears that the plaintiff got an *interim* injunction issued, and, according to the plaintiff's case, the order was not served or executed because Shwe Hnyin said he would not allow attachment (*sic*) to be made. We have two witnesses on this point, namely, Hussain and Abdul Gufoor, Hussain says he was called to witness the attachment of the paddy. He went and found the defendant on the scene. At that time Shwe Hnyin was told that the paddy was mortgaged property. Abdul Gufoor's evidence is in similar terms. The process-server has not been called. His evidence would have been more useful. Abdul Gufoor was casually present. The evidence of these two witnesses, Hussain and Abdul Gufoor, does not appear to me to be convincing. The lower Appellate Court itself considered the whole of the evidence on this point as being weak. I am, therefore, unable to hold that Shwe Hnyin had any notice of the mortgage.

The appeal is allowed, so far as the standing crops are concerned, with costs.

W. C. A. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO 22-B OF 1922.

April 25, 1923

Present :—Mr. Kotval, A. J. C.

Musammat GANGU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat KONGSHI—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 17—Minor, guardianship of—Mother, unchaste, position of.

The mere fact, that a woman gives birth to an illegitimate child is not a sufficient reason for not appointing her a guardian of her minor legitimate son's person and property.

Appeal against a decree of the District Judge, Amraoti, dated the 22nd March 1922, in Miscellaneous Case No. 70 of 1921.

Mr. *C. B. Parakh*, for the Appellants.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—It is admitted that Kongshi had the best right to be the guardian of her minor son, but it is contended that she is disqualified by reason of her immoral character. It was pleaded that two years after her husband's death she began to live with one Rama Mahar as his mistress and had an illegitimate daughter by him. The evidence as to Kongshi living with Rama is discrepant and not at all convincing. A *panchayet* is said to have been held at which Kongshi was outcasted, but N. A. Ws. Nos. 1 and 2 are not agreed as to who were the *panchas*. They do not know in what month the *panchayet* was held or the illegitimate daughter born. These witnesses were examined on the 16th January 1922 and the remaining witnesses on the 27th February 1922. Of the latter N. A. W. No. 5 is more specific but I am not inclined to put much reliance on him. He states that Rama was not a servant of Shiva but is contradicted by N.A. Ws. Nos. 1, 2 and 4. N.A.W. No. 4 who is the working *patel* of the village in which N. A. W. No. 5 resides and is a *kolwar* states that Rama was all his life in the service of Shiva. N. A. W. No. 5 further states that Kongshi is at present living with Nathu

Singh, a fact not mentioned by any other witness.

As regards the birth of a daughter, N. A. W. No. 4 produced a Births and Deaths Register which contained an entry under date 25th May 1920 that Kongshi gave birth to a girl who died after birth. Non-applicant, Gangu, in her pleading stated that after the death of Shiva her husband, Kongshi, was kept by Rama. Her witnesses Nos. 1 and 4, however, state that for two years after Shiva's death Kongshi lived with Gangu and was of good character. She then left the house and began to live with Rama. According to N. A. W. No. 5 Kongshi gave birth to a child about 7 or 9 months after she had begun to live with Rama. The birth would thus be in September to November 1920 according to the oral evidence. I am not, therefore, inclined to put much reliance on the entry in the register. N. A. W. No. 4 who produced it has no personal knowledge about it and his evidence in other respects does not command belief.

Assuming, however, that Kongshi did give birth to an illegitimate child in May 1920,—for that alone, if anything, can be said to have been proved on the record —I agree with the lower Court in holding that that fact alone is not sufficient reason for not appointing Kongshi as guardian of her son's person and property. It is not alleged that she was improperly dealing with the property while she was in possession of it. It appears that Gangu and Bhondia are in league and though it is pleaded that Gangu is in possession of the fields and Bhondia is not, it appears from the evidence that Bhondia really manages the cultivation and has possession of the crops.

I see no reason to differ from the decision of the lower Court This appeal is dismissed with costs. Pleader's fee Rs. 30.

G. R. D. *Appeal dismissed.*

LOWER BURMA CHIEF COURT.

REVIEW FIRST CIVIL APPEAL NO. 189 OF 1919.

June 5, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Macgregor.

A. L. A. R. FIRM—APPELLANT

versus

MAUNG THWE AND OTHERS—RESPONDENTS.

*Probate and Administration Act (V of 1881), s. 60—Sale without leave of Court—Sale, whether void or voidable—Administration suit—*Lis pendens, *doctrine of, applicability of.*

A sale by an administrator without the leave of the Court, as required by section 60 of the Probate and Administration Act, is not void *ab initio* but merely voidable and if no steps are taken within the period prescribed to avoid the sale, it is binding. [p. 55, col. 1.]

Speaking generally, the doctrine of *lis pendens* does not apply to administration suits. [p. 55, col. 1.]

Review of the judgment of the Chief Court in First Appeal from the District Court, Tharrawaddy in Civil Regular No. 10 of 1919.

Mr. *Gils*, for the Appellant.

Mr. *Das*, for Respondent No. 1.

JUDGMENT.—(*July* 11, 1921.)—We admitted that this application for review of our judgment on the ground that the fact that Tun Pe was, the administrator of the estate, had not been considered and dealt with.

The suit brought by Mg Thwe was against Tun Pe, as administrator. He sought a decree declaring that he was the sole heir and, therefore, entitled to the whole estate. He also prayed for possession of the whole estate.

At the time Tun Pe sold the plot now in dispute he had been held by this Court on appeal to be the sole heir. An appeal to their Lordships of the Privy Council had been admitted, and was, to Tun Pe's knowledge, pending.

The sale-deed purports to have been executed by him in his personal capacity. As administrator the whole estate vested in him. As heir, if he could have sold at all he could only sell whatever right, title and interest he had in the estate which included the plot of land in suit. He must be taken to have sold the greatest estate he could and the fact that he did not describe himself as administrator should make no difference. It cannot deprive Ma Shwe Pon of the fruits of her purchase, There is

ample authority for this, which was the view taken in *Preonath Karar* v. *Surja Coomar Goswami* (1) and English authorities for the proposition are cited therein. We must, therefore, deal with this sale as if it was one made by an administrator.

The sale was made without the leave of the Court as required by section 60 of the Probate and Administration Act, 1881. That does not, however, render the sale void *ab initio* but merely voidable. Mg Thwe has taken no steps to avoid the sale and his right to do so is now barred by time. Thus, the sale must be regarded for the purpose of this case as binding.

There remains the question whether this sale is affected by the doctrine of *lis pendens*. If Tun Pe as administrator is to be regarded as the vendor the pending suit was against him as administrator. But in this matter the terms of section 52 of the Transfer of Property Act must be carefully considered. It is essential to consider the nature of the suit and the rights of Mg Thwe as claimed and under the decree as finally made. The suit was in the nature of an administration suit and to such suits, speaking generally, the doctrine of *lis pendens* does not apply. If in such a suit a particular portion of the estate is sought to be affected in a particular way, the doctrine would apply. The right to this particular plot of land must be "directly and specifically in question." In such a suit as this one, the land in suit may no doubt be said to be directly in question but it cannot be said to be specifically in question. The fact, that possession was prayed for is not enough, and the decree could not deal specifically with the land. It declared Mg Thwe to be a co-heir and as such co-owner of the estate with Tun Pe. The result was that, as laid down in section 44 of the Transfer of Property Act, Mg Thwe was held to be entitled to joint possession and joint enjoyment of the estate and also to a right to obtain partition thereof. The estate was, however, being administered by an administrator and Mg Thwe's rights were in respect of the estate as it remained after the administration. The administrator was entitled to sell any portion of the estate to pay the debts and the estate was liable for the expenses of the administration. Ma Shwe Pon could not be deprived of the benefit of her purchase as the purchase price came to the hands of the administrator. If he was guilty of misappropriation, Mg Thwe's remedy would be against him and his estate and to that estate Mg Thwe has now succeeded. He could only set aside the sale to Ma Shwe Pon on the ground of fraud, which is not alleged, or for want of the Court's sanction, which remedy has lapsed and might never have been granted.

For these reasons we accept the application for review and set aside the judgment and decree passed on appeal and restore the decree of the District Court with costs throughout so far as A. L. A. R. Muttaya Chetty is concerned.

So far as that decree deals with the second mortgage in favour of Mr. Robertson, we must set it aside. Mr. Robertson pleaded his mortgage and the amount then due in his written statement. It had been set out in the plaint which prayed for a decree in Form No. 7 of Appendix D of the Code. To this Mg Thwe merely pleaded ignorance of the mortgage, he did not admit it. Issues are said to have been framed by consent but though both Mr. Robertson and Mg Thwe were represented neither asked for any issue as to the second mortgage. The mortgage-deed was not even put in. It was not proved or admitted. Before a decree in Form 7 could be passed the second mortgage must be proved. The question was raised in the grounds of appeal to this Court and was argued but it was not necessary to decide the point in the view we then took.

We, therefore, set aside the District Court's decree so far as it affects the second mortgage and remand the case with directions that issues be framed as to the mortgage, and the amount due thereunder, if any, and to return the evidence to this Court with its findings thereon and its reasons therefor. The matter of costs so far as defendant No. 6 is concerned will abide the result. We allow no costs in this Court in this respect as the error was due to the fault of both parties.

After remand dated 5th June 1922.

JUDGMENT.—In our judgment dated the 11th July 1921 we set aside the decree of the District Court so

(1) 19 C. 26; 9 Ind. Dec. (N. S.) 464.

far as it affected the second mortgagee, Mr. Robertson, on the ground that this mortgage and the amount due on it had not been legally established. We remanded the case that the questions as to this second mortgage might be properly tried. The evidence has now been taken and the finding of the District Court has been received. There is no appearance for the mortgaror. She had not contested this motgage at the original hearing, but did so on the remand.

Evidence has been led and the agent of the mortgagor who executed the mortgage on her behalf admits execution and, therefore, the testimony of one of the attesting witnesses can be dispensed with.

The mortgage is clearly proved. The mortgage amount is Rs. 2,200 and the interest is Rs. 2 per cent. per mensem. There will be a decree—the usual combined mortgage decree for the principal amount with interest at the contract rate from the 23rd November 1917 to date of suit and thereafter to date of the Dtistrict Court's decree and for six months thereafter and from that date at 6 per cent. on the decretal amount until payment, with costs against the other defendants in all Courts.

W. C. A. *Review allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 11 OF 1923.
May 29, 1923.
Present:—Mr. Wazir Hasan, A. J. C.
PUTTOO KHAN—DEFENDANT—APPELLANT
versus
AHMAD ZAMAN KHAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—"Subject-matter," meaning of—Suit on different cause of action, whether barred.

The expression "subject-matter" in O. XXIII, r. 1, sub-rule (3), of the Code of the Civil Procedure, are not to be identified with the "property" in suit. They obviously include the right and also the infringement of it, which is equivalent to saying that the words "subject-matter" mean the cause of action for a claim. [p. 57, col. 1.]

Rakhmabai v. *Mahadeo Narayan Pundre*, 43 Ind. Cas. 752; 42 B. 155; 20 Bom. L. R. 35, referred to.

Therefore a person who withdraws from a suit without permission is not debarred from bringing a fresh suit in respect of the same property based on a different cause of action. [p. 57, col. 2.]

Appeal against a decree of the District Judge, Fyzabad, dated the 2nd February 1923, upholding that of the Assistant Collector, First Class, Sultanpur, dated the 24th October 1922.

Mr. *Salik Ram*, for the Appellant.
Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.—This is a rent appeal arising out of a suit brought by the respondent for the recovery of rent in respect of plots Nos. 85, 86, 87 and 88 corresponding with old No. 36 for the years 1326 to *Kharif* 1329 *Fasli*. The suit was instituted under the provisions of section 127 of the Oudh Rent Act (XXII of 1886). The land is recorded in the village papers as *bila tasfia*. The plaintiff is the owner of the *patti* in which the plots in suit are situate. *Prima facie*, therefore, he is entitled to the decree which has been granted to him by the Courts below. His claim has, however, been resisted by the defendant on several grounds which will appear as this judgment proceeds.

In 1921 the plaintiff brought a suit against the defendant in the Court of the Munsif of Musafirkhana for possession of the plots in suit as well as some other plots with which I am not concerned in the present litigation. One of the issues framed in that case was, whether the plaintiff was in possession of the plots then in suit within limitation. In respect of the plots now under consideration, the Munsif found that the plaintiff had failed to prove his possession within limitation. In the end he gave the plaintiff a decree for the other plots but dismissed his suit as regards the plots in respect of which the rent is now claimed. The plaintiff then appealed from the decision of the Munsif to the Court of the District Judge of Fyzabad, but before the appeal was heard he filed an application to withdraw the suit

with permission to bring a fresh suit so far as it related to plots Nos. 85 to 88. His application was granted but the Court refused to give him permission to bring a fresh suit. The order was expressly passed under the provisions of O. XXIII, r. 1, of the Code of Civil Procedure.

On the strength of the facts stated above, the defendant-appellant raised several pleas in this suit. (1) That the suit was barred by *res judicata*. (2) That the permission to bring a fresh suit having been refused, the present suit was barred by the provisions of O. XXIII, r. 1, sub-rule (3) of the Code of Civil Procedure. (3) That he has been in adverse possession of the plots in respect of which the rent is claimed and lastly (4) that the plots are groves and consequently there is no liability for payment of any rent. All these pleas have been considered by the lower Appellate Court and negatived.

I am of opinion that the decree of the Court below is correct. Pleas Nos. 1 and 2 are obviously frivolous. The present suit is for rent in respect of these plots for the years 1326 to 1329 *Fasli*. The previous suit was for ejectment on the allegation that the defendant had cut certain trees and that he had no right to do so. The Court of Munsif was clearly not competent to entertain the present suit. In agreement with the lower Court, I reject pleas Nos. 1 and 2.

Plea No. 4 is concluded by the concurrent finding of the Courts below that there are too few trees left on these plots to give the character of a grove; I agree with that finding. Plea No. 4, therefore, fails.

As regards plea No. 3, it may be mentioned that the Court of first instance did not consider it at all. The lower Appellate Court has, however, decided it on merits and has held that there is no evidence in support of that plea. The Munsif's decision was wholly vitiated by the withdrawal of the suit in the Court of Appeal and has no legal effect left whatsoever.

At the hearing of the appeal in this Court, however, a subsidiary discussion arose with reference to the terms of section 127 of the Oudh Rent Act. The right to claim assessment of rent and a decree for the recovery of that rent under the provisions of section 127 is limited by the *sine qua non* that the person seeking relief under that section is "entitled to eject him (the defendant) as a trespasser." In view of the permission to bring a fresh suit for ejectment in respect of the plots now under consideration having been refused, the question arises whether the plaintiff is entitled to eject the defendant as a trespasser. That his remedy to institute a suit in ejectment in respect of the same subject-matter or in respect of the part of the claim which was then abandoned is barred by the provisions of O. XXIII, r. 1, sub-rule (3) of the Code of Civil Procedure is not disputed. It is argued that the remedy may be barred but the title subsists. It is further argued that a fresh suit for ejectment would be maintainable on a cause of action different from the one on which the previous suit was based. The first argument raises a question which is not free from difficulty as it is possible to decide this appeal without deciding the point raised by the first argument. I think I should not decide it. The second line of argument is, however, obviously sound. The words "subject-matter" used in O. XXIII, r. 1, sub-rule (3) of the Code of Civil Procedure are not to be identified with the "property" in suit. They would obviously include the right and also the infringement of it, which is equivalent to saying that the words "subject-matter," mean the cause of action for a claim. In this connection reference may be made to the decision in the case of *Rakhmabai* v. *Mahadeo Narayan Bundre* (1).

The appeal is dismissed with costs.

G. H. & N. H. *Appeal dismissed.*

(1) 43 Ind. Cas. 752; 42 B. 155; 20 Bom. L. R. 35.

MAUNG KYAW DUN ZAN *v.* MA SEIN.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 195 OF 1921.

February 12, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

MAUNG KYAW DUN ZAN—APPELLANT

versus

MA SEIN—RESPONDENT.

Surrender—Joint tenants—Surrender of entire lease by one tenant—Benefit to other tenants.

One joint tenant is not entitled to surrender the lease on behalf of all the joint tenants unless the surrender is for the benefit of them all. Even where the benefit is doubtful, the surrender would not bind the other joint tenants.

First appeal against a decree, dated the 31d September 1921, of the District Court, Myaungmya, passed in its Civil Regular No. 9 of 1921.

Mr. *A. B. Banerji*, for the Appellant.

Mr. *Rahman*, for the Respondent.

JUDGMENT.—The appellant is the owner of a mill which he leased on a registered-deed, dated 13th October 1920, to the respondent, Ma Sein, and another woman, Ma Thin. The term of the lease was two years and the rent was Rs. 4,000 a year payable quarterly. According to Ma Sein, a few days after the execution of the lease, the appellant came to her and stated that the mill needed certain repairs and asked for time to make them as he had undertaken to hand over the mill in working order; that she agreed to allow him about two months for the purpose and on the expiry of this period she demanded delivery of the mill to her but the appellant refused, saying he had leased it to his son. He did lease it to his son on the 14th January 1921. Ma Sein claims specific performance of the contract of lease and she has obtained a decree for possession of the mill.

The appellant's case is that he handed over possession of the mill to Ma Sein some five or six days after the lease was executed. He denies her story about taking two months' time to do certain necessary repairs, and alleges that Ma Thin came and surrendered the lease to him and that thereafter he released it to his son.

The first question for decision is, whether the surrender of the lease by Ma Thin is binding on Ma Sein? These two ladies were joint tenants under the lease, and though one joint tenant may be competent to surrender for the other joint tenants as well as for himself, he would only be entitled to do so if it was for the benefit of them all. There is nothing to show that it would be for the benefit of Ma Sein that the lease should be surrendered, and it is clear that she is most anxious to obtain possession and work the mill. Even if the benefit is doubtful the surrender would not bind Ma Sein. That being so, she is entitled under the lease to possession, and that is sufficient for the decision of this appeal.

W. C. A. *Order accordingly.*

AMMANI AMMAL *v.* PERIASAMI UDAYAN.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 205 OF 1922.

February 6, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Venkatasubba Rao.

AMMANI AMMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

PERIASAMI UDAYAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Daughters inheriting as joint tenants—Partition with surrender of mutual rights of survivorship—Alienation by one daughter—Reversioners, right of, to sue for possession—Transfer of Property Act (IV of 1882), s. 6, applicability of.

Two daughters, governed by the Mitakshara School of Hindu Law, who had inherited their father's property, partitioned it by a document, which provided that they would in future severally enjoy for ever absolutely such items of property as had fallen to their respective shares from generation to generation with right of sale, etc., and that neither of them would have any right over the properties set apart for the other. One of the daughters, subsequently, alienated some of the items which had fallen to her share. After her death, the sons of the other daughter sued for recovery of possession of the same from the alienees:

Held, (1) that the document of partition amounted to a relinquishment by each party to it, in case she should survive the other, of her right to the other's share;

(2) that, as heirs of the alienor, the plaintiffs had no *locus standi* to challenge her alienation;

(3) that, as reversioners of the alienor's father, the plaintiffs could not maintain a claim for possession during the lifetime of the other co-tenant for life;

(4) that the agreement between the co-tenants for life as to the enjoyment of the estate, to which the plaintiffs were not parties, could not have the effect of accelerating their right to possession.

Case-law discussed.

Per *Oldfield, J.*—A relinquishment by a co-tenant for life in favour of other co-tenants can be, when that is entailed by the language used, not only of the life-estate, so far as it can be enjoyed simultaneously by the sharers, but of that estate, as they take it, limited only by the lifetime of the survivor; and the uncertainty as to which of the transferors will survive to benefit does not make the transfer one of a *spes successionis* so as to offend against section 6 of the Transfer of Property Act. [p. 60, col. 2.]

Ramakkal v. *Ramasami, Naickan*, 22 M. 522; 9 M. L. J. 101; 8 Ind. Dec. (N. S.) 373, *Kanni Ammal* v. *Amma Kannu Ammal*, 23 M. 504; 10 M. L. J. 253; 8 Ind. Dec. (N. S.) 754, *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty*, 24 C. 339; 12 Ind. Dec. (N. S.) 893; *Muthiyalu Chengappa* v. *Burada Gunta*, 60 Ind. Cas. 135; 43 M. 855; 39 M. L. J. 567; 12 L. W. 656; 28 M. L. T. 272; (1921) M. W. N. 29 and *Sudalai Ammal* v. *Gomati Ammal*, 16 Ind. Cas. 428; 23 M. L. J. 355; (1912) M. W. N 908; 12 M. L. T. 288, followed.

Ridnamma v. *Venkata Ramappa*, 3 M. H. C. R. 268 and *Subbammal* v. *Krishna Aiyar*, 22 Ind. Cas. 399; 26 M. L. J. 479, distinguished [p. 61, col. 2.]

Per *Venkatasubba Rao, I.*—According to the Mitakshara School of Law, two or more daughters succeeding to their father take as joint tenants with rights of survivorship. They may effect a partition, each daughter giving her right of enjoyment over the properties allotted to the other daughter during the lifetime of the latter; and even an arrangement by which each daughter gives up her interest not merely during the lifetime of the other daughter but during the whole of her own lifetime is legally valid and enforceable. [p. 61, col. 2.]

A male reversioner's right to possession of property cannot be accelerated by an agreement between intervening limited-estate-holders to which he is not a party [p. 62, col. 2.]

Appeal against an order, dated the 25th of March 1922, of the District Court, Coimbatore, in Appeal No. 266 of 1921, preferred against a decree of the Court of the District Munsif, Dharapuram in Original Suit No. 6 of 1921.

Mr. *T. M. Krishnaswami Ayyar*, for the Appellants.

Messrs. *P. R. Ganapathi Ayyar, N. A. Krishna Aiyar*, and *C. S. Swetaranyam Ayyar*, for the Respondents.

JUDGMENT.

Oldfield, J.—The four items of suit property and others fell to two sisters, Vedambal and sixth defendant, in succession to their father; but Vedambal was in separate possession of the suit items under Exhibit A by which they to the extent open to them divided the estate. Vedambal died after alienating item No. 3 and a portion of item No. 4, to which this second appeal relates, to third, fourth and fifth defendants. The plaintiffs, the sons of sixth defendant, have sued for a declaration of the invalidity of those alienations and for possession of those items. The question is whether they are entitled to sue; the lower Appellate Court having held that they are, remanded the suit for trial on the merits.

In the plaint the title relied on is that plaintiffs are the heirs of Veerabhadra, the father of Vedambal, and sixth defendant; that is, reversioners of his estate. It is, therefore, impossible to proceed on the alternative ground, on which it was proposed to support the lower Appellate Court's decision that they could sue as heirs of Vedambal. Moreover, even if that ground were not excluded by the pleading, further reference to it would serve no purpose. For, whatever the extent of Vedambal's interest, it does not appear on principle or authority how her heirs can have had any vested or other right in the property during her lifetime, which could debar her from alienating it to their prejudice or which they can rely on against third, fourth and fifth defendants, her alienees.

The plaintiffs' claim as reversioners of Veerabhadra's estate would ordinarily be negatived by the fact that the interest of sixth defendant, his surviving female heir, is still outstanding; and they accordingly contend that the agreement between her and Vedambal, Exhibit A, effected a separation between the two shares, into which the estate under it was divided, so absolute as to constitute each share a distinct estate, in respect of which the reversioners' succession would open separately on the death of the sharer concerned. Exhibit A, no doubt, is expressed in unqualified language the parties to it agreeing "to enjoy severally for ever absolutely the properties which have fallen to their respective selves" and reciting that "neither should hereafter have a right over the proprerties set apart from

the other;" and, if it was open to them to relinquish their whole actual and future interests, each in the other's share, it must be held that they did so. It is urged that, whilst they could do so with the effect of depriving the survivor of the succession to the share of the one first deceased, the latter's share would pass, not to her own heirs, until the life-estate might be determined on the survivor's death, but at once to the reversioners.

In favour of this contention there is only one authority *Ridnamma* v. *Venkataramappa* (1), but the passage relied on it is, as a later case points out, only a non-committal reference to a possible conclusion on facts other than those actually before the Court. In *Subbammal* v. *Krishna Alyar* (2), on which the decision of the lower Appellate Court is based, the dispute was between the surviving female life-tenant and her deceased co-tenants' heir. But it turned to some extent on the wording of the document under construction and there was nothing in the judgment directly in favour of the last male owner's reversioner, there being nothing to show that the deceased's heir was regarded as possessing that character. And in fact the lower Appellate Court would seem to have erred, because it paid no attention to this aspect of the case. In *Ramakkal* v. *Ramasami Naickan* (3) and *Kanni Ammal* v. *Ammakannu Ammal* (4) the parties were the surviving life-tenant and an alienee from the deceased life-tenant, the decision in each case being in favour of the latter. The inference from these two authorities is that, as the interest of the deceased was alienable, so it would, in the absence of an alienation, have passed to her heirs in the ordinary course of in heritance, although in them again the reversioner was not before the Court and his right was not pleaded; and there is nothing inconsistent with the inference in *Sudalai Ammal* v. *Gomati Ammal* (5) although there the claim of the deceased's heir rested on a provision in the document of partition or in *Papammal* v. *Venkatasami Naicken* (Suit Appeal No. 356 of 1918 unreported), in which the learned Judges followed the clear current of authority, although they doubted its correctness. These decisions also do not deal with the claims of reversioners. But they are important, because they are consistent with the view expressed in *Subbammal* v. *Krishna Alyar* (2) that the agreement for division must be regarded as in view of its wide language we must regard Exhibit A as a transfer by way of relinquishment by each party to it, in case she should survive of her right to the other's share and that such a transfer does not offend against section 6 of the Transfer of Property Act and must receive effect. The relinquishment is legal and can be, when that is entailed by the language used, not only of the life-estate, so far as it can be enjoyed simultaneously by the sharers, but of that estate, as they take it, limited only by the lifetime of the survivor; and the uncertainty as to which of the transferors will survive to benefit does not make the transfer one of the *spes successionis*.

That is material, when (as here) the claim is by reversioners. For there can be no reason why the effect of such a transfer should be less as against them, And two cases, *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (6) and *Muthiyalu Chengappa* v. *Burada Gunta* (7), support this. In the former the reversioner's claim was expressly dismissed as premature during the lifetime of the surviving female life-tenant, the application of Dayabhaga Law not affecting this part of the decision. In the latter the grounds of decision were that a reversioner's right could not be accelerated by an agreement, to which he was not a party and that no acceleration could result from a relinquishment, not to a reversioner, but to a co-life-tenant, the fact that there the relinquishment was not, as it is in the case before us, mutual, but of the right to a share in exchange

(1) 3 M. H. C. R. 268.
(2) 22 Ind. Cas. 399; 26 M. L. J. 479.
(3) 22 M 522; 9 M L. J. 101; 8 Ind. Dec. (N. S.) 373.
(4) 23 M. 504; 10 M. L. J. 253; 8 Ind. Dec. (N. S.) 754.
(5) 16 Ind. Cas. 428; 23 M. L. J. 355; (1912) M. W. N. 908; 12 M. L. T. 288.
(6) 24 C. 339; 12 Ind. Dec. (N. S.) 893.
(7) 60 Ind. Cas. 135; 43 M. 855; 39 M. L. J. 567; 12 L. W. 656; 28 M. L. T. 272; (1921) M. W. N. 29.

for a money payment, not impairing the validity of these considerations.

The conclusion then must be that plaintiffs cannot, as reversioners claim possession until the death of the surviving life-tenant, sixth defendant; and that, as already pointed out, they cannot claim it by right of heirship to Vedambal, because against that right (if they have it) her alienation must prevail. So far the appeal must succeed and the suit, so far as it is for possession must be dismissed. The plaintiffs, however, asked also for a declaration of the invalidity of Vedambal's alienations. They may, subject to the Law of Limitation and other objections, be entitled to such a declaration as reversioners; and it is not clear that they ask for this relief only as ancilliary to their prayer for possession. The lower Appellate Court's decision must, therefore, be modified in this sense, the remand to the District Munsif being allowed only for the consideration of the prayer for a declaration and of issues (*ii*), (*iii*) and (*iv*) as framed by him.

In view of the course of pleading, the District Munsif should, before proceeding with the trial, give defendants an opportunity to file additional written statements and should frame any further issues, which may be necessary with reference to them. Costs in this and lower Appellate Court up to date will be costs in the case and will be provided for in the decree to be passed.

Venkatasubba Rao, J.—I entirely agree. This is an appeal by the defendants Nos. 3 to 5 against the order of the District Judge setting aside the dismissal of the suit by the District Munsif and remanding it for fresh disposal. Vedambal and Mahalakshmi Ammal, daughters of Veerabhadra Udayan, who inherited their father's property partitioned it by Exhibit A and certain items of property fell to the share of Vedambal and certain other items to the share of her sister Mahalakshmi. The deed contains the following clause:—

"We have each of us taken delivery of properties as have been set apart for our respective shares. We shall in future ourselves severally enjoy for ever absolutely the properties as have fallen to our respective selves, from progeny to progeny and fit for sale, gift, exchange, etc. We shall severally pay the Government tax for the lands as have been respectively set apart for us. Neither of us have a right over the properties set apart for the other."

The plaint contains an allegation that Vedambal Ammal executed a sale-deed in respect of certain properties set forth in paragraph 6 thereof and that the defendants Nos. 3 to 5 claim a title under the sale-deed. The plaintiffs are the sons of Mahalakshmi who was impleaded as the sixth defendant in the suit.

The District Munsif, holding that the plaintiffs have no cause of action during the lifetime of Mahalakshmi, dismissed the suit, and the District Judge, as observed above, reversed the decision of the District Munsif. The arguments before us range over a wide ground. But the point that presents itself for decision is extremely simple.

According to the Mitakshara School, two or more daughters succeeding as heirs to their father take as joint tenants with rights of survivorship. It is well-settled that they may effect a partition each daughter giving up her right of enjoyment over the properties allotted to the other daughter during the lifetime of the latter. The question then arises can an arrangement be entered into by which each daughter may give up her interest not merely during the lifetime of the other daughter but during the whole of the lifetime? It is difficult to see why such an agreement cannot be entered into. *A* and *B* inheriting their father's estate partition the property, *B* agreeing that in regard to the property that falls to *A* she gives up not only her interest for the lifetime of *A* but also for her own lifetime in the event of *B* surviving *A*. Why should such an agreement not be valid? If the arrangement amounted to a mere partition, the result is that *B* would give up her right in the property that fell to the share of *A* only for the lieftime of *A* and *B*'s right to take by survivorship the share that fell to *A* would be unimpaired. But if, to an arrangement amounting to a partition was superadded the surrender by *B* of her right to take by survivorship, the effect would be to dispose of the entire interest of *B* in favour of *A*. For convenience I have, in the illustration, referred to *B*'s disposal of her interest.

It makes no difference whether we consider the case from the stand point of *A* or *B*. The act of the nature referred to above on the part of either of the co-sharers amounts to an alienation of her interest in the property falling to the share of the other. Such an alienation is both on principle and authority perfectly valid and binding.

As was pointed out in *Sudalai Ammal* v. *Gomati Ammal* (5), if it is not denied that one of the joint tenants may part with her own life-interest in favour of a stranger, it becomes difficult to imagine why she may not part with it in favour of the other joint tenant. In the above case the question in regard to two co-widows was under consideration. But on this point there is no difference between the case of widows and daughters and the principle is equally applicable to the case on hand.

What Mahalakshmi gave up under the deed was her interest in the property that fell to the share of Vedambal. That interest, as observed above, no doubt, consists of two portions, (1) the interest which she would possess for the lifetime of Vedambal, (2) the interest which she would possess beyond the lifetime of Vedambal in the event of her surviving Vedambal. Does it, therefore, follow that in regard to the second portion she was dealing with *spes successionis* and, therefore, that her alienation of that portion contravenes section 6 of the Transfer of Property Act? The argument seems to grotesque, and I have no hesitation in rejecting it as was done in *Subbammal* v. *Krishna Aiyar* (2). The fact is, that what she surrendered was her entire interest and it is not permissible to divide it into two interests for the purpose of making section 6 applicable.

Ramakkal v. *Ramasami Natchan* (3) is a very useful authority in this connection. A Hindu died leaving two widows who divided his property by a partition deed under which each took possession of her share with powers of alienation over the porperty comprised in it. Certain alienations were made by one widow who subsequently died. On the surviving widow claiming the whole of her husband's property including the portion she alienated, it was held that a widow could alienate for her life any estate which came to her as such and that she could, therefore, enter into such a deed as would preclude her from recovering during her life property which she had alienated to the full extent of such alienation, provided it did not extend beyond her life-interest.

The right to the property after Vedambal's death would, under the Hindu Law, vest in Mahalakshmi for her life. The latter disposed of that interest in favou of Vedambal. If Mahalakshmi is bound by the alienation, I fail to see how it can be questioned by any other. But then it is argued that the effect of Mahalakshmi's act was to accelerate the interest of the reversioners. The identical argument was advanced in *Muthlyalu Chengappa* v. *Burada Gunta* (7) and was overruled, Sadasiva Aiyar, J., observing: "that a male reversioner's right should be accelerated by agreements to which he is not a party is, to me, a very startling proposition," and I entirely concur in this view.

It is necessary to notice another argument put forward on behalf of the respondents. It is said that even assuming that the interest transferred to Vedambal was to enure for the lifetime of Mahalkshmi, still that interest would pass to Vedambal's heirs and that the plaintiffs, as her heirs, are entitled to maintain the action. The reference to heirs succeeding seems to me quite beside the point. Such interest as Vedambal acquired was alienated in favour of the appellants before us, and the question of inheritance, therefore, does not arise. In this view it is needless to enquire whether the plaintiffs are the *streedhanam* heirs of Vedambal. *Order accordingly.*

V. N. V.
Z. K. & N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 39 OF 1922.
May 9, 1923.
Present:—Mr. Dalal, J. C.
IMAM DIN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABDUL SATTAR KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), ss. 14

IMAM DIN KHAN *v.* ABDUL SATTAR KHAN.

15—*Pre-emption decree—Failure to deposit purchase-money within time—Loss of right—Appeal, whether competent.*

Where a pre-emption decree under section 14 of the Oudh Laws Act directs payment of the purchase-money within a specified time and the plaintiff commits a default in making such payment, the decree becomes void, and under the provisions of section 15 of the Act, the right of pre-emption is lost.

Nor can the pre-emptor prefer an appeal thereafter as there is no decree in existence.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 4th April 1922.

Messrs. *Zahur Ahmad* and *Niamat Ullah*, for the Appellants.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—The plaintiffs' suit for pre-emption of a certain property was decreed by the Trial Court of the Subordinate Judge of Sultanpur. The operative portion of the judgment is in these terms:—

"In view of the above findings, the plaintiffs are entitled to pre-emption on payment of Rs. 18,000 plus Rs. 130 paid by the defendants. The result is, that I decree the plaintiffs' suit for pre emption on payment of Rs. 18,130 to the defendants within three months."

The judgment was dated 4th April 1922. No payment was made as directed by the Court, but on 7th July 1922 the plaintiffs filed an appeal to this Court objecting to the amount which they were directed to pay by the First Court. Their plea in the First Court was, that the amount of sale consideration entered in the sale-deed was fictitious, and that the real sale price was less than Rs. 18,000. The plaintiffs' appeal is No. 39 of 1922. The defendants appealed subsequently (Appeal No. 47 of 1922) contesting the plaintiffs' right to pre-empt. To-day, when the appeals came up for hearing, the learned Counsel for the defendants raised a preliminary objection, that the plaintiffs had no right to appeal on 7th July 1922. His argument was, that as the plaintiffs failed to deposit in Court or to pay to the defendants the amount of sale consideration fixed by the First Court on or before the 4th of July 1922 they lost their right of pre-emption.

We think that this argument must prevail. Under section 14 of the Oudh Laws Act when the Court finds for the plaintiff, that he has a right of pre-emption, the decree has to specify a day on or before which the purchase-money or the amount to be paid to the purchaser shall be paid. Section 15 then goes on to indicate, that if such purchase-money or amount is not paid into Court before it rises on that day, the decree shall become void, and the plaintiff shall, so far as relates to such sale, lose the right of pre-emption over the property to which the decree relates. Even if the lower Court had power to extend the time for payment under section 148 of the Code of Civil Procedure, the plaintiffs' right to pre-empt would not be saved, because, according to the provisions of section 15, it was lost on the 5th of July 1922. The learned Counsel for the plaintiffs argued that the "Court" in section 14 meant either the Court of trial or the Appellate Court and the "purchase-money" the amount which was finally settled either by the First Court or the Appellate Court. This argument is no answer to the loss of the right of pre-emption by the plaintiffs under the final clause of section 15. We are of opinion that, when the plaintiffs presented their appeal they had no right to pre-empt the property in suit, and so no appeal lay at the time from the decree of the lower Court. The plaintiffs' learned Counsel referred to a case of this Court: *Bhola* v. *Sheo Darshan Singh* (1), where in a revision application, the learned Judicial Commissioner of this Court gave it as his opinion, that an appeal lay from a decree of the Trial Court that the suit shall stand dismissed on non-payment of the purchase-money. A similar opinion was held in *Bharath Singh* v. *Dharam Singh* (2). With all respect, we may point out that the alternative form of the decree is imported from O. XX, r. 14 (1) (*b*). Under the Oudh Laws Act, sections 14 and 15, the Civil Court has no authority to pass any such decree in the alternative. The decree under section 14 becomes void and the plaintiff loses his right of pre-emption under the provisions of section 15. When there

(1) 24 Ind. Cas. 109; 1 O. L. J. 191.
(2) 21 Ind. Cas. 193; 17 O. C. 14.

is no decree in existence and the plaintiff has no existing right of pre-emption, it is clear to us that he cannot appeal.

In our opinion, the appeal was incompetent and must fail. We, therefore, dismiss it with costs

G. H. & N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 45 OF 1923.
April 25, 1923.
Present:—Mr. Justice Piggott.
GIRDHARI LAL—APPLICANT
versus
FIRM ACHAL SINGH-TAKHAT SINGH —OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17, proviso, scope of—Suit dismissed for default—Order setting aside dismissal, nature of.

The words "or in pursuance of the judgment" in the proviso to section 17 of the Provincial Small Cause Courts Act must be read distributively and applied to the words "for a review of judgment" which precede.

Section 17 does not apply to an order setting aside the dismissal for default of a suit by a Small Cause Court Judge. The order dismissing the suit for default is not a decree within the meaning of section 2 (2) of the Civil Procedure Code, nor is the application for an order to set the dismissal aside an application for an order to set aside a decree, still less is it an application for review of judgment.

Civil revision from an order of the Judge, Small Cause Court, Agra, dated the 20th of January 1923.

Mr. *S. N. Mukerji*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Party.

JUDGMENT.—A suit in the Court of Small Causes at Agra was dismissed for default of appearance by the plaintiff. Along with the order of dismissal was an order that the plaintiff should pay the defendant's costs, amounting to Rs. 18-8-o. Within limitation the plaintiff applied under O. IX, r. 9, of the Code of Civil Procedure for an order to set the dismissal aside. He satisfied the Judge of the Small Cause Court that there was sufficient cause for his non-appearance, and obtained an order setting aside the dismissal. It does not appear that this order was coupled with any direction that the plaintiff should first pay the costs which had been awarded against him, though such an order would undoubtedly have been within the discretion of the Court. The result has been that the defendant has come to this Court in revision, contending that the order setting aside the dismissal was without jurisdiction, because the plaintiff has not first deposited the aforesaid sum of Rs. 18-8-o or given security in respect of the same. This contention is sufficiently answered by the wording of the proviso to section 17 of the Provincial Small Cause Courts Act, IX of 1887. The order dismissing the suit for default was not a decree, *vide* section 2, clause (2) of the Code of Civil Procedure, nor was the application for an order to set the dismissal aside an application for an order to set aside a decree, *vide* O. IX, r. 9, of the Code of Civil Procedure; still less was it an application for review of judgment. The proviso in question, therefore, does not apply to this case. The words "or in pursuance of the judgment" in the said proviso must be read distributively and applied to the words, "for a review of judgment" which precede. I am informed that this view has been taken by the Calcutta High Court in an unreported case. The point seems to me sufficiently clear on the wording of the Statute Law. I dismiss this application with costs.

Application dismissed.

M. A. A. & K. S. D.

RANGOON HIGH COURT.

CRIMINAL REVISION PETITION NO. 718-B OF 1922.

January 16, 1923.

Present:—Mr. Justice May Oung.

U THUDAMAWARA AND ANOTHER —PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 144, proceeding under—Record, contents of—Penal Code (Act XLV of 1860), s. 173—Refusal to receive summons—Offence.

In taking action under section 144, Criminal Procedure Code, the record of the Magistrate should show in clear and unmistakeable terms the authority under which he professes to act. [p. 65, col. 2.]

A refusal to receive a summons is not an offence under section 173 of the Penal Code. What seems to be required under the section is some act of opposition offered to the officer serving the process. [p. 66, cols. 1 & 2.]

Queen v. *Punamalai Nadan*, 5 M. 199; 1 Weir 80; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 139, *Zapantis* v. *Emperor*, 57 Ind. Cas. 928; 3 U. B. R. (1920) 202; 21 Cr. L. J. 688, followed.

Criminal revision being review of the order of the First Additional Magistrate, Moulmeingyun, in Criminal Regular No. 394 of 1922, dated 2nd December 1922.

Mr. *E. W. Lambert*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In Criminal Miscellaneous No. 31 of 1922, the Township Magistrate of Moulmeingyun in the Myaungmya District issued orders under section 144, sub-section (*i*), of the Criminal Procedure Code, directing the two petitioners to abstain from delivering political speeches within his Township. A Police Officer was sent to serve these orders, but they were returned with the report that the petitioners refused to accept service and to sign the orders. Thereupon the Township Magistrate filed a complaint in the Court of the First Additional Magistrate, Moulmeingyun, charging the petitioners under section 173 of the Indian Penal Code.

In explaining the particulars of the offence, the Magistrate said that the petitioners had refused the service of the orders on them and had stated that they would neither receive nor sign the duplicate orders, knowing that they were orders from a competent Magistrate, and that they thereby intentionally prevented the service of the said orders. Evidence was then recorded and, in the result, the petitioners were convicted and sentenced each to suffer one month's simple imprisonment. The petitioners then applied to the District Magistrate of Myaungmya, praying for revision of the convictions and sentences, but were unsuccessful. The learned District Magistrate held that the petitioners did, in fact, intentionally refuse the service on themselves of the Township Magistrate's orders under section 144 of the Criminal Procedure Code and that, therefore, they rendered themselves liable to the punishment awarded under section 173 of the Indian Penal Code. He did not go on to consider whether the refusal to accept service amounted to a prevention of service as required by the section.

The petitioners have now applied to this Court for revision on two main grounds, *viz*:—

(*i*) that the Township Magistrate was not specially empowered to issue an order under section 144, Criminal Procedure Code, and that, therefore, under clause (*i*) of section 530, Criminal Procedure Code, his proceedings are void; and

(*ii*) that no offence under section 173, Indian Penal Code, was committed.

As to the first point, the Township Magistrate in cross-examination stated that he had been empowered to act under section 144, Criminal Procedure Code, by the Deputy Commissioner of Pyapon District. It does not appear from the record that the Local Government or the District Magistrate of Myaungmya District had conferred this power in the Township Magistrate, but the Trial Court has found, as a matter of fact, that the Township Magistrate was legally competent, and I do not consider it necessary to deal further with this point except to observe that it is desirable in these cases, that the record should show, in clear and unmistakeable terms, the authority under which a Magistrate, taking action under section 144, Criminal Procedure Code, professes to act.

As regards the second point, the learned Assistant Government Advocate agrees that the convictions cannot stand. Sec-

BABA v. EMPEROR.

tion 144, Criminal Procedure Code, requires that the service is to be effected in manner provided by section 134. Section 134, Criminal Procedure Code, lays it down that "the order shall, if practicable, be served in manner provided for service of a summons," and that "if such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be struck up at such place or places as may be fittest for conveying the information to the person against whom the order is made." Section 69, Criminal Procedure Code, provides that the summons shall, if practicable, be served personally, on the person summoned, by delivering or tendering to him one of the duplicates of the summons, and that every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. Section 71 provides that, if service in the manner mentioned cannot, by the exercise of due diligence, be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

In the case of *Queen* v. *Punamalai Nadan* (1) it was held that a refusal to receive a summons is not an offence under section 173 of the Indian Penal Code, and that the words "any manner prevents the service" cannot apply when the summons is tendered and refused, as it is good service.

This case has been followed in several Indian cases, and it has also been held that a refusal to acknowledge service is also no offence under the section.

In *Zapantis* v. *Emperor* (2), my brother Pratt, as Judicial Commissioner, Upper Burma, held that, since service can be effected by tender, under both the Civil and Criminal Codes of Procedure, a refusal to accept a summons, when tendered, does not amount to intentionally preventing service of summons. The Madras case quoted above was cited with approval.

Considering that the tender itself amounts to service, the refusal to accept the tender cannot be said to be a prevention of service. What seems to be required under section 173, Indian Penal Code, is some act of opposition offered to the officer serving the process.

The convictions and sentences are accordingly set aside; the petitioners are acquitted, and their bail-bonds will be cancelled.

Conviction & sentences set aside.

W. C. A.

(1) 5 M. 199; 1 Weir 80; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 139.

(2) 57 Ind. Cas. 928; 3 U. B. R (1920) 202; 21 Cr. L. J. 688.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 87-B OF 1923.

May 7, 1923.

Present:—Mr. Kotwal, A. J. C.

BABA—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 349, 562—Penal Code (Act XLV of 1860), s. 53—S. 349, construction of—Order under section 562, whether punishment—C. P. Criminal Circular No. 1-28 para. 6, meaning of—Second Class Magistrate, whether competent to try adolescent accused.

It is a general rule of criminal jurisprudence that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty, and any exception to this rule must be strictly construed. [p. 67, cols. 1 & 2.]

Emperor v. *Ram Prasad*, 36 Ind. Cas. 867; 12 N. L. R. 146; 18 Cr. L. J. 35, followed.

Sectin 349 of the Criminal Procedure Code creates one of such exceptions. [p. 67, col. 2.]

An order under section 562 of the Criminal Procedure Code directing release upon probation of good conduct cannot be said to be a "punishment" in the sense in which that word is used in section 349 of the Code, for it is not one of the various kinds of punishment described in section 53 of the Penal Code. [p. 67, col. 2.]

The Central Provinces Criminal Circular No. 1-28 para. 6, lays down that adolescents should be tried by a Magistrate not below the rank of a Sub-Divisional Magistrate; it does not say that a Second Class Magistrate may try an adolescent

but must refer the case for punishment to the Sub-Divisional Magistrate under section 349 of the Criminal Procedure Code. Such a reference is invalid. [p. 68, col. 1.]

In a case where adults and adolescents are tried jointly, even if the case of the adolescent accused can be validly referred under section 349 of the Criminal Procedure Code, it is doubtful whether the case of the adult accused can be so referred, there being no other reason for referring the case of the latter except that they have been jointly tried with the adolescents. [p. 68, col. 1.]

Criminal revision against the judgment of the Sessions Judge, East Berar, Amraoti, dated the 12th March 1923, in Criminal Appeal No. 31 of 1923.

Mr. *R. R. Jaywant*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The Second Class Magistrate, Pusad, tried eight accused jointly for rioting and hurt. He found that the accused were guilty of the offences but instead of passing sentences himself sent the case to the Sub-Divisional Magistrate for the reasons appearing in the following passage copied from his judgment:—

"In these accused, the accused Ganpati is 2 years old and Sambha 17 years of age. Both being juvenile offenders I am not competent to pass sentence on them under Criminal Circular No. 1-28 paragraph 6. I, therefore, submit the proceedings to the Sub-Divisional Magistrate, Pusad, for favour of adequate punishment under section 349, Criminal Procedure Code."

The Sub-Divisional Magistrate after hearing arguments, but without taking any evidence, wrote a judgment convicting all the accused including the two adolescents on whom he only inflicted fines.

At the commencement of his judgment the Sub-Divisional Magistrate writes that the case was referred to him by the Second Class Magistrate as two of the accused were adolescents and in the Magistrate's opinion they deserved punishments different in kind from what he could inflict. This is not a proper interpretation of what the Second Class Magistrate has written.

As stated in *Emperor* v. *Ram Prasad* (1) it is a general rule that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty. Any exception to this rule must be strictly construed. Section 349, Criminal Procedure Code, creates one of such exceptions. That section provides,—

"Whenever a Magistrate of the Second or Third Class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate.

"The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and re-call and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law."

Now, this is not a case where the Second Class Magistrate could not have inflicted a sufficiently severe punishment on the adolescent accused, nor does the Magistrate profess to refer the case on that ground. Again, it is not a case where the Magistrate considered that punishment different in kind from what he was competent to inflict was necessary. The learned Standing Counsel states that the Second Class Magistrate probably desired the case to be dealt with under section 562, Criminal Procedure Code, and, therefore, he contends, the Magistrate may be said to have been of the opinion that the adolescent accused should receive a punishment different in kind from what he was empowered to inflict. In my opinion an order under section 562 directing release upon probation of good conduct cannot be said to be a punishment. It is not one of the various kinds of punishments described in section 53 of the Indian Penal Code. Under section 562 the sentence of punishment is postponed and something which is not a punishment is substituted therefor. In any case, the Magistrate was not referring the case on that ground. His sole reason was that he was not competent to pass any sentence at all on the adolescent accused under the Judicial Commissioner's

(1) 36 Ind. Cas 867; 12 N. L. R. 146; 18 Cr. L. J. 35.

Circular. He has, however, misunderstood the Circular. The Circular states that adolescents should be tried by a Magistrate not below the rank of a Sub-Divisional Magistrate. It does not say that a Second Class Magistrate may try an adolescent but must refer the case for punishment to the Sub-Divisional Magistrate.

There being no case for reference under section 349 the reference was contrary to law and as it resulted in the accused being sentenced by a Magistrate who had not heard the evidence at all, it must be deemed to have prejudiced the accused and resulted in a failure of justice.

It is, moreover, doubtful whether in a case where adults and adolescents are tried jointly even if the case of the adolescents could have been validly referred under section 349, that of the adult accused jointly tried with them could also have been so referred, there being no other reason for referring the case of the latter except that they have been jointly tried with adolescents.

The conviction and sentence by the Sub-Divisional Magistrate are set aside. The Second Class Magistrate was not legally incompetent to try the case but as required by the Circular the case ought to have been tried by a Magistrate not below the rank of a Sub-Divisional Magistrate, I direct a trial *de novo* by a Magistrate competent under that Circular. This order governs also Criminal Revision Applications Nos. 88-B to 91-B of 1923. The bail bonds of such of the applicants as are on bail will be cancelled.

Z. K. *Conviction & sentence set aside.*

RANGOON HIGH COURT.

CRIMINAL REVISION PETITION NO. 1016 OF 1922.

February 9, 1923.

Present:—Mr. Justice Pratt.

NGA PO TIN—PETITIONER

versus

NGA PO SAUNG AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Proceedings under s. 145—Preliminary finding, necessity of—Finding as to possession—Order without jurisdiction—Revision.

In the absence of a preliminary finding as to the existence of a dispute concerning land likely to cause a breach of the peace, a Magistrate is not justified in taking any action under section 145 of the Criminal Procedure Code. [p. 68, col. 2.]

In a proceeding under section 145, Criminal Procedure Code, the scope of a Magistrate's inquiry is limited to a finding as to possession, and on that finding the only order which he legally can pass is one declaring which of the disputing parties is entitled to possession and forbidding all disturbances of his possession until evicted in due course of law. A finding with respect to the merits of the claims of the respective parties to a right of possession of the subject of dispute is a finding wholly without jurisdiction. [p. 96, col. 1.]

Although the High Court has no revisional jurisdiction with respect to proceedings under section 145, it will nevertheless interfere with an order which is without jurisdiction. [p. 69, col. 1.]

Criminal revision against the order of the Sub-Divisional Magistrate, Thazi, in Criminal Miscellaneous No. 95 of 1922.

Mr. *Ganguli*, for the Petitioner.

Mr. *Chatterjee*, for the Respondents.

JUDGMENT.—This is an application for revision of an order purporting to be passed under section 145, Criminal Procedure Code, directing the applicant, Maung Po Tin, to evacuate certain land and to refrain from interfering with the working of the land by Maung Tha Shun, Maung Po Saung or their tenants.

Applicant, Po Tin, himself asked for an order against the present respondents and the Magistrate proceeded to deal with his application with complete disregard of the express provisions of the Criminal Procedure Code.

He failed to record a preliminary finding that he was satisfied that a dispute likely to cause a breach of the peace existed and without this he was not justified in taking any action under section 145.

He then issued notice to respondents to put in statements of their *rights* to the land instead of to the parties to put in statements of their respective *claims, as respects the fact of actual possession* of the land in dispute.

He, then, in the course of the enquiry, went at considerable length into the question of the title of the parties although sub-section (4) expressly lays down that it is the duty of the Magistrate to decide whether

any and which of the parties was, at the date of his preliminary order, in possession of the subject in dispute *without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute.* On the facts, the Magistrate found that Maung Po Tin was in possession and did not find that he had forcibly or wrongfully dispossessed the respondents within two months of date of the order.

If he proposed to pass any order under section 145 therefore, the only order the Magistrate could legally pass on his findings as to possession was one declaring Maung Po Tin to be entitled to possession and forbidding all disturbances of his possession until evicted in due course of law. The Magistrate, however, proceeded to lay down the proposition that it is presumed that possession means rightful possession, and under cover of this wholly unwarranted presumption which is entirely opposed to the spirit of the section, held that, because Maung Tin, who mortgaged the land to Maung Po Tin, had already signed on agreement consenting to the distribution of the estate of which the land forms part, the land must be held to have been in possession of Maung Tha Shun.

This finding was wholly without jurisdiction, and deliberately went behind the actual fact of possession to which the inquiry is strictly limited by law. It was an adjudication on the merits in contradiction to the actual facts as to possession and was opposed not merely to the express provisions of section 145 but to an array of case-law on what constitutes possession under the section.

Although the High Court has no revisional jurisdiction with respect to proceedings under section 145 there is ample authority for interference, when, as in the present instance, the order although purporting to be under section 145, is in susbstance not justifiable under the section; or, in other words, is without jurisdiction.

In the proceedings now in question there has been a distinct abuse of the jurisdiction of the Court.

I set aside the Magistrate's order.

W. C. A. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 127 OF 1923.

May 29, 1923.

Present:—Mr. Dalal, J. C.

BHAGWATI PRASAD—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Unsoundness of mind—Prior and subsequent conduct of accused.

In order to bring a case within the purview of section 84 of the Penal Code, the accused must satisfy the Court that his unsoundness of mind is of such a nature and degree that by reason thereof he is incapable of knowing the nature of the act or of knowing that he is doing what is either wrong or contrary to law. [p. 71 col. 2.]

Muhammad Husain v. *Emperor*, 18 Ind. Cas. 641, 15 O. C. 321; 14 Cr. L. J. 81, *Emperor* v. *Harka*, A. W. N. (1906) 193; 4 Cr. L. J. 88, referred to and distinguished.

In a case where an accused sets up the plea of insanity, the Court can judge only by inference to be derived from the prior and subsequent conduct of the prisoner as to the state of his mind at the time of the commission of the offence. [p. 71, col. 2.]

Appeal against an order of the Sessions Judge, Lucknow, dated the 17th/19th February 1923.

Messrs. *Niamat Ullah, Hakim Uadin, Nazir Uddin,* and *Rabi Shankar,* for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Bhagwati Prasad, about 24 years of age, was convicted by the learned Sessions Judge of Lucknow of two offences under section 302, Indian Penal Code, of causing the deaths of two old women *Musammat* Kallo, a Kahariin, and *Musammat* Rani, a Brahman. The murders were committed on 10th February 1922, and the order of the learned Sessions Judge was passed on 17th February 1923. In appeal it is admitted that the two murders were committed by Bhagwati Prasad. All the three assessors in the lower Court were of the same opinion. The finding, therefore, of the lower Court is upheld that Bhagwati Prasad committed the acts alleged by the prosecution.

The question of difficulty is whether by reason of unsoundness of mind, he was incapable of knowing the nature of the act alleged as constituting the murder, or that

his act was wrong or contrary to law. The circumstances in which the two women were murdered are not in doubt and can easily be told. At about 8-30 P.M. on the night of the 10th February 1922 cries were heard coming from the direction of the accused's portion of a house in which he lived separately from his two brothers, Babu Sheo Prasad and Babu Ajudhia Prasad. These two brothers on hearing the cries went out and saw the prisoner beating the woman *Musammat* Rani with a piece of wood. The woman was hit on the head and so badly injured at the time that with difficulty she crawled to Sheo Prasad's quarters. Sheo Prasad went to the Police outpost and a Head Constable arrived at the house with two constables. The prisoner made no attempt to run away or conceal himself. When the Police arrived they, with others, went inside the prisoner's room and made a discovery, which was to find the dead body of another woman *Musammat* Kallo lying on a bed inside the prisoner's room. There were injuries on the head of this woman and a considerable amount of blood had dropped from the bed and collected in a pool near it. *Musammat* Rani died from the effects of her injuries on the 12th of February. The *post mortem* examination of the two women disclosed several contused wounds about the head. On the body of *Musammat* Kallo there were seven contused wounds, five of them round about the left ear. The medical opinion was that death was due to the fracture of the skull bones and that the wounds were probably caused by a blunt weapon. *Musammat* Rani also showed symptoms of death from the fracture of the skull.

The appellant so far has said very little about the crimes. It is in evidence that when the Police arrived and the *Havildar* in the presence of the prisoner called out "Who committed this act?" the constable replied pointing to the prisoner "This is the man" and the *Havildar* said "arrest him he has shed blood" the prisoner uttered the words "arrest me, I have shed blood." The inquiry prior to commitment started almost immediately; and on 22nd of February 1922, the Committing Magistrate was unable to obtain any response from the prisoner to questions put to him. When the prisoner was put up on his trial in April 1922 in the Court of Session it was found that by reason of unsoundness of mind he was incapable of making his defence. During that inquiry Colonel Clements, who had the prisoner under observation from the 8th March 1922 to the 18th of April 1922, was examined as a witness. The prisoner was not placed under medical observation prior to the 8th of March 1922. The Medical Officer was satisfied from his observation that the prisoner was insane and was not simulating signs of sanity. He took no interest in the observation kept on him, and was indifferent to what went round. He was morose and had fixed delusions. He complained of the visit of a black man every night at 1 A.M. who stayed with him for an hour or two, seized and beat him. During this observation the prisoner was not able to distinguish right from wrong and was not responsible for his actions. This was the view of the Medical Officer and the prisoner was kept in a Lunatic Asylum until the beginning of this year. In February he was considered capable of making his defence, and so was put on his trial. All the three assessors were of opinion that by reason of unsoundness of mind the prisoner did not know the nature of his act, or that he was doing wrong when he committed the murder. As already stated, the learned Sessions Judge disagreed. What the learned Judge has said in his interesting judgment is that the prisoner, by reason of unsoundness of mind and delusions, believed in power to be obtained through human sacrifice, and that he killed the two women under the effect of this delusion. The learned Judge was of opinion that the prisoner should be dealt with as if the facts with respect to which the delusion existed were real. Even if the facts were real, human sacrifice would not be justified, so the appellant must have known that he was doing wrong when he committed the murders. This theory as to the appellant's belief in the power to be gained by human sacrifice is based on the contents of two vernacular books *Kali-ka-puran* and *Indarjal*. The learned Government Pleader, who has taken considerable pains over this matter, has been unable to find the book

BHAGWATI PRASAD *v.* EMPEROR.

Kali-ki-puran. Two chapters of that book are on the file. The book *Indarjal* is produced in this Court. It is, however, admitted that neither book was found in the possession of the prisoner, and both were put in by the investigating officer to support the possibility of the prisoner having such delusion. There is no evidence of any kind which would entitle this Court to draw the inference that the prisoner had ever read either book. *Indarjal* contains references to owls and to certain charms obtained from the feathers of that bird. The prisoner kept owls and decked himself with the feathers of the bird. This connection, however, is not sufficient to establish the prisoner's belief in human sacrifice and that he killed the two women as such sacrifice.

There can be no doubt that the prisoner's mind had been unhinged and that he had shown signs of insanity since May or June 1921. His behaviour was generally peculiar. He wore a garland of animal bones and tied amulets of red cloth round his arms. There is evidence that he had delusion of such an amulet placed in his mouth rendering him invisible. Another delusion of his was that a black man and others followed him with guns with the intention of shooting him. Two or three hours prior to the murder he had complained to both his brothers that the black man was after him to shoot him. Ten days prior to the murder he had hit the witness Sheo Darshan from behind with a stick. The learned Sessions Judge appears to accept this incident as evidence of the appellant's desire for human sacrifice, but the inference appears to me to be far fetched. Obviously, the prisoner was so deranged in his mind for months prior to the occurrence that it would not be said with certainty what particular delusion impelled him to commit a certain act. The present case, in my opinion, stands by itself because we have no indication from the prisoner's future acts as to the state of his mind at the time of the commission of the offence. In the case quoted by the learned Judge of *Muhammad Husain* v. *Emperor* (1) and in *Emperor* v. *Harka* (2) the Court obtained considerable help from the words and acts of the prisoner to draw the conclusion that the prisoner in each case knew that the act he was committing was wrong in law. In the Allahabad case the *Sadhu*, who had killed a child, admitted his knowledge of the act being wrong and explained that a Goddess had told him that if he killed some one she will appear before him in person. In the Oudh case the prisoner went to the Police Station and made a specific report as to the incidents which led to his committing the murder of his wife. The majority of Judges correctly laid down with reference to the facts of that case that the burden lay on the accused to satisfy the Court that his unsoundness of mind was of such a nature and degree that by reason thereof he was incapable of knowing the nature of the acts or of knowing that he was doing what was either wrong or contrary to law. In the Oudh cases and similar cases the prisoners suffered from delusions and from temporary fits of insanity and were able actively to defend themselves when tried. In the present case the prisoner has appeared to me to have been always on the brink of insanity and his participation in the trial before the lower Court was exceedingly slight. He contented himself by a denial of the commission of the murders and had not the capacity to give any explanation. The medical witness gave an opinion which may be an explanation that the prisoner has possibly forgotten the incidents of the 10th of February 1922. In a case like the present, a Court can judge only by inference to be derived from prior and subsequent conduct of the prisoner as to the state of his mind at the time of the commission of the offence. The circumstances of the present case are such that the only possible inference, in my opinion, is that the appellant was incapable of knowing the nature of the act or that it was wrong. One woman was an old servant of the family and another a harmless dependent. There was no motive for the murder. The appellant made no attempt to disappear after the murder, or to offer any explanation in

(1) 18 Ind. Cas. 641; 15 O. C. 321; 14 Cr. L. J. 81.

(2) A. W. N. (1906) 193; 4 Cr. L. J. 55.

extenuation of his crime. His words after the murders "Arrest me, I have shed blood!" were merely a mechanical repitition of words spoken in his presence. He took no interest in the inquiry prior to committal and the very first time the Medical Officer saw him he was found to be quite insane. For months prior to the occurrence he had shown symptoms of insanity, and it was after a stay of nearly a year in the Lunatic Asylum that he was considered to be in a fit state to undergo his trial. The inference seems irresistible to my mind that the appellant has been in a continuous state of insanity, and whatever act he did he did in an irresponsible way and did not know the nature thereof or that it was wrong if it happened to be a wrong act according to law.

I set aside the convictions under section 302, Indian Penal Code. I hold that the appellant did commit the acts which would have been murders except for his unsoundness of mind which brought his acts under the provisions of section 84 of the Indian Penal Code. I direct him to be kept in safe custody in the Lunatic Asylum at Bareilly. Until he is removed to the Lunatic Asylum he shall be kept in safe custody and under proper control in the prison where he may happen to be imprisoned at present. The learned Sessions Judge of Lucknow shall be requested to take proper action for the carrying out of this order and the submitting of information and of a history sheet to the Local Government.

G. H. *Conviction set aside.*

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 355-B OF 1921.
January 5, 1922.
Present:—Mr. Justice Pratt.
MRS. MAY BOUDVILLE—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 202—Magistrate holding preliminary inquiry, whether debarred from trying case.

The mere fact that a Magistrate holds a preliminary inquiry into the truth of a complaint, does not incapacitate him from trying the case.

Queen-Empress v. *Maganlal*, Rat. Un. Cr. C. 530; Cr. Rg. No. 63 of 1890, followed.

Criminal revision from a decree of the Sub-Judge, Tenasserim, dated the 6th August 1921.

Mr. *Robertson*, for the Petitioner.

ORDER.—Applicant, May Boudville, was convicted of criminal breach of trust by the First Additional Magistrate, Tavoy. On appeal the learned Sessions Judge considered that the Magistrate ought not to have tried the case as he had already in a preliminary inquiry come to the conclusion that there was sufficient evidence to justify a prosecution. The Sessions Judge, therefore, without going into the merits of the case, set aside the conviction and sentence, and ordered a re trial. This order I am now asked to revise and dispose of the case on its merits.

The trial before the Magistrate was perfectly regular and the fact that he had held a preliminary inquiry did not incapacitate him from trying the case.

If this view were to be adopted then every Magistrate who held a preliminary inquiry into the truth of a complaint would be debarred from trying the case.

There is no reason to consider that the Magistrate was prejudiced or that accused did not have a fair trial. The record of the Magistrate is as full as the law requires it to be and the judgment of the Sessions Court, in my opinion, discloses no valid reason for ordering a re-trial.

There was ample evidence on the record to enable the Sessions Judge to decide the appeal on its merits, and there is no reason to suppose fresh evidence would be forthcoming at a re-trial.

It is quite simple to separate the irrelevant and inadmissible evidence on the record.

I do not think, however, that this Court should pass orders on the merits on revision.

Following the procedure adopted by the Bombay High Court in *Queen-Empress* v. *Maganlal* (1), I set aside the order of the Sessions Court on appeal and direct that the appeal be re heard on its merits by the same Court.

W. C. A. *Order set aside.*

(1) Rat. Un. Cr. C. 530; Cr. Rg. No. 63 of 1890.

JASURAM MARWARI *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION NO 328 OF 1923.

June 19, 1923.

Present:—Mr. Justice Macpherson.

JASURAM MARWARI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 97—Private defence of property—Possession, re-taking of.

The fact that a person has title to a plot of land, does not give him the right to forcibly eject a trespasser in peaceful possession of the same. His remedy is to eject him by civil process.

The right of private defence of property does not cover a case of taking or re-taking possession by means of criminal force or show of criminal force.

Criminal revision from an order of the Deputy Magistrate, Monghyr, dated the 31st January 1923.

Mr. *G. C. Pal*, for the Petitioners.

JUDGMENT.—This is an application for revision of the conviction of the four petitioners by the Deputy Magistrate of Monghyr, of an offence under section 143 of the Indian Penal Code and the sentence of fine of Rs. 60 each, which conviction and sentence have been upheld on appeal by the Sessions Judge of Monghyr.

The facts alleged were that the complainant, Jawahir Halwai, took settlement from the landlord of a piece of waste land in Jamalpur Bazaar in January 1922, obtained permission from the Municipality in May to erect a fuel *gola* upon it, and sold fuel there for several months until the 11th October when a mob of some twenty persons including the petitioners came to the plot and cleared it of the fencing and all its contents. The Trial Court found that the complainant was in actual peaceful possession of the disputed land, and that although the petitioners and others have right and title to the same, they were not in actual physical possession but without justification came to the land to assert possession by force. In appeal the learned Sessions Judge found that there could be no doubt that the complainant actually "managed to obtain possession of the land" in dispute in January 1922 and was in possession thereof on the date of occurrence, even if the petitioner, Jasuram, had title it was not clear that he had actually obtained possession at any time of the small plot of party land in dispute and it was certainly the complainant who was in possession at the date of occurrence. He found also that the occurrence took place and the complainant's *gola* had been demolished as alleged, and that the four petitioners were members of the unlawful assembly, the common object of which was to take possession by criminal force or show thereof of the land on which complainant had his *gola*.

It is contended that upon the facts found the case does not come within the definition of unlawful assembly inasmuch as the land being the property of the petitioner, Jasuram, the complainant was a trespasser whom Jasuram was entitled to eject from the land. I am unable to accede to this contentton. In the first place, it is not quite clear on the findings of the learned Sessions Judge that this small part of waste land was within the area purchased by Jasuram. But even if it was, the finding is that he certainly had not been in possession for many months while the complainant had been and had carried on his *gola* on the land. Possibly Jasuram may have a right to eject complainant from the plot by civil process. But he is not within his rights when he takes a mob of men and forcibly clears the person in possession of the land in respect of which he has only title without possession. The right of private defence of property does not avail him, section 99 of the Penal Code expressly sets out that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities who in this instance were close by. That right does not cover a case of taking or re-taking possession by means of criminal force or show of criminal force' as in the present instance.

In my opinion the learned Sessions Judge was entitled upon the record before him to come to the conclusion of fact at which he has arrived, he has correctly applied

the law to the facts and there is no reason to interfere with his decision.

The application is rejected.

M. D. J. & N. H. *Application rejected.*

RANGOON HIGH COURT.

CRIMINAL REVISION PETITION NO. 12B OF 1923.

February 15, 1923.

Present:—Mr. Justice May Oung.

AHMED EBRAHIM—APPELLANT

versus

Hajee A. A. GANNY—RESPONDENT.

Penal Code (Act XLV of 1860), s. 406—Criminal Procedure Code (Act V of 1898), s. 179—Criminal breach of trust—Place of trial of offence—Loss to beneficiary, whether "consequence" of offence.

For the application of section 179 of the Criminal Procedure Code it is essential that the offence should depend on the act done and on the consequence which has ensued. [p. 75, cols. 1 & 2.]

Simhachalam v. *Rati Kanta Laha*, 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762, followed.

The loss caused to a person by an act of misappropriation of his property by another is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued but only on the act which has been done. [p. 75, col. 2.]

In re Rambilas, 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 29 M. L. J. 175; 15 Cr. L. J. 688, *George Langridge* v. *Grace Atkins*, 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856, *Simhachalam* v. *Rati Kanta Laha*, 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762, followed.

Therefore, a person cannot prosecute another for criminal misappropriation of his property under section 179 of the Criminal Procedure Code at the place of his own residence on the ground that, as a consequence of the act of the accused, wrongful loss was caused to him at that place. [p. 75, cols. 1 & 2.]

Criminal revision against the order of the Eastern Sub-Divisional Magistrate, Rangoon, dated the 14th December 1922, passed in Criminal Regular Trial No. 828 of 1922.

Mr. *Patker*, for the Appellant.

Mr. *Mya Bu*, for the Respondent.

JUDGMENT.—The complainant, a dealer in silk goods, had agencies at Kobe and Yokohama in Japan. The accused was his agent at Kobe, and the agent at Yokohama was Sulaiman. On the 28th September 1920, the complainant remitted a sum of Rs. 10,000 *yen* to the accused with instructions to pay the same to Sulaiman; the sum is stated to have been received by the accused, who, however, failed to pay it to Sulaiman and misappropriated it. Later, another sum was remitted and the accused misappropriated a portion of it.

The complainant, therefore, filed his complaint in Rangoon whence the monies were sent through a bank indicated by the accused. The latter pleaded *in limine* that, in view of section 188 of the Criminal Procedure Code, the Court has no jurisdiction unless the sanction of the Local Government is first obtained. The learned Magistrate acquiesced in this and directed the complainant to procure the necessary sanction. The complainant applies in revision and seeks to have the Magistrate's order set aside on the main ground that, since wrongful loss was caused to him at Rangoon and such loss was a consequence of the accused's act, the offence is triable by the Rangoon Court under sub-section (2) of section 181, read with section 179.

In *Abdul Salam* v. *Ramnewal Singh* (1) a precisely similar contention was considered by the Judicial Commissioner of Upper Burma (now my brother Pratt). The case of *Queen-Empress* v. *O'Brien* (2), *Ganeshi Lal* v. *Nand Kishore* (3) *In re Rambilas*(4) and *Rajani Binod Chakravarti* v. *All India Banking and Insurance Com-*

(1) 54 Ind. Cas. 677; 3 U. B. R. (1919) 172; 21 Cr. L. J. 149.

(2) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72.

(3) 15 Ind. Cas. 319; 34 A. 487; 10 A. L. J. 45; 13 Cr. L. J. 479.

(4) 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505 (1914) M. W. N. 894; 29 M. L. J. 175; 15 Cr. L. J. 688.

pany, Ltd. (5) were referred to, and it was held that section 179, Criminal Procedure Code, does not apply in circumstances as such appear in the proceeding.

The question whether loss resulting from criminal breach of trust can be said to be such a consequence as completes the offence was further considered by the Allahabad High Court in *George Langridge* v. *Grace Atkins* (6), and it was held by Muhammad Rafique, J., following *O'Brien's case* (2) and *Mahadeo* v. *Emperor* (7) and distinguishing *Ganeshi Lal* v. *Nand Kishore* (3), that in a criminal breach of trust loss to the victim is a consequence which completes the offence. The element of "wrongful gain" was not, apparently, taken into account.

The same point came up before a Bench of the Madras High Court in *In re Rambilas* (4), in which all the Allahabad cases referred to above were cited and commented upon. The effect of section 179 of the Criminal Procedure Code, read with section 405 of the Indian Penal Code, was considered and the finding arrived at was as follows:—" The offence of criminal breach of trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property (in this case the cash proceeds of the *hundis*) dishonestly, *i.e.*, with the intention of causing wrongful gain or wrongful loss. It is only the *intention* which is essential. Whether wrongful gain or loss actually results is immaterial; it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it."

The Bench, therefore, decided to follow the ruling of Karamat Hussain, J., in *Ganeshi Lal* v. *Nand Kishore* (3). Their decision was in turn followed by a Bench of Calcutta High Court in *Simhachalam* v. *Rati Kanta Laha* (8), wherein it was thus laid down:—

"Now for the application of section 179 it is essential that the offence should depend on an act done and on a consequence which has ensued. But loss to one person, though a normal result of an act of misappropriation by another, is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued, but only on the act which has been done. Section 179, therefore, does not in terms apply."

In this view I agree. Applying it to the present case, it is clear that the conversion took place in Japan, that the accused intended wrongful gain for himself in that country and that, therefore, the offence was committed there within the meaning of section 181 (2). No significance can be attached to the circumstance that the Rangoon Bankers to whom the complainant actually paid the monies were indicated by the accused and were hence, in a sense, his agents. The amounts were actually received by the accused at Kobe and it was only after their receipt that he misappropriated them.

The Rangoon Court had, therefore, no jurisdiction to entertain the complaint, unless specially empowered to do so under the provision of section 188.

The application is dismissed.

N. H. *Application dismissed.*

(5) 22 Ind. Cas. 192; 41 C. 305; 17 C. W. N. 1207; 15 Cr. L. J. 48.
(6) 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856.
(7) 6 Ind. Cas. 563; 32 A. 397; 7 A. L. J. 319; 11 Cr. L. J. 372.
(8) 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 533 OF 1922.
November 29, 1922.
Present:—Mr. Justice Stuart.
DINA NATH—APPLICANT
versus
NEK RAM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195, applicability of—Perjury before District Judge as Registrar—Sanction for prosecution—District Judge, jurisdiction of.

H. K. BHEDWAR v. C. S. R. RAO.

A District Judge has no jurisdiction to sanction a prosecution for perjury in respect of an affidavit sworn before him as District Registrar. To such a case section 195, Criminal Procedure Code, has no application.

Criminal appeal from an order of the District Judge, Agra.

Mr. *J. M. Banerji*, for the Applicant.

Mr. *Narain Prasad Asthana*, for the Opposite Party.

JUDGMENT.—The sanction cannot stand either on facts or law. In the first place, on the face of it, Dina Nath has not committed perjury because the assertions which he made were, according to his affidavit, not from his personal knowledge but from what he had been told, and there is nothing whatever to show that these assertions were not correct. Apart from that, the District Judge could not possibly sanction a prosecution for perjury in respect of an affidavit sworn before him as District Registrar. Section 195 of the Criminal Procedure Code has no application.

I allow this application and set aside the proceedings of the District Judge, dated the 25th September 1922, ordering the prosecution of Dina Nath on a charge under section 193 of the Indian Penal Code.

W. C. A. *Application allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 377 OF 1923.

May 22, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

H. K. BHEDWAR—COMPLAINANT—PETITIONER

versus

Rao Saheb C. S. R. RAO—ACCUSED—OPPOSITE PARTY.

Penal Code (Act LXV of 1860), ss. 415, 417—Cheating—Loss, likelihood of.

The petitioner, a Book-maker of the Calcutta Royal Turf Club, allowed the opposite party to take bets on credit. In respect of debts due to the petitioner on account of bets the opposite party gave the petitioner a cheque and the petitioner, relying on the assurance of the opposite party that there would be no difficulty in getting the cheque cashed, allowed him to take further bets on credit and the opposite party became further indebted to the petitioner. Thereafter, the petitioner presented the cheque for payment and it was dishonoured. Then he applied to the Magistrate for process under section 417 Indian Penal Code:

Held, that it could not be said that the act which the petitioner was induced to do by reason of the deception, caused or was likely to cause loss or damage to him as it did not follow that had the petitioner refused to take bets on credit, the opposite party would have made the same wagers in cash, and that therefore, the case did not come within the four corners of section 415, of the Penal Code. [p. 77, col. 2.]

Babus *Monmotha Nath Mukherjee* and *Narain Chandra Kar*, for the Petitioner.

JUDGMENT.

Ghose, J.—In this case a Rule was issued, calling upon the Chief Presidency Magistrate of Calcutta to show cause why the order dismissing the petitioner's complaint should not be set aside and why further enquiry into the said complaint should not be made and process issued against the opposite party under section 417, Indian Penal Code, or such other further order made as to this Court might seem fit and proper.

The facts giving rise to the application on which the Rule was issued, are as follows :—The petitioner is a licensed Book-maker of the Calcutta Royal Turf Club and has a permanent book for the season 1922-1923 within the first enclosure of the Calcutta Race Course. On the assurance of the opposite party, who is a Deputy Director of Commercial Intelligence, employed under the Government of India, that he would pay up his losses, if any, punctually on the settling day, the petitioner allowed the opposite party to take bets on credit on the 9th of December 1922. The debts due to the petitioner by and from the opposite party in respect of bets on credit amounted to a sum of Rs. 1,591. The opposite party failed to pay the said sum of Rs. 1,591 on the then following settling day and accordingly

the petitioner decided not to allow to the opposite party any more credit until the said sum was paid off in full. Thereupon the opposite party sent to the petitioner on the 15th December 1922, a crossed cheque for Rs. 1,591 on the Indian Industrial Bank. The said cheque was sent in the evening after banking hours. The opposite party assured the petitioner that the said cheque would be paid on presentation and on such assurance the petitioner allowed the opposite party to take bets with him on credit on the 16th December 1922, and in respect of such bets taken on credit on the 16th December 1922, the opposite party became indebted to the petitioner to the extent of Rs. 3,450. The cheque referred to above was presented for payment on the 18th December 1922, when it was dishonoured. The opposite party was thereupon communicated with and he gave a fresh cheque for Rs. 5,041 to cover his losses on the 9th and the 16th of December and assured the petitioner that there would be no difficulty whatsoever in getting the said cheque cashed. It appears that the petitioner relied on the assurance of the opposite party and allowed him to take further bets on credit on the 23rd and 26th December 1922. The opposite party became indebted to the petitioner in a further sum of Rs. 752. Meanwhile, the said cheque for Rs. 5,041 was presented for payment on the 28th December 1922 when it was dishonoured. The petitoner thereafter made various efforts to obtain payment of the two sums of Rs. 5,041 and Rs. 752 but without success. Eventually, on the 1st March 1923, the petitioner applied to the Chief Presidency Magistrate of Calcutte for process against the opposite party under section 417, Indian Penal Code, for having cheated him in respect of the said cheques. The learned Magistrate came to the conclusion that on the facts no case of cheating had been made out and accordingly dismissed the petitioner's application under section 203, Criminal Procedure Code.

On behalf of the petitioner it has been contended before us that the opposite party by representing to him that the cheques in question would be honoured and thereby the dues up to the 16th of December would be satisfied, induced the petitioner to accept his bets on credit, *i. e.*, bets which the opposite party would othersise have had to pay in cash, and that the petitoner by accepting such bets on credit lost a sum of Rs. 752 which would otherwise have come to his till. It is argued, therefore, that the opposite party has deceived the petitioner and has fraudulently or dishonestly induced the petitoner to take bets on credit from him, which he (the petitioner) would not have done, if he were not so deceived, and which act has caused him a loss of Rs. 752.

In my opinion, although it is quite clear that the petitioner was deceived and thereby induced to take bets on credit from the opposite party, I am unable to say that the act which the petitioner was induced to do by reason of such deception has caused or was likely to cause damage or harm to him in body, mind, reputation or property. It does not follow that if the petitioner had refused to take bets on credit from the opposite party, the latter would of a certainty have had to offer bets by paying cash. The opposite party might not have offered any bets at all. In order to bring home the offence of cheating against the opposite party, the petitioner would have to show that his case comes within the four corners of section 415, Indian Penal Code; and in this I think the petitioner has failed. The analogy suggested on behalf of the petitioner about a person obtaining goods or money by means of a cheque which he knows will not be paid, and thereby being guilty of the offence of cheating, does not, in my opinion, hold good in this case.

I would accordingly discharge this Rule.

Cuming, J.—The facts of the case out of which this application for revision has arisen are these:—

The petitioner, Mr. H. K. Bhedwar is a licensed Book-maker of the Royal Calcutta Turf Club and operates in the first enclosure. The opposite party is a Deputy Director of Commercial Intelligence. The petitioner allowed the opposite party to bet with him, on the 9th December and as a result of this the opposite party lost Rs. 1,591. The opposite party did not meet his obligations on settling day and

so the petitioner refused to allow him to bet on credit.

The opposite party then gave petitioner a cheque for Rs. 1,591 on December 18th. In consideration of receiving the cheque the petitoner allowed the opposite party to bet with him on credit on December 16th. The petitioner allowed this on the understanding that the cheque for Rs. 1,591 would be met on presentation. The opposite party lost on the 16th December a further sum of Rs. 3,450. On the 18th December the petitioner presented the cheqe for Rs. 1,951 payment of which was refused there being no funds to meet it. The opposite party represented to the petitioner that he had put his account in order and gave him on the 22nd December a fresh cheque for Rs. 5,041 to cover his losses on the 9th and 16th. The cheque was made over to the petitioner on the 22nd December after Banking hours. On the strength of the cheque the petitioner allowed the opposite party to bet with him on credit on the 23rd and 26th December when the opposite party lost a further sum of Rs. 752. This cheque also was dishonoured on presentation.

The petitioner's case is that the opposite party has cheated him. That the opposite party knew quite well when he issued the cheques he did that they would not be met and that by giving these cheques to the petitioner which he knew would not be honoured he deceived the petitioner, as the result of which deception loss was caused to the petitioner. The petitioner laid a complaint against the opposite party charging him under section 417, Indian Penal Code, with cheating. The learned Chief Presidency Magistrate dismissed the complaint on the ground that no criminal offence was disclosed. The point to be here decided is, whether, accepting the facts as alleged by the petitioner and holding that the opposite party knew quite well that the cheque would not be met, the offence of cheating has been committed. Obviously, if the facts are true the opposite party did deceive the petitioner and by so doing induced him to do an act which he would not otherwise have done, namely, allowed him to bet with him on credit. The question then to be decided is whether the allowing of the opposite party to bet on credit is an act which caused or was likely to cause damage or harm to the petitioner in mind, body or reputation. Mr. Mukherjee contends that it has cost the petitioner the loss of Rs. 752 which the opposite party lost to the petitioner on the 23rd and 26th of December. His argument is that if the opposite party had not been allowed to bet on credit he would have wagered the same amount in cash, that hence the petitioner would have received Rs. 752 in cash and he had lost that amount, and so has suffered loss. I do not think, however, we are entitled to assume for one moment that if the opposite party had not been allowed to bet on credit he would have made the same wagers in cash. It is at the most a possibility and I should say, on the facts hardly a probability. It cannot be said that the petitioner is any the worse off than he was before because the opposite party as the result of the deceit lost Rs. 752 to him and has not yet paid it. It has been suggested in argument that the petitioner might as the result of bets on one horse give longer odds on some other horse and so suffered loss. In the petition there is no suggestion of this and it seems at the best a remote contingency hardly capable of proof.

The question is not free from difficulty but after a careful consideration I am of opinion that it cannot be said that allowing the opposite party to bet on credit was an act which caused loss or damage to the petitioner.

The learned Presidency Magistrate was, therefore, right in the view he took that no criminal offence had been disclosed and I would discharge this Rule.

S. C. M. & N. H. *Rule discharged.*

LOWER BURMA CHIEF COURT.

CRIMINAL APPLICATIONS NOS. 1255 AND 1309 OF 1921.

February 23, 1922.

Present:—Mr. Justice Macgregor.

KYAW DWE AND ANOHTER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 239

HAKAM *v.* RALIA RAM.

—Joint-trial—Allegations against two accused mutually exclusive—Misjoinder of charges.

Where the allegations against two accused persons are mutually exclusive, *i. e.*, where the allegation is that either one or the other committed the offence, they cannot be tried together.

Azim-ud-din v. *Emperor*, 21 Ind. Cas. 163; 6 Bur. L. T. 191; 14 Cr. L. J. 563; 7 L. B. R. 68, followed.

Criminal applications against an order of the Magistrate, Tharrawaddy, dated the 5th December 1921 exercising powers under section 30.

JUDGMENT.—In this case, the exhibit counterfeit 100-rupee currency note was found by Sub-Inspector Police Po Gwin in the possession of 1st accused, Kyaw Dwe (appellant in Criminal Appeal No. 1309) on 8th October 1921. He said that he had got it from Po Yun and produced witnesses. Po Yun was arrested on 12th October. He said that it was Po Chit who had given the note to Kyaw Dwe and produced witnesses. Po Chit had been arrested on 11th October and denied having anything to do with it. The Police sent up all three together for trial making the different accused's witnesses the witnesses for the prosecution. Kyaw Dwe has been convicted under section 489C and Po Chit under 489B the Special Power Magistrate acquitting Po Yun because he disbelieves the prosecution-witnesses who have given evidence against him and in favour of Po Chit.

The trial was bad for misjoinder of accused with reference to section 239, Criminal Procedure Code. Where the allegations against two accused are mutually exclusive, as the Magistrate has regarded them in this case against Po Yun and Po Chit, they cannot be tried together, *i. e.*, where the allegation is that either one or other of them committed the offence. See *Azim-ud-din* v. *Emperor* (1).

The unusual and confusing procedure, in this case of prosecuting on the evidence of conflicting defence witnesses, should have put the Magistrate on his guard.

The trial was also bad for misjoinder, in that the evidence is against the supposition that Kyaw Dwe knew or had reason to believe that the note was counterfeit at the time when he accepted it. Any subsequent retaining of it by him in such circumstances as to amount to an offence under section 489C would, therefore, not be a part of the same transaction to which the acts of those guilty under section 489B in connection with it belonged.

I, therefore, set aside the convictions and sentences in the cases of Kyaw Dwe and Po Chit and direct that they be re-tried separately by the Additional Special Power Magistrate, Tharrawaddy. The defence witnesses should be examined for the defence and not for the prosecution in each case.

W. C. A. *Re-trial ordered.*

(1) 21 Ind. Cas. 163; 6 Bur. L. T. 191; 14 Cr. L. J. 563; 7 L. B. R. 68.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1201 OF 1922.

January 2, 1923.

Present:—Mr. Justice Martineau.

HAKAM AND OTHERS—PETITIONERS

versus

RALIA RAM AND ANOTHER—COMPLAINANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 435 (3)—Initial order, failure to make, effect of—Revision.

Where in a proceeding under section 145 of the Criminal Procedure Code the Magistrate fails to make the initial order prescribed by sub-section (1) of that section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are without jurisdiction, and cannot be regarded as proceedings under section 145. [p. 80, col. 2.]

In circumstances such as the foregoing, the High Court is not precluded by section 435 (3) of the Criminal Procedure Code from interfering in revision. [p. 80, col. 2.]

Application for revision of an order of the Additional Sessions Judge, Gujranwala, at Sialkot, dated the 20th July 1922, affirming that of the Magistrate, First Class at Ahmadnagar, District Gujranwala, dated the 12th June 1922.

Messrs. *Sham Lal* and *Aziz Ahmad*, for the Petitioners.

Messrs. *G. C. Narang* and *B. N. Kapur*, for the Respondents.

HAKAM *v.* RALIA RAM.

JUDGMENT.—This is a petition for revision of an order purporting to have been passed under section 145, Criminal Procedure Code. The Magistrate omitted to make the initiatory order required by sub-section (1) of that section, and this omission is the main ground on which the application is based.

Mr. Aziz Ahmad on behalf of the petitioners relies on *Abdulla Khan* v. *Gunda* (1), *Tara Chand* v. *Behari Lal* (2) and *Dewan Chand* v. *Queen-Empress* (3). In the first of those cases a copy of the initiatory order had not been served or published as required by sub-section (3), and in the second case no initiatory order had been made, but in addition to this the Magistrate in both those cases had omitted to take the evidence of the witnesses of the parties, whereas there is no such omission in the present case. *Dewan Chand* v. *Queen-Empress* (3) is also not a case analogous to the present one.

Dr. G. C. Narang on behalf of the respondents has cited *Sukh Lal* v. *Tara Chand Ta* (4), *Debi Prasad* v. *Sheodat Rai* (5), *In the matter of Chinnappudayan* (6), *Muhammad Sharif* v. *Dhanpat Rai* (7), *Nur Bakhsh* v. *Emperor* (8) and *Sajad Hussain* v. *Nanak Chand* (9), but those cases also are not exactly in point. In the first the Magistrate had drawn up the initiatory order, but had only omitted to direct the publication of a copy of the order. In the second and third cases also the defects in the proceedings were different from that in the present case. In *Muhammad Sharif* v. *Dhanpat Rai* (7), although the Magistrate had omitted to record a preliminary order under sub-section (1) of section 145 he afterwards, in the presence of the parties, recorded an order which essentially complied with sub-section (1), and it was for that reason held that the proceedings were not wholly without jurisdiction. The same was the case in *Sajad Hussain* v. *Nanak Chand* (9) and in *Nur Bakhsh* v. *Emperor* (8). Chevis, J., merely followed *Muhammad Sharif* v. *Dhanpat Rai* (7).

In the present case, however, the initial defect in the proceedings was not remedied subsequently. It is true that at one hearing the Magistrate directed the petitioners to file a written statement, but this was not a sufficient compliance with the requirements of the law. Under section 145 (1) it is first of all essential that the Magistrate should be satisfied that a dispute likely to cause a breach of the peace exists and that he should make an order in writing stating the grounds of his being so satisfied, whereas in this case no such order was passed at any stage of the proceedings. Under sub-section (5) any person interested is entitled to show that no dispute likely to cause a breach of the peace exists, and in such case the order passed under sub-section (1) will be cancelled and all further proceedings thereon will be stayed.

It is clear, therefore, that the omission to pass an order under sub-section (1) is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are, in my opinion, without jurisdiction and cannot be regarded as proceedings under section 145 of the Criminal Procedure Code.

I hold accordingly that section 435 (3) does not preclude this Court from entertaining the application for revision in the present case.

I accept the application, quash the Magistrate's proceedings as having been taken without jurisdiction, and set aside his order.

W. C. A. *Revision accepted.*

(1) 7 P. R. 1907 Cr.; 24 P. W. R. 1907 Cr.; 71 P. L. R. 1908; 6 Cr. L. J. 113.
(2) 36 Ind. Cas. 868; 22 P. R. 1916 Cr.; 18 Cr. L. J. 36.
(3) 2 P. R. 1899 Cr. (F. B.)
(4) 33 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618.
(5) 30 A. 41; 4 A. L. J. 705; A. W. N. (1907) 265; 6 Cr. L. J. 352.
(6) 30 M. 548; 3 M. L. T. 18; 7 Cr. L. J. 28.
(7) 23 Ind. Cas. 487; 68 P. L. R. 1914; 15 P. W. R. 1914 Cr.; 15 Cr. L. J. 279.
(8) 39 Ind. Cas. 1001; 26 P. W. R. 1917 Cr.; 18 Cr. L. J. 633.
(9) 39 Ind. Cas. 3011 22 P. W. R. 1917 Cr. 18 Cr. L. J. 461.

RAMNATH *v.* SITARAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 457 B OF 1921.
April 19, 1923.
Present:—Mr. Kotval, A. J. C.

RAMNATH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SITARAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family consisting of brothers—Partition suit by mortgagee-decree-holder from one brother—Mother, whether entitled to share—Devolution of share after her death.

In a suit for partition of share belonging to one of two joint Hindu brothers, by a mortgagee who has obtained a foreclosure decree in respect of the same, the mother is entitled to claim a share equal to that of each of the two brothers. Such share after the death of the mother will pass equally to the mortgagee-decree-holder and the other brother who had not mortgaged his share.

Bilaso v. *Dina Nath*, 3 A. 88; 5 Ind. Jur. 489; 2 Ind. Dec. (N. S.) 61 (F. B.) and *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.), followed.

Second appeal against the decree of the District Judge, Amraoti, dated the 28th October 1921, in Civil Appeal No. 92 of 1921..

Messrs. *N. G. Bose*, R. B., and *Balwantrao Pendharkar*, for the Appellants.

Sir *B. K. Bose*, Messrs. *V. Bose* and *P. N. Rudra*, for the Respondents.

JUDGMENT.—For the purposes of this appeal the facts may be stated as follows. Defendants Nos. 1 and 2, Sitaram and Tulsiram, two brothers, are members of a joint Hindu family which owned certain fields. In pursuance of a foreclosure decree the plaintiffs on the 31st May 1918 got formal possession of the half joint share of defendant No. 1, Sitaram, in the fields. They now sue for partition and separate possession of the half share and for mesne profits. Defendant No. 3, Punjai, is the mother of defendants Nos. 1 and 2. She claims a ⅓rd share in the joint family property on the ground that under the Mitakshara Law she is entitled to a share equal to that of each of the sons on partition. If her claim is allowed, the plaintiffs are entitled to partition and possession of a ⅓rd share only. The lower Courts have allowed the mother's claim and passed a decree in favour of the plaintiffs in respect of a ⅓rd share only. The plaintiffs' claim for mesne profits has been dismissed. This decision is challenged in this Court.

If the present suit were a suit for partition by Sitaram against Tulsiram the mother would, it is admitted, be entitled to a share. Does the fact that Sitaram's share has gone to the plaintiffs and it is the plaintiffs who claim a partition make any difference to the mother's claim? No authority has been cited to show that a person who has foreclosed the interest of a joint brother can claim to be in a more favourable position than the brother and can defeat the mother's claim. *Bilaso* v. *Dina Nath* (1) is an authority to the contrary. That case is sought to be distinguished. It is said that in that case the family estate consisted of a dwelling house and the right of the mother in dispute was the right of residence therein, which is of the nature of a charge whereof she could not be deprived under any circumstances. The decision in the case cited above was not influenced by the fact that the family property was a dwelling house. It was based on the principle that the mother has a latent and inchoate right of participation in the property left by her husband which becomes effective when separation takes place. I hold that defendant No. 3 is entitled to a share as against the plaintiffs also.

The share given to the mother will on her death go back to Sitaram and Tulsiram or their representatives, *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2), and there is no reason why the plaintiffs should not get the half of it which will revert to Sitaram or his representatives. As the decree stands, the plaintiffs will not be able to get that half after the mother's death. The decree will, therefore, be amended by the addition of a declaration that after the mother's death one-half of her ⅓rd share will go to the plaintiffs or their representatives.

(1) 3 A. 88; 5 Ind. Jur. 489; 2 Ind. Dec. (N. S.) 61 (F. B.).

(2) 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.).

The next point raised in appeal concerns the plaintiffs' claim for mesne profits. It is contended that the plaintiffs were entitled to mesne profits from the time that they were put in formal possession. The plaintiffs alleged that in June 1918 the defendants obstructed them in their cultivation of the fields in suit. The Trial Court found that the plaintiffs never attempted to cultivate any part of the field and were not prevented from cultivating it. The lower Appellate Court has found that the plaintiffs were never in actual possession and were not excluded from possession. It is not pleaded or shown that Sitaram was excluded from possession or enjoyment of the common property. The claim for mesne profits was, therefore, rightly rejected. The decree of the Trial Court, confirmed by the lower Appellate Court, is altered by the addition referred to above. In other respects it is upheld. The appellants will pay half the costs of the respondents in this Court. Costs in the lower Courts will be paid as ordered by those Courts.

G. R. D.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 13 OF 1921.
February 13, 1923.

Present: Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice May Oung.

S. M. A. R. CHETTY FIRM—APPELLANT

versus

KO TEIK KA AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 58 (2), 87—Erroneous registration of document—Error in procedure—Defect, whether curable.

Where a document is presented by a person duly authorised to present it, who thus initiates the jurisdiction of the Registering Officer, and who does all that he is required to do under the Registration Act and is guilty of no shortcoming thereunder, it is contrary to the scheme of the Act that he should be punished for any error or defect in the procedure of the Registering Officer subsequent to the presentation. [p. 86, col. 1.]

Case-law reviewed.

Where, on the application of the purchaser under a sale-deed executed by several persons, the Sub-Registrar erroneously admits the deed to registration under section 58 (2) of the Registration Act in spite of a denial of execution by one of the executants, the error of the Sub-Registrar is an error of procedure curable by section 87 of the Act, if there has been no fraud on the part of the purchaser and the sale-deed is found, as a matter of fact, to have been executed by all the alleged executants. [p. 86, col. 1.]

Second Civil appeal against a decree of the Divisional Court, Hanthawaddy, dated the 18th October 1920, in Civil Appeal No. 42 of 1920.

Mr. *N. M. Cowasjee*, for the Appellants.
Mr. *Young*, for the Respondents.

JUDGMENT.

Robinson, C. J.—Maung Po Han and Ma Do Ma, his wife, being the owners of the land in disputes executed a conveyance of it in favour of the appellant Chetty firm, which bears date the 1st February 1919. They executed another conveyance of the same land in favour of the respondents bearing date the 5th February 1919. The conveyance in favour of the appellants was duly registered on the 24th of February 1919; but it has been held by both Courts that this document was, as a matter of fact, executed on the 24th February but antedated in order to obtain priority over the conveyance in favour of the respondents. It has been held by both Courts that the conveyance in favour of the respondents was executed by both Po Han and Ma Do Ma as a fact and Po Han has admitted execution all along. Neither of these points can now be considered and have not been argued for the appellants. But it is urged that the registration of the respondents' deed is defective and illegal so as to make it inadmissible in evidence, and that it can have no force and effect to convey any title to this land to the respondents; in other words, that the appellant firm has been guilty of fraud, or an attempt at fraud, and, having failed in that, seek to obtain possession of this land nevertheless by obtaining a decision that the respondents have acquired no title to it.

The sole question before us is, whether the registration of the respondents' deed was made illegally and without jurisdiction.

This deed was duly presented for registration on the 26th of February to the Joint Sub-Registrar, the application stating that Po Han and Ma Do Ma refused to come to the Registration

S. M. A. R. CHETTY FIRM v. KO TEIK KA.

Office and praying that summons may be issued to them for registration. Summons was accordingly issued and both duly appeared. The registration proceedings do not show whether or not they were asked to admit or deny execution of the deed. The diary order merely shows that they objected to registration and that, consequently, registration was refused. Thereupon the respondents applied for copies and presented an appeal under section 73 to the Registrar. Their appeal shows merely that Po Han and Ma Do Ma came and objected to registration. The Registrar held: "Section 58 (2) obviously applies. The papers are fowarded to the Joint Sub-Registrar, U Tha Zan U, for disposal in accordance with that section." The order, however, proceeds: "The parties should be called up and asked if they admit execution; if they do, he should proceed as in section 58 (2); if they deny execution, registration should be refused."

On the matter coming before the Joint Sub-Registrar, he passed the following order: "Received the documents and records from the Office of the Dupty Commissioner. Plaintiffs are ordered to produce two witnesses on the 8th of March 1919." On the 8th of March the respondents produced two witnesses who were sworn and examined and the Joint Sub-Registrar's order then is: "The document is registered under section 58 (2), Registration Act."

In his evidence Po Han stated: "I alone executed the deed of sale to Teik Ka. My wife was not then present. She has never executed this deed; but she jointly executed the mortgage (Exhibit '2') with me in favour of Teik Ka." And again, "My wife and I were summoned by the Sub-Registrar to attend his office. I told the officer that I executed this deed, but I did not agree to its being registered as a sale-deed."

It seems to me to be clear that both executed the deed of sale knowing that it was a deed of sale, and that subsequently they endeavoured to avoid it, the reason put forward being that Teik Ka had said that though it was a deed of sale, he would treat it as a mortgage, and that they feared that he would not do so when the time came. It further appears to me that there can be little doubt that both admitted execution before the Joint Sub-Registrar, but that, because of this fear, they said that they did not wish to have the document registered. Unfortunately, however, there is no evidence as to these facts, which can only be inferred generally in the case.

Now Po Han admits that he admitted execution before the Joint Sub-Registrar and even if it be assumed, or be a fact, that Ma Do Ma denied execution by herself, the Joint Sub-Registrar should have admitted the document to registration so far as Po Han was concerned, even if he refused registration so far as Ma Do Ma was concerned. Throughout his procedure subsequent to the presentation has been wrong and not in accordance with the provisions of the Act. Even after receipt of the order of the Deputy Commissioner, he did not comply with the clear terms of that order but proceeded to take evidence as to execution, which he was not entitled to do under the Act. And, finally, he registered the document, or admitted the document to registration under section 58 (2), which deals with the case of a person who admits execution but refuses to endorse the same.

The question is whether this action on the part of the Joint Sub-Registrar renders the registration illegal and void, or is merely a defect in procedure which may be cured under section 87 of the Act.

Their Lordships of the Privy Council have twice dealt with such a position. In the case of *Sah Mukhun Lall Panday* v. *Sah Koondun Lall*(1), they dealt with the matter although it did not actually arise in the case before them. In that case a sale-deed was presented by the purchaser; the vendors were not before the Registering Officer, but he satisfied himself in their absence of the due execution of the deed by them, and admitted the deed to registration. Their Lordships say: "There can be no doubt that the Registering Officer acted in contravention of section 36 in registering the deed without the vendors having appeared before him; but it is not necessary for their Lordships to determine whether the registration was a nullity, or whether the error was one of which a stranger to the deed could take advantage. It may, however, be

(1) 2 I. A. 210; 15 B. L. R. 228; 24 W. R. 75; 3 Sar. P. C. J. 509 (P. C.).

observed that there are no words in section 36 declaring that the registration of a deed shall be null and void if made without the appearance of the persons who executed it; and it is very doubtful whether the words of that section are not merely directory to the Registering Officer for the benefit of the parties to the deed, and whether his acting without the appearance of the parties and upon evidence, instead of the admission of the parties of the execution of the deed, was more than a defect in procedure within the meaning of section 88. Again, it is not clear that the words 'unless it shall have been registered in accordance with the provisions of this Act,' in section 49, are not, especially as regards strangers to the deed, confined to the procedure on 'admitting to registration' without reference a to any matters of procedure prior to registration, or to the provisions of sections 19, 21, or 36, of the Act, or other provisions of a similar nature. In considering the effect to be given to section 49, that section must be read in conjunction with section 88, and with the words of the heading of part 10 "Of the Effects of Registration and Non-Registration." Now, considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is, by the Act, rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21, or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure in section 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. If the Registering Officer refuses to register, the mistake may be rectified upon appeal under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

Their Lordships were dealing with Act XX of 1866, and the reference to sections. 36 and 88 should be read as to sections 35 and 87 of the present Act.

In a later case—*Muhammad Ewaz* v. *Brij Lal* (2)—their Lordships in dealing with the rule laid down by the learned Judges of the Allahabad High Court said: "The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *prima facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed the registration to be, obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding." And they then go on to quote the passage from *Sah Mukhun Lall* v. *Sah Koondun Lall* (1)

These two cases clealy bring out the distinction that must be drawn between "a defect in procedure" that is the fault of the Registration Officer for which the persons presenting the document for registration are in no way responsible, and "a mistake' arising from their own wrongful act. This distinction is recognised in several later cases which are based on these two decisions of their Lordships of the Privy Council.

In *Pakran* v. *Kunhammed* (3) the mother of three sons executed a deed of gift in favour of one of them and then died. The

(2) 4 I. A. 166; 1 A. 465; 3 Sar. P. C. J. 738; 3 Suth. P. C. J. 438; 1 Ind. Dec. (N. S.) 339 (P. C.).
(3) 23 M. 580.

donee alone registered the document, the other sons not appearing before the Registering Officer. It was urged that an admission by one out of three representatives of the donor was not an admission within the meaning of the Act; but it was held that the error was a defect in procedure in the course of registration and that the registration was not rendered invalid thereby. Reference may also be made to *Srimati Sujan Bivi* v. *Srimati Asafa Khatun* (4) where it was said: "It appears to us that it may be open to question whether section 87 of the Registration Act, 1877, which cures defects in the procedure of the Registering Officer, can be extended to cure also the short comings of persons who apply to have documents registered; * * *" and reference was made to the case of *Mujib-un-nissa* v. *Abdur Rahim* (5). That was a decision by their Lordships of the Privy Council. The executant of a document gave a power-of-attorney to his agent to present it for registration, but died before the document was presented. The Registrar was aware of his death, but accepted and registered the document. And their Lordships say: "Now the case in hand is that of a person who, when he presented the deed for registration (as he says he did) on 4th November 1889, stood in no other relation to the deed than that, before the death of the person executing it, he had held his power-of-attorney. It is perfectly plain, not merely from the general law but from the terms of this section 32 itself, that, after the man's death the only attorney who would have had any *locus standi* would have been the attorney of the representative or assign of the deceased. It has been suggested, however, that the error of the Registrar was a defect in his procedure only, and, accordingly, under section 87 does not invalidate the act of registration. To their Lordships the error appears to be of a more radical nature. When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The Registrar could not be held to exercise the jurisdiction conferred on him if, hearing of the execution of a deed, he got possession of it and registered it; and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody. * * * The Registrar indeed did not merely disregard section 32, for he proceeded to accept the admission of the alleged attorney as a good admission of the execution of the deed, although section 34 requires in the case of a deceased the admission of the representative or assign.

"Their Lordships were referred to two decisions of this Committee in support of the appellants' contention. Neither case gives any countenance to the view that the absence of any party legally entitled to present a deed for registration is a defect in procedure falling under section 87. In both those cases the Registrar was throughout moved by a person having title and was exercising his jurisdiction. The difference is, in their Lordships' judgment, vital. They, therefore, hold the registration of this deed to have been illegal."

It will be noticed that this case was based not only on the fact that the wrong action taken was the action of the party seeking registration, but that it also referred to action which gave rife to the jurisdiction of the Registrar to register.

This case was followed in *Ishri Prasad* v. *Baijnath* (6) which was an exactly similar case. In *Razi-un-nissa* v. *Sabir Husain* (7), the Sub-Registrar registered a document as against a person denying execution thereof, and it was held that his action was *ultra vires* and without jurisdiction, and that the document could not be admitted in evidence as against the party denying execution. Reference is made to *Muhammad Ewaz's case* (2) and it is pointed out that the words, "The Registering Officer

(4) 4 Ind. Cas. 69; 13 C. W. N. 722.
(5) 23 A. 233; 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

(6) 28 A. 707; 3 A. L. J. 743; A. W. N. [illegible] 195.
(7) 26 A. 57; A. W. N. (1903) 195.

shall refuse to register the document as to the person so denying," were added after their Lordships' decision. The case was one of presentation of the petition in accordance with the requirements of the Statute; but it was held that the Registration Officer had neglected the prohibitory provisions of section 35, and for that reason they held that the document had not been duly registered.

With this one exception, all the authorities cited have been authorities in which the petition was presented by a person having no authority to present it, whereby the Registering Officer took a jurisdiction which he did not possess.

Lastly, the first two Privy Council cases were considered and followed in the case of *Maung Tun* v. *Maung Paw U* (8). That case is very similar to the present one. The Sub-Registrar accepted for registration a document without the appearance and admission of one of the executing parties but upon evidence called for by him. It was held that this irregularity or defect was merely one of procedure and did not render the registration null and void.

Having regard, therefore, to the authorities, I am of opinion that, where a document is presented by a person duly authorized to present it who thus initiates the jurisdiction of the Registering Officer, and who does all that he is required to do under the Act and is guilty of no shortcoming thereunder, it would be contrary to the scheme of the Act, and it could not have been the intention of the Legislature that he should be punished for any error or defect in the procedure of the Registering Officer subsequent to the presentation.

The respondents in the present case asked the Sub-Registrar to summon the executants; he did so, and one, at any rate, admitted execution, but the Registrar refused registration. The respondents had then a remedy, and they applied that remedy and obtained an order in their favour, and finally obtained registration from the Sub-Registrar.

They are ignorant persons not in a position probably to obtain legal advice; they relied on the action of the Registering Officer, as they were justly entitled to rely, and, if that officer committed an error, it must, having regard to the *dicta* of their Lordships of the Privy Council, be held to be error in procedure to be cured by section 87 of the Act. They were guilty of no fault and, if they are to be penalized for the mistakes of the Registering Officer, and thereby the fraudulent conduct of the appellants is to be successful, it would be most deplorable.

In my opinion, therefore, this appeal fails; the decree of the Court below must be confirmed, and the appeal dismissed with costs throughout.

May Oung, J.—I concur.

W. C. A. & N. H. *Appeal dismissed.*

(8) P. J. (1893-1900), p. 27.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 25 OF 1923.
April 30, 1923.
Present:—Mr. Dalal, J. C.
INDAR SINGH—DEFENDANT—APPELLANT
versus
GURDAYAL SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLI, r. 1, O. XLIII, rr. 1 (c), 2—Ex parte decree, setting aside of—Order demanding deposit of large decretal amount, whether equitable—Appeal against dismissal of application to set aside ex parte decree—Failure to file copy of dismissal order—Appeal, competency of.

An order granting a re-hearing of a suit decreed *ex parte* on condition of the applicant's depositing security to the large amount of Rs. 7,000, the sum decreed, is hard and cannot be upheld in equity.

In an appeal against an ultimate order dismissing an application to set aside an *ex parte* decree, for non-compliance of the conditional order granting re-hearing, it is incumbent on the appellant to file a copy of the order of dismissal along with a copy of the conditional order. His failure to do so, however, is a technical defect and would not on that ground render the appeal incompetent.

Appeal against a decree of the Deputy Commissioner, Rae Bareli, dated the 9th February 1923.

Mr. *Ghulam Hasan*, for the Appellants.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—The defendant, Indar Singh, has appealed from an order passed by the learned Collector of

Rae Bareli. The first order was of 19th February 1923, allowing the appellant's application for the setting aside of a decree passed against him *ex parte* on two conditions: (1) that he forthwith pay to the plaintiff all costs they have incurred in all the proceedings up to date, including Plearder's fee and the attachment proceedings, but excluding the Court stamps on the plaint, and (2) that he deposit security to the extent of Rs. 7,000 to cover the decretal amount and interest and future costs in case a decree is given against him. A month's time was granted to comply with these conditions though the word "forthwith" is used in the first condition imposed. An appeal was presented on 29th March 1923; prior to that date the learned Collector had dismissed the appellant's application on 21st March 1923. In reality, the apellant ought to have filed a copy of the order of dismissal along with a copy of the order of 19th February 1923. This is, however, a technical defect and I will not entertain Mr. Wasim's objection that an appeal does not lie. Mr. Wasim is a learned Counsel for the plaintiff-respondent.

The question is, upon what equitable conditions the re-hearing may be granted. The order for deposit of security to the large amount of Rs. 7,000 appears to me to be hard. I think justice will be done to both parties if the attachment of the defendant's property is continued under O. XXXIX, r. 1 (*b*), of the Code of Civil Procedure. As regards costs, I think that the defendant should pay to the plaintiff costs Rs. 86-8 incurred in the lower Court up to the date of his application for setting aside of the *ex parte* decree.

I set aside the lower Court's orders dated 19th February 1923 and 21st March 1923, and direct re-hearing of the suit on condition of the defendant depositing in the lower Court, within 15 days of to-day's date, Rs. 86-8 for payment to the plaintiff. If such deposit is not made within the time specified, this appeal shall stand dismissed with costs. If the deposit is made, costs here and other costs, besides Rs. 86-8 shall follow the event. The attachment of the defendant's property shall continue in any case either as attachment in execution of decree or as attachment under O. XXXIX, r. 1 (*b*), if the suit is re-heard.

G. H. & N. H. *Order accordingly.*

PATNA HIGH COURT.

CIVIL REVISION CASES NOS. 83, 114 AND 116 OF 1923.

June 7, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

Musammat PUHUP DEO KUER—PETITIONER

versus

RAM CHARITAR BARHI AN OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Objection to attachment by previous transferee from judgment-debtor—Auction-sale—Jurisdiction, determination of.

A Court has no jurisdiction to try a claim under O. XXI, r. 58, of the Civil Procedure Code to property attached in execution of a decree, after the sale of that property, even though the claim was registered before the sale was held, as the sale *ipso facto* determines the attachment, and thereafter the Court is *functus officio.*

Gopal Chandra Mukerji v. *Notobar Kundu*, 15 Ind. Cas. 53; 16 C. W. N. 1029, followed.

Revision from an order of the Munsif, Third Court, Patna, dated the 30th November 1922.

Mr. *Kailaspati*, for the Petitioner.

Mr. *B. C. Sinha*, for the Opposite Party.

JUDGMENT.

Mullick, J.—In this case the decree-holder in execution of a decree for arrears of rent attached certain plots of land some of which were claimed by the opposite party as transferees from the tenant. A claim case under O. XXI, r. 58, Civil Procedure Code, was registered by the Executing Court, but before it could be disposed of, for some reason or other, the sale was held and the whole of the tenancy was purchased by the decree-holder at the auction. Notwithstanding this, the Executing Court on the 30th November 1922 proceeded to dispose of the claim case by allowing the claim in respect of the plots claimed by the objecting transferees. It is against this

order that the decree holder-moves this Court in revision.

It is obvious that, after the sale was held, the attachment was *ipso facto* determined, and the Court had no longer any jurisdiction to try the claim case, and so it was held in *Gopal Chandra Mukerji* v. *Notobar Kundu* (1).

It is contended by the learned Vakil for the opposite party that the sale was brought about by the fraud of the decree-holder. There is nothing to support this contention and, in any event, it would not affect the question of jurisdiction. The order of the Executing Court releasing the properties claimed must be set aside.

The application is accordingly allowed with costs. Hearing fee one gold *mohur*.

This order will govern Civil Revision Cases Nos. 114 and 116 of 1923.

Bucknill, J.—I agree.

W. C. A. *Application allowed.*

(1) 15 Ind. Cas. 53; 16 C. W. N. 1029.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 194 OF 1922.

May 17, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

SANT BAKHSH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh DILDAR HUSAIN—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-fee—Redemption of mortgage, decree for, appeal against—Amount claimed larger than allowed by decree—Court-fee payable.

When a mortgagee in appeal claims a larger amount than that awarded by the decree of the lower Court allowing redemption, his Memorandum of Appeal is chargeable with an *ad valorem* Court-fee calculated on the difference between the amount found due by the lower Court and that claimed by him in appeal.

Sangat Bakhsh Singh v. *Rawat Dijdeo Bakhsh Singh*, 67 Ind. Cas. 968; 25 O. C. 30; (1922) A. I. R. (O) 82, followed.

Appeal against a decree of the Third Additional District Judge, Lucknow, dated

the 9th March 1922, modifying that of the Munsif, South Lucknow, dated the 17th March 1921.

Mr. *Daya Kishen Seth*, for the Appellants.

Mr. *A. P. Nigam*, for Respondent No. 1.

ORDER.—The defendants-appellants have appealed to this Court against a decree for redemption of a mortgage passed by the Court below in favour of the plaintiffs-respondents. In their Memorandum of Appeal they attacked the plaintiff's right to redeem as well as disputed the amount for which redemption has been allowed, claiming a larger sum than that which has been awarded to them by the decree of the lower Court.

The learned Pleader for the appellants says, that the difference between the amount now claimed and the amount decreed by the lower Court is Rs. 336. The respondents' Pleader says that the appellants should pay a Court-fee on this amount. The ruling of a Bench of this Court in the case of *Sangat Bakhsh Singh* v. *Rawat Dijdeo Bakhsh Singh* (1) supports the Pleader for the respondents. The appellants want time to make good the deficiency. They are allowed time to do so till the 30th May 1923, and they are further directed to amend their Memorandum of Appeal so as to show the amount of the mortgag-emoney now claimed.

G. H. *Order accordingly.*

(1) 67 Ind. Cas. 968; 25 O. C. 30; (1922) A. I. R. (O.) 82.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1467 OF 1921.

February 21, 1923.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Gokul Prasad.

MIR SINGH—DEFENDANT—APPELLANT

versus

MAKKHAN—PLAINTIFF—RESPONDENT.

Jurisdiction of Courts—Suit for declaration of

MIR SINGH *v.* MAKHAN.

title to crops—Civil Courts, jurisdiction of—Equity—Wrongful dispossession of tenant by landlord—Possession given to third person—Tenant, whether can claim crops grown.

A suit for a declaration that plaintiff is entitled to the value of crops grown in a certain plot of land is cognizable by a Civil Court. [p. 90, col. 1.]

Ram Singh v. *Girraj Singh*, 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252, distinguished.

Where a *zemindar* wrongfully dispossesses a tenant from a plot of land and puts another person in possession of the same, and the latter raises a crop thereon, whatever remedy the tenant may have against the landlord, he cannot on any principle of equity, claim any portion of the crop, the ownership in which rests with the person who raised it. [p. 90, col. 1.]

Second appeal from a decree of the Additional District Judge, Meerut, modifying that of the Subordinate Judge, Muzaffarnagar.

Messrs. *S. Abu Ali* and *Kailas Chandra Mital*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This appeal and the connected Second Appeals Nos. 1408 and 1643 of 1921 arise out of a suit brought under the following circumstances. The defendant made an application to the Criminal Court under section 145 of the Criminal Procedure Code in respect of certain plots of land and the sugar-cane crop which existed on that land. Both parties claimed the sugar-cane crop and claimed to be in possession. The Criminal Court caused the sugar-cane crop to be sold by auction and the amount realised by the sale was Rs. 1,450-8. After the case under section 145 of the Code of Criminal Procedure was decided, the present plaintiff applied to the Criminal Court for payment to him of the aforesaid amount which had been placed in deposit with one Banarsi Das. The Criminal Court referred the plaintiff to the Civil Court to have his title to the money determined. Thereupon the present suit was brought for a declaration that the aforesaid sum of Rs. 1,450-8 was due to him, the sugar-cane crop having been raised by him and not by the defendant. The plaintiff, no doubt, stated that he was the sub-tenant of the defendant in respect of the four plots of land on which the sugar-cane crop had been grown but both the Courts below have found that this statement was not true. The Court of first instance came to the conclusion that the four plots of land in which the sugar-cane crop had been grown formed the cultivatory holding of the defendant, that the *zemindar* had dispossessed the defendant and had put the plantiff into possession and that the plaintiff had sown the crop. That Court was of opinion that as the land was the cultivatory holding of the defendant, the plaintiff should be awarded only a half of the value of the crop although the whole crop according to the Court's finding had been raised by the plaintiff alone. One fails to understand on what principle this decree was made. If the crop was raised by the plaintiff it belonged to him. He may not have any title to the land in which the crop was grown but the crop itself was his property and, therefore, he was entitled to the price of the sugar-cane which he had raised on this land. From this decree of the Court of first instance both parties appealed. The learned Judge of the lower Appellate Court found that the defendant had failed to prove that he had raised the crop and he came to the conclusion that the crop had been grown by the plaintiff. It is true that he said in his judgment that, inasmuch as the defendant had admitted in the Revenue Court that the crop had been sown by the plaintiff, the onus lay upon him to prove that he had grown the crop. The question of onus did not at all arise in the lower Appellate Court as both sides had given evidence. In this case the allegation of one party was that the sugar-cane crop belonged to him and that of the other party was that he was the owner of the crop. No third party was involved. The crop was either raised by the plaintiff or by the defendant. If the defendant failed to prove that he had raised the crop, the inevitable conclusion was that it was the plaintiff who raised it, and the finding of the lower Appellate Court is that the crop had been grown by the plaintiff. That Court further found that the landlord forcibly dispossessed the defendant and put the plaintiff into possession and that during the period of the plaintiff's possession he had planted the sugar-cane and raised the crop. That being the finding of the lower Appellate

Court, it was the plaintiff who was entitled to the crop and to the amount which represented the value of the crop. There was no principle of equity under which the defendant could take away or appropriate any portion of the crop. If the landlord wrongfully dispossessed him, his remedy was to sue for restoration of possession and for compensation from the landlord for wrongful dispossession; but he could not claim any portion of the crop existing on the land which had been grown not by him but by the plaintiff. The learned Judge was, therefore, wrong, in our opinion, in holding that upon some equitable principle the defendant was entitled to one-third of the crop and in making a decree in the plaintiff's favour for two-thirds only. From this decision of the learned Judge the three appeals before us have been preferred, two of them, namely, Second Appeals Nos. 1407 and 1408 of 1921, by the defendant, and No. 1643 by the plaintiff. It is urged on behalf of the defendant that the Civil Court was not competent to entertain the suit and that the suit ought to have been instituted in the Revenue Court. This plea is clearly untenable. The matter in controversy between the parties was the value of the sugar-cane crop, and what the plaintiff claimed was a declaration to the effect that he was entitled to the value of the crop. There was no dispute in the suit as to the title to the land in which the crop was grown. Incidentally the question might arise, by what title the plaintiff had grown the crop. He no doubt said that he was the sub-tenant of the defendant, but he failed to substantiate that statement, and the Court came to the conclusion, as stated above, that the *zemindar* had wrongfully dispossessed the defendant and had put the plaintiff into possession. This act of the *zemindar* may have been improper but there was no question of the title to the land in the present suit, and consequently the suit could not be brought in the Revenue Court. Mr. Mital called our attention to a ruling reported in *Ram Singh* v. *Girraj Singh* (1), but that ruling manifestly has no application to a case of this kind.

(1) 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252.

The next contention was that the Court below had wrongly placed the onus of proof on the defendant. We have already commented on this matter. There was no question of onus of proof in the case before the lower Appellate Court, both sides having given evidence; all that it had to decide upon the evidence was whether the crops belonged to the plaintiff or to the defendant. If the crop had not been grown by the defendant, the only other person who could have sown it was the plaintiff and the finding was that it was the plaintiff's crop. Therefore, the appeals which have been preferred by the defendant are without force and must be dismissed. As regards the plaintiff's appeal it must succeed. Upon the finding that the crop was raised by the plaintiff, he is entitled to the amount which was realised by the sale of the crop, and to this amount the defendant has no title. The whole of the plaintiff's claim ought to have been decreed. The result is that we dismiss the appeals of the defendant with costs and decree the plaintiff's appeal with costs.

K. S. D. & N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 36 OF 1922.
May 30, 1923.
Present:—Mr. Wazir Hassan, A. J. C.
B. PIRTHI PAL SINGH—DEFENDANT—APPELLANT
versus
Raja MUHAMMAD EJAZ RASUL KHAN—PLAINTIFF—RESPONDENT.

U. P. Court of Wards Act (I V of 1912), s. 61—Covenant by Court of Wards—Personal liability of ward—General rule.

It is a well-settled principle of law that a guardian cannot so contract in the name of his ward as to entail the imposition of a personal liability on the ward. [p. 92, col. 1.]

Waghela Rajsanji v. *Shekh Masludin*, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.), *Srinivasa Thathacharlu* v. *Noolamma*, 55 Ind. Cas. 436; 11 L. W. 246; (1920) M. W. N. 340, relied upon.

PIRTHI PAL SINGH *v.* MUHAMMAD EJAZ RASUL KHAN.

Under section 61 of the U. P. Court of Wards Act, however, a ward becomes personally liable under a covenant entered into by the Court of Wards on his behalf. [p. 92, col. 2.]

Therefore, although the breach of a warranty implied by law in respect of a sale effected by the Court of Wards on behalf of a ward cannot result in the personal liability of the latter for damages, yet where an express covenant of warranty of title has been entered into, the purchaser is entitled to be indemnified. [p. 92, col. 1.]

Appeal against the decree of the Subordinate Judge, Bara Banki, dated 22nd July 1922, upholding decree of the Munsif, Ram Sanehighat, dated 3rd April 1922.

Mr. *Bisheshar Nath Srivastava*, for the Appellant.

Mr. *Niamatullah*, for the Respondent.

JUDGMENT.—In the year 1891 the estate of the predecessor-in-interest of the plaintiff was under the superintendence of the Court of Wards of the United Provinces and so was the estate of the defendant-appellant. Acting on behalf of those disqualified proprietors, who were minors, the Court of Wards executed a deed of sale on the 22nd August 1891 in respect of certain properties belonging to the appellant in favour of the respondent's predecessor-in-interest. Amongst those properties was included a 5 pies 6 *kirants* 4 *jau* share in *pati* Bangawan, *pargana* Daryabad, Tahsil Sanehighat, District Bara Banki, and in the schedule attached to the deed of sale the nature of this share was described to be "by mortgage in consideration of Rs.3,000," and the sale price the sum of Rs. 783. The vendee in pursuance of the conveyance entered into possession of this property and continued in enjoyment of that possession till the year 1920 when he lost it in consequence of a decree in a suit of ejectment to be mentioned in detail hereafter. The original mortgagor was a Muhammadan lady, who died in the year 1920. On her death certain persons claimed to be entitled to the reversionary interest in the property mortgaged on the ground that the lady held under a custom of the family only a life interest in the property. Their claim succeeded with the result that the plaintiff-respondent was dispossessed of the mortgaged property without, of course, receiving anything by way of the return of the mortgage-money, the title which succeeded against him being paramount to that of the mortgagor.

The plaintiff-respondent then brought the suit, out of which this appeal has arisen, for the recovery of Rs. 783, as damages for breach of the covenant relating to the warranty of title contained in the sale-deed. The defence was that there was no such covenant as would entitle the plaintiff to a claim for damages arising out of the facts stated above. The plaintiff's claim was succeeded in the Courts below. Hence this appeal by the defendant. The Court of first instance seems to have conceded that there was no indemnity clause in the sale-deed which would justify a claim on the part of the plaintiff on the facts as they have happened in this case. It says:—"The sale-deed contains clear covenants for title and for the quiet enjoyment. It is true that there is no clause such as (*sic*) by which a transferor undertakes to indemnify the transferee against the loss occasioned by the conduct of any person not claiming through him." The argument on behalf of the plaintiff in that Court seems to have proceeded on the line that there was a warranty implied by law under the provisions of section 55, sub-section (2) of the Transfer of Property Act, 1882. The Court accepted the argument and gave effect to it, observing that there was no contract to the contrary in the sale-deed. An argument was advanced on behalf of the defendant that he was not personally liable for any damages arising out of the warranty implied by law. This argument was supported by quoting a decision reported as *Srinivasa Thathacharlu* v. *Neolamma* (1). The Court distinguished that case on the ground that "the claim for damages was based on an express indemnity clause contained in the sale-deed. The case was not considered from the aspect of their being an implied guarantee of title in every sale-deed". On these grounds the argument was repelled and eventually a decree was passed in favour of the plaintiff.

The defendant appealed to the Court of the Subordinate Judge of Bara Banki.

(1) 55 Ind. Cas. 436; 11 L. W. 246; (1920) M. W. N. 340.

The learned Subordinate Judge agreed with the Court of first instance and held: "I think it must be held that the case is governed by sections 54 and 55 of the Transfer of Property Act, that the vendor was bound to disclose the defect in his title to the vendee and that there was an implied warranty of title." As regards the personal liability of the defendant, the learned Subordinate Judge was of opinion that, inasmuch as the sale was effected by the Court of Wards the defendant must be held liable for the damages arising out of the implied warranty in respect of that sale.

I must disagree with these grounds of decision. The breach of a warranty implied by law in respect of a sale effected by the Court of Wards cannot result in a personal liability of the defendant for damages. It is a well-settled principle of law that a guardian cannot so contract in the name of his ward as to entail the imposition of a personal liability on the ward—See the decisions of their Lordships of the Privy Council in the cases of *Wagheia Rajsanji* v. *Shekh Masludin* (2) and *Indur Chunder Singh* v. *Radhakishore Ghose* (3). The plaintiff's claim, therefore, on the basis of the breach of an implied warranty cannot be sustained.

The line of argument taken in this Court, both by the learned Advocate for the appellant and the learned Advocate for the respondent, took an entirely different direction from the one in which it proceeded in the Courts below. It was argued, I am sure, with a subconsciousness, that the claim could not succeed on the ground of the breach of warranty implied by law unless there was an express covenant contained in the deed, entitling the plaintiff to the remedy which he has sought in this suit, and which has been granted to him by the Courts below. This was in accordance with the case set out in the plaint. If the sale-deed contains a covenant of the nature which the plaintiff's learned Advocate contends it does, then I have no doubt that, in spite of the rule of the general law, which I have stated above, the defendant-appellant will be bound to indemnify the plaintiff under the provisions of the special law applicable to him as contained in section 61 of the U. P. Court of Wards Act, 1912. The second portion of section 61, sub-section (2), is to the effect that the covenants entered into by the Court of Wards shall be binding on the ward after the ward has ceased to be under the superintendence of the Court of Wards and by sub-section (4) of the same section a retrospective effect is given to the provisions of this section. The learned Advocate for the appellant contends that the context suggests that the ward's liability is limited for its satisfaction to the property which may be charged with it. I do not agree with this contention. To my mind the language is wide enough to make the ward personally liable. Such of the words of sub-section (2) as have a bearing on the question under consideration may be quoted here: "Such covenants shall be binding on the ward . . . .after the ward has ceased to be under the superintendence of the Court of Wards." It follows that if the sale-deed contains a covenant of warranty of title in relation to the mortgage in question, it must be held that the decrees passed by the Courts below against the appellant are correct.

The sole question for consideration now is whether there is or not such a covenant in the sale-deed. A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the paymnet of money advanced (*vide* section 58 of the Transfer of Property Act, 1882). The substance of a mortgage, therefore, is the transaction of the loan involved in it and the transfer of the property is merely collateral for the purpose of securing the re-payment of the loan. When this sale-deed, therefore, conveyed mortgagee rights in the share mentioned above it conveyed primarily the right to recover the debt and it is common ground that at the date of the conveyance both the vendor and the vendee, who in this particular case were, however, represented by one person, that is, the Deputy Commissioner of Bara Banki, knew that there was no defect in the title of

(2) 11 B. 551 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.).
(3) 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; Ind. Dec. (N. S.) 782 (P. C.).

the mortgagee in respect of the recovery of the mortgage-money. The plaintiff's learned Advocate argued that what was conveyed to his client's predecessor-in-interest in the mortgaged premises was an interest to enjoy the mortgage property in perpetuity *pro tanto* and, inasmuch as the plaintiff has been deprived of that enjoyment in consequence of the decree obtained by persons who had a paramount title to that of the mortgagor, he was entitled to the damages claimed by him. I do not agree with this argument, for if the mortgage-money was paid to him on the day following the conveyance he would have had no occasion to enjoy the possession of the property and yet he could not have had any claim for damages against the vendor. The substance, therefore, of the right which was conveyed to and acquired by the plaintiff's predecessor-in-interest was the right to the mortgage-money. I have already said that the vendee and vendor both knew that the vendor had such a right and, therefore, the transfer of that right was conveyed by the words, "and all the estate, right, title, interest of the said vendor into and upon the same (the premises conveyed)," and the following words sufficiently amount to a covenant in respect of the soundness and the validity of that right. "To have and to hold the same to the use of the said Shaikh Naushad Ali Khan (vendee), his heirs and assigns for ever and the same vendor doth hereby for and in behalf of the said minor Babu Pirthipal Singh (vendor) his heirs and assigns covenant with the said purchaser that notwithstanding anything by him or his predecessors-in-title done omitted or knowingly suffered he now hath power to grant the said premises and that the same shall at all time remain and be to the use of the said Shaikh Naushad Ali Khan . . . and that free and discharged from or otherwise by the vendor for and in behalf of the said Babu Pirthipal Singh, his heirs and assigns sufficiently indemnified against all estates, incumbrances, claims and demands." Any claim, therefore, in derogation of the right to recover the mortgage-money was provided against by the covenant for indemnity in relation thereto contained in the words quoted above. I have already stated that not only such a claim was made but it has succeeded also and the plaintiff-respondent has lost possession of the mortgaged property without recovering the mortgage-money.

The appeal fails and is dismissed with costs.

G. H. & N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 243 OF 1922.
March 23, 1923.
Present:—Mr. Hallifax, A. J. C.
NARAIN—PLAINTIFF—APPELLANT
versus
TUKARAM—DEFENDANT—RESPONDENT.

Court-Fees (Act VII of 1870), s. 7, cls. v, xi (cc)—Tenant staying over after notice to quit—Suit for possession—Court-fees — Tenant holding over, who is.

A suit for possession against a person who continues to be in possession after his tenancy has come to an end and who was given a notice to quit according to law, is not for recovery of immoveable property from a person who is a tenant holding over but is a suit to recover it from a trespasser and as such falls not under section 7, xi (*cc*) of the Court-Fees Act but under clause v of that section. [p. 194, cols. 1 & 2.]

A tenant holding over is a person who, after his right to the occupation of land under lawful title is at an end, continues, having no title at all, in possession of the land without the agreement or disagreement of the person in whom the right of possession resides. [p. 94, col. 2.]

Second appeal from the decree of the Additional District Judge, Nagpur, dated the 6th March 1921, in Civil Appeal No. 152 of 1921.

Messrs. *Amaram Bhagwant* and *S. C. Dutt Choudhury*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The plaintiff is the *malik makbuza* of a field valued at Rs. 5,600 of which the annual revenue is Rs. 51. He claimed possession of this field from the defendant, alleging that the latter had taken a lease of it from him for the year 1920-21 (1330 F.) for Rs. 145, and had

wrongfully re-taken possession of it after the end of the year by going on the land with his harrows. It was further alleged in the plaint that the plaintiff had given the defendant written notice in November 1920, that he would have to quit at the end of the agricultural year. The defence was that the plaintiff had given the defendant a fresh lease of the field for the year 1331 *Fasli* in September 1920 for Rs. 145 and had recovered a portion of the lease money at the time.

2. In the First Court the second lease alleged by the defendant was held not proved and the plaintiff was given a decree for possession. In respect of the payment of costs the learned Subordinate Judge held that the suit was of the kind mentioned in clause XI (*cc*) of section 7 of the Court-Fees Act, and ordered, therefore, that the Pleader's fee should be calculated on the sum at which the suit was valued for Court-fees, as under section 8 of the Suits Valuation Act the valuation for Court-fees and for jurisdiction would be the same in that case. In this, and also in the decree, the mistake was made of taking Rs. 255 as the proper valuation for both purposes; if the suit was of the kind mentioned in clause XI (*cc*) of section 7 of the Court-Fees Act, the proper valuation was Rs. 145.

3. In appeal the learned Additional District Judge held that the lease for the second year alleged by the defendant was proved to have been granted and ordered that the suit should be dismissed. A plea was mentioned as raised by the plaintiff who was there the respondent, that the Court had no jurisdiction to hear the appeal as the market-value of the property was in excess of Rs. 5,000, but the learned Judge affirmed the view taken in the First Court that the suit was of the kind mentioned in clause XI (*cc*) of the Court-Fees Act, and, therefore, the value both for Court-fees and for jurisdiction was only Rs. 145 (the mistake of the First Court in calling the amount Rs. 255 being noticed and corrected).

4. The question of the jurisdiction of the lower Appellate Court is raised again here. In that connection, we are concerned with nothing but the allegations in the plaint, and they cannot possibly be regarded as calling the person from whom the plaintiff claimed to recover immoveable property either a tenant of a tenant holding over. No attempt has been or could be made in this Court to support the view that the plaint makes any allegation of actual tenancy during the second of the two years, but the learned Pleader for the defendant has contended that, on the plaintiff's allegations, he was a tenant holding over. The first suggestion of this to be found in the case is in the petition of appeal to this Court, where the proposition seems to have been set up for the pleasure of knocking it down again. A "tenant holding over", or a tenant at sufferance, is a tenant "who after his right to the occupation, under a lawful title is at an end, continues (having no title at all) in possession of the land, without the agreement *or disagreement* of the person in whom the right of possession resides." (Wharton's Law Lexicon, page 841). Woodfall's Law of Landlord and Tenant defines a tenant on sufferance as "one who entered by a lawful demise or title, and, after that has ceased, wrongfully continues in possession without the assent *or dissent* of the person next entitled," explaining further that "the reversioner, who suffers this is considered to be guilty of some laches or negligence, as is generally the case."

5. The plaint very clearly asserts that the defendant did not remain in possession after the end of the first year without the disagreement of the plaintiff, as it is alleged that the latter gave him written notice to quit. Even according to the defendant's own allegations, if they could be taken into consideration in deciding this point, he could not be called a tenant holding over as he very distinctly asserted, that he was not there without the agreement of the owner. The suit is clearly for the possession of land held by a trespasser, and falls under clause V of section 7 of the Court-Fees Act. The proper valuation, therefore, for Court-fees is Rs. 255 and for jurisdiction is Rs. 5,600, so that the appeal lay to this Court and not to the Court of the District Judge.

6. The decree of the lower Appellate Court will accordingly be set aside, and the

case will go back to that Court with instructions to return the petition of appeal to the defendant under r. 10 of O. VII, read with section 107, of the Civil Procedure Code. The defendant-respondent must pay all the costs incurred in this and the lower Appellate Court, but this order will be subject to modification in any appeal from the original decree that he may present to this Court.

G. R. D. *Decree set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 11 OF 1922.
May 10, 1923.
Present :—Mr. Simpson, A. J. C., and Mr. Wazir Hasan, A. J. C.
LAL BAHADUR AND OTHERS—DEFENDANTS—APPELLANTS
versus
MURLI DHAR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76, cl. (g)—Mortgagee's duty to keep accounts—Contract to the contrary.

A mortgagee is, in view of s. 76 (*g*) of the Transfer of Property Act, under a statutory obligation to keep clear, full and accruate accounts of all sums received and spent by him as mortgagee. A mortgagee cannot contract himself out of this legal duty, there being no reservation in favour of a contract to the contrary as there is in some of the other clauses of the section. [p. 97, col. 1]

The only cases in which the performance of the duty imposed by section 76, clause (*g*), of the Transfer of Property Act can be dispensed with are provided for in section 77 of the Act. [p. 97, col. 1.]

Appeal against a decree of the Sub-Judge, Sitapur, dated the 5th Septemaer 1921.

Messrs. *Haidar Husain* and *Bishambhar Nath Srivatana*, for the Appellants.

Messrs. *Ram Chandra, Chail Behari Lal* and *Har Dhian Chandra*, or he Respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Sitapur, dated the 5th of September 1921, allowing the claim of the plaintiff-respondent for foreclosure of a mortgage in lieu of Rs. 30,887-14-7. The appellants in this Court are the defendants-mortgagors. The sole ground of appeal argued before us is the accuracy of the amount of the mortgage-money found due to the mortgagee by the Court below. Other grounds of appeal taken in the memorandum were abandoned and the cross-objections filed by the plaintiff-respondent were not argued.

The basis of the plaintiff's claim is the deed of mortgage, dated the 21st of December 1897 (Exhibit 1). The amount of the principal sum secured thereby is Rs. 5,200. The rate of interest agreed upon is 14 annas per cent. per mensem and the property mortgaged is the 12 annas share of village Gobinda Sarai. The conditions of the mortgage which have a bearing on this appeal are as follows :—

(1) The mortgagors shall redeem on payment of the principal and the interest at the end of Jaith, 1305 *Fasli*, *i.e.*, the middle of June 1898.

(2) In default, the mortgagee will be entitled to enter into the possession of the mortgaged property.

(3) In case possession is taken by the mortgagee, there will be no redemption for five years following it.

(4) "The amount of principal, interest and compound interest that shall become due at the time of taking possession according to the terms hereof shall carry interest at the rate of annas 14 per cent. per month. The income (from the) *mal* and *sawai* items in accordance with the *Patwari's* papers shall be applied in the first instance after payment of the revenue, other Government demands, village expenses and collection expenses, and the balance shall be appropriated by the mortgagee towards interest and then the surplus (if any) shall go towards the payment of principal."

It may be noted here that the word 'income' in the above clause is a translation of the word '*nikasi*' in the original deed of mortgage which means the gross income as distinguished from the net income. The Counsel for the parties also agree to the above interpretation and this is the interpretation accepted in the plaint paragraph 2 (h 3).

(5) "If the aforesaid interest is not paid off out of the amount of profits, the remaining amount of interest shall carry compound interest to be paid six monthly at the aforesaid date. It shall be paid along with the principal at the time of redemption (of the mortgaged property) and then the property shall be redeemed. The property cannot be redeemed unless the amount due under this mortgage-deed is paid off."

(6) "If we, the executants, do not get the mortgaged property redeemed after five years the mortgagee shall also be entitled to have the mortgaged property foreclosed or bring a money suit in respect of the entire amount of principal, intreest and compound interest and realize the same from the person and other property of the executants and by getting the latter sold by auction."

The mortgagors made default in the payment of the mortgage-money on the due date with the result that the mortgagee, after an interval of over six years from the date of default, brought a suit for the recovery of possession and obtained a decree on the 5th December 1904 (Exhibit 3) on a compromise dated the 28th of November 1904, (Exhibits 2 and 3) the essential terms of which were as follows:—

"(1) It has been agreed that Rs. 10,000 is due to the plaintiff on account of the amount of principal and interest. The plaintiff has, as a measure of favour, remitted the remaining amount due and costs.

"(2) As regards this item of Rs. 10,000 it has been agreed that the defendants may deposit it within three months from this date, so that the property may be redeemed. In case the above period expires the plaintiff, according to the terms of the mortgage-deed, shall get possession of the mortgaged property for five years. The amount of interest and profits shall be adjusted in accordance with the terms of the mortgage-deed."

The three months and the extended period of two months (Exhibit A1) expired without any payment being made by the mortgagors. Eventually, the mortgagee entered into the possession of the mortgaged property on the 17th of September 1905 (Exhibit 5). The mortgagee's possession, for the purpose of account, has been treated to have commenced from the beginning of the *Fasli* year 1313.

By the effect of the compromise decree dated the 5th of December 1904 (Exhibit 3) the mortgage-money was fixed at Rs. 10,000 and was to carry interest and compound interest in accordance with the terms of the deed of mortgage.

The relief asked for and granted by the Court below is a decree for foreclosrue

The ground on which the paryer for this relief is founded may best be stated in the language of the plaint itself.

10. That the period of the plaintiff's mortgagee possessions expires on 17th September 1910 and the plaintiff is entitled to get the mortgaged property foreclosed.

11. That in confirmity with the conditions of the mortgage-deed, the compromise and the decree aforesaid, receipts have been given in the account, entered in statement No. 1 containing the full gross rental of the mortgaged property and the rent of the plaintiff's *khudkasht* lands to the extent of the mortgaged share and in accordance with the statement No. 2 relating to principal, interest and compound interest up to the end of April 1920, the money due to the plaintiff, after deducting the amount realized as set forth in the statement No. 2, comes to Rs. 39,984-9 besides future interest and compound interest till the date of realization.

The statements of account referred to in paragraph 11 quoted above are statements prepared for the purposes of this suit and are attached to the plaint. The nature of each of the two statements is stated in the same paragraph and need not be repeated.

Paragraph 13 of the plaint states that the said statements of account are based on "Patwari's supplementary rent roll" except for the years 1326 and 1327 *Fasli* for which the *Patwari's* papers were not available and for those years "the profits have been calculated approximately."

Now a perusal of the statements of account reveals the plaintiff's case to be that the profits of the property mortgaged have fallen far short of the amount of interest, with the result that the account proceeds on the basis of six monthly rests and continues throughout as such. It is obvious

that, in order to obtain the relief for foreclosure as prayed for, the plaintiff must substantiate these accounts. He was under a statutory obligation to "keep clear, full and accurate accounts of all sums received and spent by him as mortgagee." (*Vide* section 76 (*g*), Transfer of Property Act, IV of 1882). He says that he has kept no accounts, at all events he has produced none. His Counsel argues that the mortgagee has discharged the legal obligation by tendering the *Patwari's* papers in evidence as provided in the deed of mortgage. We are of opinion that the plaintiff could not contract out of this legal duty, there being no reservation in favour of a contract to the contrary as there is in some of the clauses of the afore mentioned section 76. Nor do we think that the *Patwari's* papers were intended by the parties to the mortgage to serve as a substitute for the mortgagee's accounts which are intended to serve many more purposes than the *Patwari's* papers can possibly do. Those purposes are stated in clauses (*g*) and (*h*) of section 76. The only cases in which the performance of the duty imposed by section 76, clause (*g*), can be dispensed with are provided for in section 77. It is clear that the present case does not fall within the last mentioned section.

As regards the evidentiary value of the *Patwari's* papers, the learned Subordinate Judge is of opinion that they are not reliable. In this particular case we agree with him that they are not. The danger of relying on these papers is enhanced by several facts. The bulk of the area under cultivation yields grain rent, the amount of which naturally varies from year to year, and with a view to approach to anything like accuracy the crops must be appraised and valued every year. The plaintiff has not shown that this was done except in the year 1327 when the profits, as given by the *Patwari* Kali Charan (P. W. No. 1), came to Rs. 1,367-9-9 which leave a balance of Rs. 1,081-9-3 after deducting the Government revenue. This is more than the amount of interest Rs. 1,050 a year. The defendant's evidence consistently shows that the *Patwari* did not attend the annual appraisement of crops. The learned Subordinate Judge refers to this evidence without any adverse comment.

2. There is an area of over 30 *bighas pukhta* of *sir* and *khudkasht* lands cultivated by the mortgagee from year to year. The *Patwari's* papers show no profits whatsoever arising from those lands. The plaintiff has, in statement No. 1, fixed the rent of these lands at Rs. 6 per *pukhta bigha* all through. This standard of valuation of the annual rental is, in our judgment, too low. In respect of the lands under his own cultivation, the mortgagee is liable to be debited with a "fair occupation rent" *vide* clause (*h*), section 76. Kali Charan *Patwari* (P. W. No. 1) says that these lands are of "better quality than those let to tenants" who give their rents in grain. The plaintiff has not given any satisfactory evidence on the basis of which a standard of fair occupation rent could be obtained.

3. As regards the lands held by tenants, we have the evidence of the defendants' witnesses all of whom are tenants of the village in suit. For instance, Baldi (D. W. No. 2) says that the "*zemindars* get Rs. 8 or Rs. 9 worth grain per *kham bigha*." This will come to Rs. 24 or Rs. 27 per *pukhta bigha*, which we think is too high.

4. The only *sewai* income included in the profits shown in the *Patwari's* papers is a sum of Rs. 12 said to have accrued yearly from the sale of hides. Here again is a suppression of various sources of *sewai* profits which are disclosed by the evidence of the plaintiff's witness, Kali Charan, *Patwari*. He speaks of 8 annas per plough realized from tenants and of an additional levy of Rs. 4-14 per cotton field (*kapas*). The number of ploughs unanimously given by the defendants' witnesses is 40 to 42. Thus, the evidence produced by both the parties establishes *sewai* income of Rs. 12 from the sale of hides; Rs. 4-14 from the additional levy on cotton fields, and Rs. 20 from the levy on ploughs annually.

5. Further, the *Patwari's* annual rent roll (*jamabandi*) is not filed; what is filed is the yearly abstract giving the total of gross rental (*tatimma jamabandi*) Exhibits 6 to 18, for the years 1313 to 1325 *Fasli*. In the absence of details we are unable to say that these totals cover all the sources of

revenue: cash rent, grain rent, *sir* and *khudkasht* profits and *sewai*. See in this connection the decision in *Noyes* v. *Pollock* (1). In agreement with the Trial Judge we are therefore, of opinion that the *Patwari's* papers on which the plaintiff has based his accounts do not furnish a reliable data on all points. The situation, therefore, is this:—that there are absolutely no reliable accounts before us. The learned Counsel for the appellants contends that the plaintiff having failed to establish the case upon which he came to Court, his suit should be dismissed. On the other hand, the contention on behalf of the respondent is that the appellants having failed to prove that the mortgagee realized more than what he admits, the decree of the lower Court, being for a smaller sum than claimed by him, should be maintained. We are unable to yield to either of these contentions.

The method adopted by the learned Subordinate Judge is unsatisfactory. He has taken from Exhibit 37 the area of the land in the entire village (16 annas) yielding rent in money for the five years (1308-1312) when the mortgagors were in possession. Again, he has taken from the same paper the amount of the cash rent for those lands only, for the same period and finally has struck an average of Rs. 1-8-0 as the rent per *kham bigha*. Then, he has arbitrarily fixed 750 *kham bighas* as the entire area under cultivation in the village every year. On this data he has calculated profits at Rs. 843-13-0 a year for 1313 to 1318 in respect of the 12 annas share mortgaged. For the period subsequent to 1318 *Fasli* he has adopted an average of Rs. 2 per *kham bigha* as shown by the plaintiff in columns 3 and 4 of statement No. 1 and has calculated profits on that basis at Rs. 1,125 a year. Besides the deduction for the Government revenue, he has also allowed 7 per cent. to the mortgagee for his collection charges.

Now, the claim for collection charges was expressly abandoned by the mortgagee in paragraph 12 of the plaint. The bulk of the profits being grain rent it may be that the mortgagee incurred no expenses for collection. He could and might have personally attended to the division of the grain produce twice a year; as the evidence of Kali Charan, *Patwari*, suggests. There was therefore, no justification for crediting the mortgagee with any expenditure for collections. Exhibit 37 upon which the Subordinate Judge's conclusions are founded is an abstract of the Pargana Book which is kept at the Tahsil Head Quarters and maintained by the Qanungo under Board's Circular 3-VIII Rules 55C and 60. The entries are made from the *Patwari's siahas* which he files at the close of the year in the Tahsil. The evidential value of the entries in Exhibit 37 is, therefore, no more than of the entries in the *Patwari's* papers themselves, and we have shown that in the particular circumstances of this case they are not reliable as, indeed, the learned Subordinate Judge himself holds. Further, a yearly average of rental founded merely on cash rent roll cannot be accepted as a safe basis for calculation of profits if we take into consideration, as we must, the fact that the bulk of the profits is derived from the landlord's share of the grain produce which has increased by leaps and bounds during the latter years of the mortgagee's possession and must have brought immense profits consequent on the steady rise in prices of grain since 1914; facts which the learned Subordinate Judge notices but overlooks in striking an average for the purposes of the calculation. Besides, the amount of cash rental during the mortgagor's possession as entered in the *Patwari's* papers is by no means a correct index of the actuals. They being the *Zamindars* were finally responsible for the Government demand which may be assessed at the next Settlement. It was to their interest to show as low a rental as possible. Lastly, any calculation on the basis of an average area under cultivation for cash rents is, in our judgment, wholly misleading. A perusal of Exhibit 37 will disclose a remarkable increase in the area of lands yielding grain rent and a corresponding decrease in the area of lands with cash-rent since the year 1321 Fasli.

The mortgagee's case, as disclosed by the statement No. 1, is, that for the first five years (1313 to 1318) of his entering into possession the mortgagors continued in the actual occupation of the *sir* and *khudkasht* lands.

(1) (1885) 30 Ch. D. 336; 55 L. J. Ch. 54; 53 L. T. 430; 33 W. R. 787.

LAL BAHADUR *v.* MURLI DHAR.

This case, however, is not set out in the body of the plaint but is sought to be supported by the *Patwari's khetaunis* for those years, Exhibit 25 to 30. The best evidence on the point under consideration would have been the mortgagee's accounts. They are not before us, nor has the plaintiff or any managing agent of his sworn to that fact. In the circumstances, we decline to accept the *Patwari's* papers as sufficient or reliable evidence. On the other hand, we have unanimous evidence of a large number of village tenants produced by the defendants showing that the plaintiff took possession also of those lands when he entered into that possession of the share. We see no reason to reject this evidence. It is consistent with the probability that the lands being of the best quality and fairly large in area would naturally be taken possession of by the mortgagee who had a right to them. No reason is shown or even suggested why the mortgagee did or could not take possession of these lands from the beginning or how he came into possession later. We hold that the mortgagee has been in possession of the *sir* and *khudkasht* lands since 1913 *Fasli* and is accordingly liable to be debited with the profits thereof.

In the statement 1 attached to the plaint, we observe that the plaintiff has made deductions to the extent of one-fourth in the profits arising out of the *sir* and *khudkasht* lands as representing the fraction belonging to the share not assigned to him. The learned Subordinate Judge seems to have done the same thing. This clearly is wrong. These lands are not held by the entire proprietary body of the village but appertain exclusively to the mortgagor's share of 12 annas in the possession of the mortgagee.

We are not prepared to accept the bare suggestion, unsupported by any evidence, that the mortgagee did not keep any account of his receipt and expenditure. As observed by the learned Subordinate Judge, the plaintiff was a "leading" legal practitioner at Sitapur and keeps *karindas* and *munshis*. He must be presumed to have been aware of the provisions of law on the subject. We think that the accounts are suppressed.

The Counsel for the appellants has argued that, having regard to the default of the mortgagee in keeping or producing the necessary accounts, there should be a presumption that the whole of the mortgage money, principal (Rs. 10,000) and interest has been wiped off by the receipts of rents and profits of the mortgaged property. We are unable to yield to this argument. "Presumptions, even *in odium spoliatoris*, have known reasonable limits. They must not be conjectures, nor founded on data which the evidence itself shows to be in exact.' [*Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (2).]

The ultimate paragraph of section 76 of Act IV of 1882 is as follows:—

"If the mortgagee fail to perform any of the duties imposed upon him by this section, he may when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure." The general result at which we arrive is, that the net profits of the mortgaged property were large enough to cover the interest (Rs. 1,050) as it accrued from year to year, any deficiency in *Kharif* being balanced by an excess in *Rabi*. We think we are jusitfied in backing this conclusion with the presumption which we might make against the plaintiff to this limited extent only.

Further, clause 3 of the mortgage-deed provides that if the interest at the rate of 14 annas per cent. per mensem is "not paid off out of the amount of profits," it is only then that compound interest will be chargeable on the basis of six monthly rests. It is a part of the plaintiff's cause of action that the profits have fallen short of the amount of interest all through. He must prove this. He has not done so.

Now we proceed to state categorically the conclusions which we deem we are justified in drawing from the evidence on the record, after having carefully balanced the weak and the strong points of it and also from the presumption, to a limited extent, arising out of the mortgagee's conduct in not producing any account of his receipt and expenditure. Having regard to the condition of evidence, these conclusions are

(2) 12 M. I. A. 157 at p. 168; 11 W. R. P. C. 19; 2 B. L. R. (P. C.) 44; 2 Suth. P. C. J. 190; 2 Sar. P. C. J. 403; 20 E. R. 299; 7 Ind. Dec. (N. S.) 511.

obviously not correct to a mathematical precision, but, in the circumstances, they are just and proper according to our judgment:

(1) The area of the lands yielding (1) grain rent (2) cash rent and of (3) *sir* and *khudakasht* as shown in Exhibit 37 may be accepted.

(2) The amount of the cash rent as given in Exhibit 37 may also be accepted.

(3) The money equivalents of the grain rent as shown in Exhibit 37 or other *Patwari* papers cannot possibly be accepted. The plaintiff fixes too low and the defendants too high a rate of rent as we have said before. We think that a fair standard would be Rs. 8 per *pukhta bigha*.

(4) For the same reason we fix the same amount of rent, *i.e.*, Rs. 8 per *pukhta bigha* for the *sir* and *khudkasht* lands. This should be debited against the mortgagee from 1313 Fasli. Without any deduction for the one fourth share not mortgaged.

(5) *Sewai* income of Rs. 36 a year should be credited to the mortgagors.

(6) No deduction should be allowed to the mortgagee for collection charges.

(7) Deduction should be allowed of Rs. 283 annually for the proportionate Government revenue.

We annex to our judgment a schedule of accounts prepared on the lines aforementioned.* It will be noticed that, except in the year 1319 *Fasli*, the profits have exceeded the interest. But, as we have already mentioned, this account does not carry the guarantee of mathematical accuracy. It only represents a fair and proper estimate founded on the evidence which we have before us. We have consequently not deemed it just to debit the mortgagee with the profits in excess of the interest.

We, therefore, allow the appeal and modify the decree of the lower Court by declaring that Rs. 10,000 are due to the plaintiff under the mortgage dated the 21st December 1897. We allow to the defendants six months' time from to-day's date to deposit the said sum in Court for payment to the plaintiff in default the mortgage will be foreclosed. The usual preliminary decree for foreclosure as required by O. XXXIV, r 2, of the Code of Civil Procedure will be prepared. The cross-objections are dismissed. In the particular circumstances of the case, which are abundantly indicated in our judgment, wye direct that the parties shall bear their own costs in both the Courts.

G. H. *Appeal allowed.*

* Not printed.—[Ed.]

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 433 OF 1922.

February 13, 1923.

Present:—Mr. Justice MacColl.

MA NGWE KIN—PLAINTIFF—APPELLANT

versus

MA HME AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Inheritance—Child of divorced wife when disentitled to inherit—Child living separate from father at his request, rights of—Civil Procedure Code (Act V of 1908), s. 99, O. VI, r. 14—Omission to sign plaint—Irregularity.

It is settled law that if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household, he is debarred from inheriting from his father. [p. 101, col. 2.]

A child, however, who, on the divorce of his mother, merely at his father's request lives separately from him, is not included amongst the six classes of children who are not entitled to inherit. [p. 102, col. 1.]

A decree passed in favour of a plaintiff cannot be disturbed in appeal on the ground that he omitted to sign the plaint as required by O. VI, r. 14 of the Civil Procedure Code, section 99 of the Code applies to such a case. [p. 101, col. 1.]

Civil second appeal against the judgment and decree of the District Court, Lower Chindwin, passed in Civil Appeal No. 18 of 1922, dated the 2nd May 1922.

Mr. *Mitter*, for the Appellant.

Mr. *Ganguly*, for the Respondents.

JUDGMENT.—The plaintiff-appellant brought a suit for a share of her father, Maung Kaung Tha's estate. The first defendant-respondent is the widow of Maung Kaung Tha. The second defendant-respondent, Ma Leik, is his daughter by his second wife and the 3rd and 4th defendants-respondents are his co-heirs.

The plaintiff-appellant is the daughter of Maung Kaung Tha's third wife, Ma Shwe Khan. One of the defences raised was

that the plaintiff-appellant's mother had been divorced by Maung Kaung Tha and the plaintiff-appellant had lived with her and had severed all connection with her father and that, consequently, she was not entitled to inherit from him. The Courts below agreed in dismissing the suit on the ground that the plaintiff-appellant had not kept up filial relations with her father and was not entitled to inherit. There are no findings on the other issues framed. The plaintiff-appellant did not appear in Court. She filed the plaint through an agent and she did not even sign the plaint. Under O. VI, r. 14, every pleading must be signed by the party and his Pleader (if any); provided that where a party pleading is by reason of absence, or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. I cannot find any power-of-attorney given by the plaintiff to her agent on the record and no explanation was apparently obtained for her failure to sign the plaint. No objection, however, appears to have been taken and section 99 of the Civil Procedure Code applies to the case. It appears from the evidence that Ma Shwe Khan left Maung Kaung Tha before the plaintiff-appellant Ma Ngwe Kin's birth, that after her birth she applied for an order of maintenance against Maung Kaung Tha and he thereupon sued her for restitution of conjugal rights and for the custody of her child and obtained a decree. Ma Shwe Khan then divorced him. Ma Ngwe Kin lived for a short time with her father and then went and lived with his sister. Later she returned and lived with her father and was doing so when he married his last wife, the first defendant-respondent, Ma Hme. Ma Ngwe Kin continued to live with her father and her step-mother for some time and then was sent by her father to live with her mother and she continued to live with her mother until her father's death; but during that time she paid two or three visits to her father. The case has been very imperfectly tried. There are a great many discrepancies as to the length of time that Ma Ngwe Kin lived with her father and as to her age when she left him. Very little attempt has been made to clear up these discrepancies and it is not at all clear whether Ma Shwe Khan after the divorce lived in the same village as Maung Kaung Tha or not.

The learned Additional Judge of the District Court found that Ma Ngwe Kin, for a number of years before her father's death, had definitely thrown in her lot with her mother's family and severed connection with her father's household. It is not clear altogether on which side the Additional Judge laid the burden of proof with respect to this issue. He apparently laid it on the plaintiff-appellant but at the same time considered that the evidence of the Circle *Thugyi* Ko Maung Gyi, proved that plaintiff-appellant severed all connection with her father's household. He seems to have thought that the Circle *Thugyi* owing to his position had peculiar opportunities of knowing what took place in the various households under his charge. I think the Additional Judge was mistaken in this. A Circle *Thugyi* may be in charge of a very large area and I do not suppose that he pays particular attention to children with whom he has no concern. Practically all the rulings in Upper and Lower Burma relating to the question whether a child who has separated from his father can inherit or not have been cited. But none of them are exactly parallel. There are, as far as I know, no texts in any of the *Dhammathats* that lay down when a child of a divorced wife can inherit from his father and when he cannot. But it may be taken as settled law that if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father. In the present case, however, the plaintiff-appellant did not go to live with her mother on the latter's divorce but remained with her father. If she had continued to live with her father up to his death there can be no question at all that she would have been entitled to inherit from him. The burden of proving that she had lost that right was, therefore, upon the defendant-respondents and the question is whether they discharged it. According to the evidence of the Circle *Thugyi* Ma Ngwe Kin was eight or nine when she left her father

and he died when she was sixteen or seventeen. According to the evidence of the plaintiff's agent she was thirteen when she left her father. I do not think the fact that Ma Shwe Khan was divorced from Maung Kaung Tha should affect the case at all; because, as I have said, the plaintiff-appellant did not go to live with her mother on the divorce but continued to live with her father. The question, therefore, is whether a separation for three years according to the witness, Maung Po Tok, or for eight years according to the evidence of the Circle *Thugyi* can itself deprive her of the right to inherit. In *Ma Taik* v. *Ma Nyun* (1) it was held that a daughter who, from her infancy to the age of twenty-one, had never had anything whatever to do with her father although her mother had not been divorced, was not entitled to inherit. That, of course, was a such stronger case. In the present case Maung Kaung Tha apparently cherished the plaintiff-appellant and when she left him she did so at his request presumably as a matter of convenience. There is the evidence of the first defendant herself, Ma Hme, who is certainly not inclined to favour the plaintiff-appellant, because though, when examined at the first hearing, she stated that the latter had lived with her father and with her for two years after her marriage, she, when examined as a witness, reduced this period to one year, to the effect that the plaintiff-appellant paid her father two or three visits after leaving him. So there was apparently no rupture. There is, so far as I know, no provision in the *Dhammathats* enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting. A child who merely at his father's request lives separately from him is not included amongst the six classes of children who are not entitled to inherit. It was held, in the ruling cited above, that the Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion, and there must be some filial neglect to exclude. What filial neglect is proved in the present case? The plaintiff-appellant lived separately from her father to suit his convenience. Is there any evidence that her father sent for her on any occasion and that she did not go to him or that he ever requested her to do something for him and was met with a refusal? She was only sixteen when her father died, and as she was living separately from him she would naturally not minister to him unless he requested her to do so. I am, therefore, of the opinion that the suit, so far as this issue concerned, has been wrongly decided, and as there are no findings on the other issues the case will be remanded to the Sub-Divisional Court for findings on the other issues framed. The proceedings will be re-submitted with the findings of both Courts within two months.

W. C. A. *Case remanded.*

(1) 2 U. B. R. (1897-1901), p. 193.

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS NOS. 156 AND 155 OF 1922.

May 1, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Macpherson.

A. A. O. No. 156 OF 1922.

AULAD ALI—DECREE-HOLDER—APPELLANT

versus

ABDUL HAMID—AUCTION-PURCHASER—RESPONDENT.

A. A. O. No. 155 OF 1922.

AULAD ALI—RESPONDENT—APPELLANT

versus

S. M. LATIFUR RAHMAN—APPELLANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Refusal to accept deposit—Refusal to exercise jurisdiction—Revision.

A refusal to accept a deposit under O. XXI, r. 89, of the Civil Procedure Code tendered for the purpose of setting aside a sale is a refusal to exercise jurisdiction and a revision from such an order lies under section 115 of the Code. [p. 104, col. 1.]

Appeal from an order of the District Judge, Purnea, dated the 16th March 1922, confirming that of the Subordinate Judge, Purnea, dated the 11th December 1920.

AULAD ALI v. ABDUL HAMID.

Appeal from an order of the District Judge, Purnea, dated 16th March 1922, reversing that of the Munsif, Purnea, dated 11th December 1920.

Syed *Muhammad Tahir*, K. B., for the Appellant.

Mr. *S. N. Dutt*, for the Respondent.

JUDGMENT.

A. A. O. No. 156 OF 1922.

Mullick J.—Appeal No. 156 of 1922 is preferred by a mortgagee whose mortgage lien covered 4 lots of property and who obtained a preliminary decree against the respondent on the 28th July 1918 and a final decree on the 13th July 1919. Meanwhile, on the 16th April 1918, the appellant had bought the equity of redemption in lot No. 1 in execution of a money-decree which he had obtained against the respondent. Then, on the 4th August 1920, the appellant took out execution of his mortgage-decree and applied for the sale of plots Nos. 2, 3 and 4 only, but this course the judgment-debtor objected to and the execution case was dismissed. In his next application for execution the apppellant entered in the list of the properties to be sold all the four lots, but he requested that lot No. 1 should be sold last because he had purchased the equity of redemption in it. The judgment-debtor opposed this prayer and on the 11th December 1920 lot No. 1 was put up to sale and the whole decretal debt realised therefrom.

The appellant thereupon appealed to the District Judge but without success, and he files the present second appeal on the ground that, in the absence of any direction in the decree to the contrary and of any equities created against himself, he was entitled to sell the mortgaged properties in whatever order he chose. I think this contention is well founded. The purchase of the equity of redemption split up the mortgage and the appellant became entitled to recover only a proportionate share of the mortgage-money by the sale of lots Nos. 2, 3 and 4. He was not entitled to sell these 3 lots for the entire debt and all that the Execution Court could compel him to do was to sell lots Nos. 2, 3 and 4 for the reduced amount. But the Court could not compel him to sell lot No. 1 and its order was, therefore, bad.

But the lot having been purchased by a third party *bona fide* and without notice. We are unable in this appeal to set aside the sale.

It is alleged by the appellant that the purchaser, Latifur Rahman, is a *benamidar* for the judgment-debtor, but that has not been proved. The appellant might, perhaps, have been in a better position if he had, when the Court decided to sell lot No. 1, declined to proceed with the execution and preferred an appeal; but as matters stand this second appeal must be dismissed with costs.

JUDGMENT.

A. A. O. No. 155 OF 1922.

Mullick, J.—This appeal has been heard with the above Appeal No. 156.

It appears that after Latifur Rahman purchased the property, the mortgagee made an application under O. XXI, r. 89, Civil Procedure Code, for leave to deposit the purchase-money with interest and to get the sale set aside. The Munsif decided in the appellant's favour, but the District Judge in appeal held that by putting the four properties up to sale without stating in the sale proclamation that he had purchased the equity of redemption in lot No. 1 the appellant had created an equitable estoppel against himself. He accordingly reversed the Munsif's order and dismissed the appellant's application. Against this order the appellant files the present appeal.

It is clear no appeal lies but the appellant asks that his petition may be treated as an application for revision. In the special circumstances of this case we grant his prayer and proceed to consider the merits of his case.

Far from attempting to conceal that he was the purchaser of the equity of redemption the appellant had from the moment that he filed his first execution case strenuously contended that lot No. 1 could not be sold because he was its owner by purchase and I can see no representation on his part by reason of which the auction-purchaser was induced to change his position. I think, therefore, that there was no equitable estoppel in the case.

The next question is whether the appellant was entitled to make the deposit. In

MA HMUN v. MA NGWE THIN.

my opinion his purchase of lot No. 1 did not extinguish the equity of redemption; the right purchased was, in the first place, not co-extensive with his right as mortgagee and, in the second place, here the presumption of an intention to keep the security alive is very strong.

Therefore, he was at the time of the mortgage-sale the owner of the property, and he was competent to make the deposit under O. XXI, r. 89, of the Civil Procedure Code. In my opinion the Munsif's order setting aside the sale was right and the learned District Judge was wrong in reversing it.

It is, however, contended by the opposite party that this is not a case in which we can interfere under section 115, Civil Procedure Code. The reply is that it is now the settled practice of the Court to treat a refusal to accept a deposit tender for the purpose of setting aside a sale as a refusal to exercise jurisdiction and I think that the present application is maintainable under section 115, Civil Procedure Code.

The result is that the application is allowed with costs: the order of the District Judge is set aside and that of the Munsif restored. The appellant is entitled to his costs in the Courts of the Munsif and the District Judge. The hearing fee in this Court is fixed at Rs. 32.

Macpherson, J.—I agree.

M. D. J. *Order accordingly.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 189 OF 1921.

February 20, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

MA HMUN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MA NGWE THIN—PLAINTIFF—RESPONDENT.

Buddhist Law, Burmese—Succession—Parentage, determination of—Evidence of general repute, value of—Devolution of ⅛ shares—Grandchild v. step-grandmother.

In determining the parentage of a person for purposes of succession, evidence of general repute is of considerable importance, where the deceased has not left any blood relations and the events material for the decision of the question happened very long ago. [p. 105, col. 1.]

Semble.—The share of a grandchild as against the step-grandmother in the absence of any issues of the second marriage is one-half of the "*payin*" and one-eighth of the "*lettet-pwa*". [p. 106, col. 2.]

First civil appeal against the decree of the District Court, Pyapon, dated 13th August 1921, in Civil Regular No. 13 of 1921.

Mr. *Kyaw Htoon*, for the Appellants.

Mr. *Maung Pu*, for the Respondent.

JUDGMENT.

May Oung, J.—The plaintiff, now respondent, claiming to have been the granddaughter of one U Po Maung, deceased, sued the defendants, the widow and stepdaughters of U Po Maung, for a share in the estate left by him. U Po Maung is stated to have been married thrice, first to Ma Dun Hala, by whom he is alleged to have had one son, Po Mya, next to Ma Ngwe Gyi by whom he had no issue and lastly to the 1st defendant. The plaintiff averred that she was the daughter of Po Mya who died before his father.

In the first instance, the plaintiff's application for leave to sue *in forma pauperis* was opposed by the defendants. During the enquiry the 1st defendant specifically admitted, on oath, that the plaintiff was the daughter of Po Mya who was the only son of U Po Maung by his former wife; but on the plaintiff's application being allowed the defendants filed a written statement in answer to the claim in the course of which they disclaimed personal knowledge of U Po Maung's family connections, prior to the 1st defendant's union with him and protested that they had never even seen the plaintiff until she came forward after U Po Maung's death to claim a share in the inheritance.

Issues of fact were, therefore, framed to ascertain the plaintiff's and Po Mya's parentage. These were decided in the plaintiff's favour and defendants Nos. 1 and 2 now appeal. Their learned Counsel urges that the evidence adduced in the case was insufficient to establish the plaintiff's claim. It is necessary, in the first place, to remember that the plaintiff was called upon to prove, among other things, events which took place long before she was born. She is now about twenty-eight years old and Ma Dun Hla is stated to have died forty-two years before the suit. Again, U Po Maung was an Upper Burman who came as a young man to settle in the Delta and died at the age of eighty-two leaving no other blood relatives. And it is not sug-

gested that Ma Dun Hla left any. Hence this is a case in which evidence of general repute is of considerable importance provided it is cogent. In this connection the statement of Ko Shwe Sa, a witness called by the defendants themsleves, is clear and unmistakeable. He is over sixty years of age, a resident of Thandin, the deceased's village, and a hawker. He had known the deceased for forty years and had heard the plaintiff addressing U Po Maung as "grandfather" and Po Mya calling him father. Referring to the deceased and the plaintiff, he said," the general talk in the village was that they are grandfather and granddaughter," and, speaking of the deceased and Po Mya, "it was talked about in the village that they were father and son." Now Thandin is a small hamlet containing about thirty houses and it is only reasonable to suppose that relationships such as are now in question would generally be known to and talked about by most of the inhabitants. It may, therefore, be taken as fully established that the plaintiff was at least the reputed granddaughter of the deceased and there is no evidence that the latter at any time denied the relationship.

U Tha Zan, the 1st witness of the plaintiff, aged eighty years and a money-lender, had lived at Thandin for over forty years and during that period had known the deceased intimately. They worked adjoining lands. According to him, U Po Maung went over to Wegyi, a distant village, and married there. After seven or eight years he returned to Thandin, bringing with him his wife, Ma Dun Hla, and a child about four years old; that child was Po Mya. Subsequently, U Po Maung, left a widower, married Ma Ngwe Gyi, and Po Mya divided his residence between his father's house at Thandin and those of his mother's relatives at Wegyi. Po Mya married Ma Hnin Nu at Wegyi and by her had a daughter, the plaintiff. The witness first saw the plaintiff when the latter was seven or eight years old and it was then that she began visiting U Po Maung at Thandin; U Po Maung told him that she was his grand-daughter. The plaintiff gave birth to a child in U Po Maung's house and was living with him at the time of his death; she had been so living for over a year. Finally, the witness stated that the fact of Po Mya's being the son of U Po Maung was "notorious" in the village. The defence seek to discredit the evidence of this witness, on the ground that he had a law-suit over a small piece of land with U Po Maung which was compromised, the witness paying the sum of Rs. 5. After the case witness did not go to U Po Maung's house and was not on speaking terms with him and the first defendant; but U Po Maung is dead and there is no reason to hold that the witness, at his age, bears such a strong resentment towards his widow as would lead him to swear falsely to a state of facts which must, in the ordinary course, have been within his knowledge. The first defendant, though she is strenuous in her denials, says, "I have heard the statements made by the plaintiff's witnesses. I am not prepared to say whether their statements are true or false." I would accept U Tha Zan's evidence without hesitation or doubt.

Besides U Tha Zan, there are three other residents of Thandin who supported the plaintiff and established the facts that Po Mya was generally looked upon and acknowledged as the son of U Po Maung, that he used to visit his father occasionally and that he worked his father's land with his father for a few years.

There is also the admitted fact that the plaintiff and her husband lived for over a year, prior to U Po Maung's death, in a hut near the latter's granary behind his house. The first defendant says that they came and lived there to work as coolies but, considering that she had in her written statement falsely denied ever having seen the plaintiff before U Po Maung died, no reliance can be placed on her attempts to be little the position in which the plaintiffs tood towards U Po Maung during his lifetime. It is proved that U Po Maung was very stingy and the fact that he did not keep his granddaughter in comfort does not negative the evidence that the relationship claimed did exist.

For the defence, besides Ko Shwe Sa, already mentioned, two witnesses were called who gave negative evidence. U Hmo Gyi, aged seventy-six, stated that he had never seen the plaintiff before U Po Maung's

death, or after that event till a month before, he came to Court as a witness in this case. Seeing that his house was only four or five doors away from U Po Maung's this is an extraordinary denial and the witness must, I think, be held to have been trying to say too much. He, however, admitted that after Ma Ngwe Gyi's death Po Mya came and worked U Po Maung's land for one year, and was not prepared to say that the plaintiff was not Po Mya's child. Maung Tin Dok styled himself a Doctor and said that he had known U Po Maung since he, witness, was about seventeen; he was fifty-five when he gave evidence. He lived four or five houses away and used to meet the deceased almost every day. He denied everything except that he had seen the plaintiff in a hut at the back of U Po Maung's house but, according to him, she lived in it for only three or four months; he did not even know that Po Mya ever worked U Po Maung's land, a fact admitted by U Po Hmo Gyi. In my view, the statements of these witnesses did not appreciably weaken the case for the plaintiff.

There is one weak point on plaintiff's side, *viz.*, her omission to call her mother who is admitted to be alive at Wegyi. Her testimony would have been of value, especially as regards the question of the plaintiff's birth and parentage; and, as she had visited Thandin, she might have spoken to her relationship with U Po Maung. But, in any case, her evidence, if given, would have been open to the objection that she was interested in her daughter's welfare and I do not think that the failure to cite her is fatal to the claim.

Above all, there are the first defendant's admissions made when she was examined on the question of the plaintiff's pauperism. She has made frantic efforts to explain these away. First of all, she said that she did not think she had made the statements attributed to her. Then she pleaded that owing to the loss of her husband and certain relatives her mind was unhinged and hence she did not know what she had stated before. Confronted with the statements, she said they must be incorrect. Finally, it was only in re-examination that she said: 'In my former deposition I made those statements in cross-examination, because she had claimed that status.'' I would hold that she is utterly unreliable and that she must be deemed to have acknowledged the plaintiff's status and thus spoken the truth in an unguarded moment.

The conclusion is, therefore, in my view, irresistible that the plaintiff was the granddaughter of the deceased and, as such, entitled to a share in his estate.

There remains the question of the extent of that share. The Court below, following the decision in *Sein Tun* v. *Mi On Kra Zan* (1) awarded the plaintiff 9/20ths of the "*payin*" or "*alletpa*" property possessed by U Po Maung at the time of his marriage with the first defendant, and 1/8th of the jointly acquired property of that marriage. In doing so it omitted to notice that in this case there was no issue of the subsequent marriage as was the case in the ruling cited. The first defendant had brought two daughters from a previous marriage but the latter cannot inherit from their step-father in the presence of a descendant, the plaintiff, and their claim, if any, as against their own parent does not arise. The exact point is, however, covered by authority. The *Dhammathats* quoted in *Ma Hnin Dok* v. *Ma U* (2) are clear and unambiguous; they give the grandchild one-half of the "*payin*" and 1/8th of the '*lettet-pwa.*" In the later case of *Maung Kado* v. *Ma Kyin* (3), the position as regards '*payin*" was re-examined and the method of equal division between the grandchild and its step-grandparent was confirmed. The plaintiff has not, however, appealed and the award of 9/20ths cannot, therefore, be disturbed.

I would dismiss the appeal with costs, payable by the first defendant out of her share in the estate.

Robinson, C. J.—I concur.

N. H. *Appeal dismissed.*

(1) 3 L. B. R. 219.
(2) 2 U. B. R. (1897-1901) 126.
(3) 2 U. B. R. (1897-1901) 164.

GANGADHAR DAJI *v.* GOVIND NARAYAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 126-B OF 1922.

April 24, 1923.

Present:—Mr. Prideaux, A. J. C.

GANGADHAR DAJI—PLAINTIFF—APPLICANT

versus

GOVIND NARAYAN—DEFENDANT—NON-APPLICANT.

Contract Act (IX of 1872), s. 23—Money paid for settlement of marriage—Suit for recovery, whether lies.

A person who gives to another, who is to procure a girl for his marriage, money for payment to the guardian of the girl selected, should money be demanded, can, on failure of the marriage negotiations, sue for its recovery.

Srinivasa Aiyar v. *Sesha Iyer*, 41 Ind. Cas. 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282 and *Gulabchand Paramchand* v. *Fulbai Harichand*, 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649, followed.

Vaithyanatham v. *Gangarazu*, 17 M. 9; 3 M. L. J. 132; 6 Ind. Dec. (N. S.) 6, *Pitamber Ratansi* v. *Jagjivan Hansraj*, 13 B. 131*n.*; 13 Ind. Jur. 267*n.*; 7 Ind. Dec. (N. S.) 88, *Dholidas Ishvar* v. *Fulchand Chhagan*, 22 B. 658; 11 Ind. Dec. (N. S.) 1021, distinguished.

Revision of the decree of the Small Cause Court Judge, Akola, dated the 28th June 1922 in Civil Suit No. 2817 of 1921.

Mr. *M. B. Niyogi*, for the Applicant.

ORDER.—The present applicant-defendant is the husband of the plantiff's younger sister. The plaint states that in February 1920 defendant asked for Rs. 200 for the purpose of settling the plaintiff's marriage. The plaintiff, however, sent only Rs. 175 by money order. Defendant did not spend that sum in connection with the plaintiff's marriage in accordance with the agreement come to and, therefore, plaintiff sued to get the money back. Plaintiff's Pleader stated that girls were scarce in the caste and plaintiff wanted the defendant to secure a girl for him and the money was given him to be paid to the guardian of the girl selected should money be demanded.

For the defence, receipt of money was admitted. Defendant selected a girl to be married to the plaintiff and Rs. 400 were to be paid. Rupees 175 was not paid to the guardian of the girl but was with the defendant. The negotiations fell through. As the money was paid for a purpose which is immoral and opposed to public policy it could not be recovered. It was further pleaded that the defendant had lent Rs. 300 to the plaintiff some two years before and plaintiff told the defendant that this sum of Rs. 175 might be taken in part payment of that debt. This alleged agreement was denied by the plaintiff. No evidence was called in the case and the Judge found that defendant had no evidence to show that the amount was allowed to be appropriated towards the debt: and as regards the plaintiff's right to recover the amount, it was held that the amount was not paid to the bride's father; it was in deposit with the defendant who was bound to return it to the plaintiff. Plaintiff's claim was decreed. Against that decree the present application in revision has been filed by the defendant.

It is here pleaded that the contract is one of marriage brocage; that the money was paid to the defendant to induce the guardian of some minor girl to give that girl in marriage to the plaintiff. It has been held that agreements to procure marriage by reward are void on the ground that the marriage ought to proceed if not from mutual affection, at least, from the free and deliberate decision of the parties with an unbiased view to their welfare. But consent of parties is not an essential condition in the Hindu marriage contract. It has been held that agreement to pay money to the parent or guardian of a minor in consideration of his consenting to give the minor in marriage is void as being opposed to public policy: See *Vaithyanatham* v. *Gangarazu* (1) *Pitamber Ratansi* v. *Jagjivan Hansraj* (2), and *Dholidas Ishvar* v. *Fulchand Chhagan* (3). But I do not think that these cases govern the present one. It may be that the guardian or parent to whom the sum of money has been promised inconsideration of his or her giving his or her daughter in marriage may not be able to recover the sum so promised on the ground that the agreement is void as opposed to public policy. But where the plaintiff has paid the money in advance a suit can lie to recover back the amount on failure of the defendant to give the bride

(1) 17 M. 9; 3 M. L. J. 132, 6 Ind. Dec. (N. S.) 6.

(2) 13 B. 131*n.*; 13 Ind. Jur. 267*n.*; 7 Ind. Dec. (N. S.) 88.

(3) 22 B. 658; 11 Ind. Dec. (N. S.) 1021.

in marriage: See *Srinivasa Aiyar* v. *Sesha Iyer* (4) and *Gulabchand Paramchand* v. *Fulbai Harichand* (5).

The present is not a case by a person paying money to a stranger hired to procure a wife for him. Defendant was to get nothing but if, according to custom of the caste, the father of the proposed bride had to be paid something then the money was to be paid to him. Under these circumstances, I do not see how the defendant can refuse to return the money and he has failed to prove any agreement whereby the same was to go towards the payment of money lent by him. The decree of the lower Court appears to me to be correct. I dismiss this application in revision.

N. H. *Application dismissed.*

(4) 41 Ind. Cas. 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282.

(5) 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 19 OF 1923.

March 29, 1923.

Present:—Mr. Simpson, A. J. C.

MAKUND SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat GHAFUR-UN-NISSA—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Evidence Act (I of 1872) s. 165, applicability of—Witness called by Court—Right to cross-examine.

Section 165 of the Evidence Act applies to Court witnesses, as the expression "any witness" appears to include such a witness. The cross-examination of a Court witness is not a matter of absolute right but requires the leave of the Court. Where, however, such a witness makes an important statement which is against the case set up by one or other of the parties, the Court should allow the witness to be cross-examined. [p 109, col. 2; p. 110, col. 1.]

Empress v. *Grish Chunder Talukdar*, 5 C. 614; 5 C. L. R. 364; 2 Ind. Dec. N. S.) 998, *Gopal Lall Seal* v. *Manick Lall Seal*, 24 C. 288; 12 Ind. Dec. (N. S.) 859, *Mohendro Nath Dos Gupta* v. *Emperor*, 29 C. 387; 6 C. W. N. 550, *Chintamon Singh* v. *Emperor*, 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146 and *Tarince Churn Chowdhry* v. *Sharoda Soondurce Dossee*, 3 B. L. R. (A. C. J.) 145 at p. 158; 11 W. R. 468, not approved.

Coulson v. *Disborough*, (1894) 2 Q. B. 316; 9 R. 499; 70 L. T. 617; 42 W. R. 449; 58 J. P. 784, referred to.

Appeal against an order of the Sub-Judge, Gonda, dated the 21st December 1922, setting aside the decree of the Munsif, Tarabganj, dated the 30th November 1921.

Mr. *Aditya Prasad*, for the Appellants.

Messrs. *M. Wasim* and *Mahmud Beg*, for Respondent No. 1.

JUDGMENT.—This is a defendants' appeal. The suit was one for pre-emption. The vendor was Fazal Akbar. The vendees were Makund Singh and others, the present appellants. The plaintiff pre-emptor was *Musammat* Ghafur-un-Nissa, widow of Fazal Rahim, Fazal Akbar's brother. In the Court of trial it was objected by the vendees defendants that *Musammat* Ghafur-un-Nissa was not a co-sharer and, therefore, had no right of pre-emption. The learned Munsif gave effect to this plea and dismissed the suit. The plaintiff appealed and the appeal was heard by the learned Additional Subordinate Judge who allowed the appeal and as the case had been decided on a preliminary point remanded it for decision on merits. The vendees have filed the present appeal against this order of remand. I am of opinion that the appeal fails because the question decided by the lower Appellate Court was one of fact which cannot be disturbed in second appeal. The learned Subordinate Judge said:—"The question as to whether the appellant has still got a right or share in the property left by her son, Fazal Rab depends upon the consideration of the further questions,—

"(1) As to whether Exhibits A3 and A7 were validly executed or not and what was their effect upon the rights of the appellant.

"(2) As to whether her title in the property has been extinguished by adverse possession of Fazal Akbar or not.

"Before the lower Court a plea of the exclusion of appellant from inheritance left by her son, was also raised, but was rejected by the learned Munsif for cogent reasons with which I fully concur, that plea has not been pressed upon me." The share which is now claimed by *Musammat* Ghafur-un-Nissa, plaintiff-respondent, came to her by inheritance on the death of her son Fazal Rab. Proof of the alleged custom having failed, it is for the appellant to show that the plaintiff's title has become extinguished. He attempted to do so by means of certain mutation proceedings. It appears that it was

the Patwari who reported the death of Fazal Rab and that two compromises purporting to be entered into by *Musammat* Ghafur-un-Nissa and her husband's brother, Fazal Akbar, were put in before the learned Tahsildar and that mutation was effected on the basis of these compromises. The name of Fazal Akbar being recorded over the share of *Musammat* Ghafur-un-Nissa. I may point out here that the share which Fazal Akbar had sold is his own. There is no dispute about that. The question is, whether *Musammat* Ghafur-un-nissa is a co-sharer of any share so as to give her a right of pre-emption.

Now, the lady was a widow and a *pardanashin* and she was living, and is still living, in the same house as Fazal Akbar. In these circumstances, any one who set-up such a transaction as this compromise was bound to staisfy the Court (1) that it was executed, (2) that the lady fully understood what she was doing. The lower Appellate Court has found that the fact of execution is not proved and I cannot see that the Court has fallen into any error of law in coming to this decision. The compromise is not signed by the lady. It is not asserted that she appeared before the Tahsildar. It bears a mark made on her behalf by one Shamsool Haq, one of her relations, and there is no power-of-attorney authorising him to act for her. This part of the case, therefore, is at an end.

Secondly, it is argued that, whether she executed the compromise or not, her rights have been put an end to by the adverse possession of Fazal Akbar. But if the compromise fails, Fazal Akbar's possession would not be adverse. No doubt he was managing the property, but he may have been doing so on her behalf. She may have thought so, and even that would be enough. The Court will not be absolute to deprive the original owner of her title merely because some trick has been practised on her. It is in evidence that she was receiving some thing from Fazal Akbar and she says that she regarded it as her share in the profits. For these reasons I dismiss the appeal with costs.

There is a point which I do not decide. But as it was raised and argued before me, I think it right to say something on the subject for the guidance of the Courts. Fazal Akbar was called by the First Appellate Court as a Court witness and was examined. The present appellants vendees who were the respondents in that case claimed to examine him and the Court refused. The refusal is in these words.—

"At the time when I expressed my intention to the above effect the learned Pleaders for parties did not pray that they may be granted an opportunity to cross-examine. When his statement was recorded it turned out to be against the respondent; when learned Pleader prays for permission to cross-examine him, or suggest questions to the Court for his examination. The learned Pleader for the appellant contests the above prayer. I am afraid it is not possible for me to accede to the prayer of the learned Pleader for the respondent. I cannot allow him to cross-examine the witness as all the points for which he has been examined have been brought on record."

The learned Subordinate Judge was clearly wong in refusing permission to examine. The view of the Calcutta High Court is that parties have an absolute right, without the permission of the Court at all, to cross-examine a Court witness. *Empress* v. *Grish Chunder Talukdar* (1), *Gopal Lall Seal* v. *Manick Lall Seal* (2), *Mohendro Nath Das Gupta* v. *Emperor* (3) and *Chintamon Singh* v. *Emperor* (4). No doubt, all these cases were criminal cases. Most of them referred back to the old case *Taring Churn Chowdhry* v. *Sharoda Soonduree Dossee* (5). If it had been necessary to decide the point I should have felt constrained either to follow these Calcutta decisions or to refer the matter to a Bench. My personal opinion, if I may venture to state it, is that cross-examination is not a matter of right but requires the leave of the Court. I consider that section 165 of the Evidence Act applies to Court witnesses. The expression "any witness" appears to me to include a Court witness also. I think if the Judge were examining a Court witness,

(1) 5 C. 614; 5 C. L. R. 364; 2 Ind. Dec. (N. S.) 998.
(2) 24 C. 288; 12 Ind. Dec. (N. S.) 859.
(3) 29 C. 387; 6 C. W. N. 550.
(4) 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146.
(5) 5 B. L. R. (A. C. J.) 145 at p. 158; 11 W. R. 453.

and Counsel on either side were to object to the putting of a particular question the Judge would rely upon section 165 of the Evidence Act. So far as the statutory law goes, either the Evidence Act deals with the question in section 165, in which case the leave of the Court is necessary, or the Evidence Act is absolutely silent on the point, in which case, apart from the Calcutta Rulings, the only authority I know is the English case *Coulson* v. *Disborough* (6). It was a civil suit. The Judge refused permission to cross-examine and it was held that there was no right of cross-examination without the leave of the Court. It seems quite probable that the Legislature intended to embody the same rule in section 165 of the Evidence Act although, of course, the Evidence Act is much holder than this decision.

But even if the learned Subordinate Judge was justified in believing that he had a discretion in the matter, it is plain that the discretion was wrongly exercised. This Court witness made an important statement which was against the case of the present appellants, and on every ground of justice that statement ought to have been subjected to the test of cross-examination. The learned Subordinate Judge seems to have actually thought that he had no authority to permit cross-examination. This is certainly wrong, and I should have been obliged to send the case back to have this witness cross-examined were it not that the respondent was ready to have the evidence of this witness taken out of the record, and the case decided apart from it, and the appellants ultimately agreed to this course being taken. The evidence of Fazal Akbar is, therefore, to be regarded as struck out of the record. As I said above, the appeal fails and is dismissed with costs.

G. H. *Appeal dismissed.*

(6) (1894) 2 Q. B. 316; 9 R. 390; 70 L. T. 617; 42 W. R. 449; 58 J. P. 784.

PATNA HIGH COURT.

CIVIL REVISION NO. 184 OF 1923.

May 22, 1923.

Present:—Mr. Justice Das and Mr. Justice Foster.

BISHESHWAR PRATAP NARAIN SAHI —PETITIONER

versus

ASARFI SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XX, r. 3—Inherent power of Court—Power to re-call order passed by predecessor—Judgments, sanctity of.

Section 151 of the Civil Procedure Code gives no power whatever to a Judge to re-call an order passed by his predecessor-in-office. He is entitled to correct clerical or arithmetical mistakes in the judgment or errors arising from any accidental slip or omission and he is also entitled to review a judgment if there are grounds for review, but otherwise he is not entitled to touch that judgment in any way. [p. 111, col. 2; p. 112, col. 1.]

Revision from an order passed by the Subordinate Judge, Muzaffarpur, dated the 27th April 1923.

Messrs. *Sultan Ahmad* and *B. K. Sinha*, for the Petitioner.

Messrs. *S. C. Mitra* and *B. K. Mitra*, for the Opposite Party.

JUDGMENT.

Das, J.—The petitioners were the plaintiffs in an action to recover possession of certain properties known as Sursand Raj Estate. They entered the properties in four schedules, properties in schedules III and IV being properties claimed by Asarfi Singh as his *mokarrari*. With reference to the property entered in schedule III there was a previous litigation between the parties, Asrafi Singh claiming those properties as his *mokarrari* and the petitioners disputing the claim of Asarfi Singh. The Court of first instance decided the suit in favour of Asarfi Singh; in other words, it held that Asarfi Singh had a *mokarrari* interest in those properties. In appeal the decision of the Court of the first instance was set aside and this Court in second appeal upheld the decision of the lower Appellate Court. It appears that Asarfi Singh has obtained leave to appeal to His Majesty in Council against the decision of this Court.

Now, it is admitted that the decision of the Judicial Committee will govern the rights of the parties so far as schedule III

and IV properties are concerned; and before the learned Subordinate Judge the parties seem to have entered into some sort of agreement on this point. The learned Subordinate Judge in dealing with the schedule III and IV properties says as follows:—

"It has, therefore, been proposed by both parties that these issues may be left undetermined by this Court and in case of plaintiff's success a decree may be passed in respect of these properties subject to the decision of their Lordships of the Privy Council. I agree with the proposal made by the parties and leave this point undetermined."

The decree of the learned Subordinate Judge with reference to the schedule III and IV properties is in these terms:-

"Let it be declared that the plaintiffs as *Bandhus* of the late Babu Kishun Pratap Indra Narayan Singh and by virtue of the agreement dated the 9th May 1908 are entitled to possession of the properties described in schedules I to IV of the plaint, but as regards the properties described in schedules III and IV they are entitled to possession subject to the decision of the Privy Council" and in dealing with the question of mesne profits the learned Subordinate Judge expressed himself in these terms:—

"Let it be furher declared that the plaintiffs are eatitled to profits with respect to the property of schedule IV but subject to the decision of the Privy Council for three years before suit and for subsequent period until delivery of possession or three years after the decree whatever event first occurs."

In my opinion there is no doubt whatever that the learned Subordinate Judge gave the plaintiffs a decree in regard to schedules III and IV properties, but provided that that decree would have no operation if the Privy Council should ultimately allow the appeal of Asarfi Singh.

The petitioners applied for execution of the decree before the learned Subordinate Judge who actually passed the decree. The learned Subordinate Judge allowed execution not only in respect of schedule I and II properties but also in respect of schedule III and IV properties. Thereupon the opposite party Asarfi Singh applied for restitution under section 144 of the Civil Procedure Code and for an order that the properties should be re-delivered to him and to a Receiver who had been appointed in a previous litigation. His view apparently was that there was no decree in respect of schedules III and IV properties and that the decree could not be executed so as to entitle the plaintiffs to recover possession of schedule III and IV properties. This application was made not before the learned Subordinate Judge who dealt with the case and passed the decree, but before another Subordinate Judge who succeeded the first mentioned Subordinate Judge. The learned Subordinate Judge in dealing with the application of Asarfi Singh conceded that section 144 had no application to the facts of the case, but he thought that he had complete jurisdiction to re-call the order which had been passed by his predecessor-in-office under section 151 of the Civil Procedure Code. The order which he ultimately passed was in these words,—

"I, therefore, allow the application under section 151 of the Civil Procedure Code because in my opinion possession over these properties could not be delivered before the decision of the Privy Council. The receiver and the applicant will be restored to the possession of schedules III and IV properties."

In my opinion the order of the learned Subordinate Judge cannot be supported. Section 151 of the Civil Procedure Code gives him no power whatever to re-call an order which had been passed by his predecessor-in-office. The application for execution was an application in accordance with law made before a Subordinate Judge who had jurisdiction to deal with that application. Rightly or wrongly, the learned Subordinate Judge dealing with the application allowed execution to proceed against schedules III and IV properties. If he was wrong in allowing execution to proceed against schedules III and IV properties, Asarfi Singh, who was a party to the suit, could have appealed against that order under the provision of the Civil Procedure Code. Where there is a remedy by way of appeal, it is, in my opinion, an extraordinary thing for

NANNHU v. ROSHAN SINGH.

a learned Judge to exercise what he calls his inherent power and to set aside an order passed by his predecessor-in-office. In my opinion he arrogated to himself a power which did not belong to him but which, properly speaking, belonged to an Appellate Court. Order XX, r. 3, of the Civil Procedure Code provides that the judgment "shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review."

The rule embodies the well-known principle that, after the judgment is entered and signed, the Court pronouncing the judgment is no longer competent to deal with the subject-matter of that judgment except on review or under section 152 of the Code. In other words, he is entitled to correct clerical or arithmetical mistakes in the judgment or errors arising from any accidental slip or omission and he is also entitled to review the judgment if there are grounds for review, but otherwise he is not entiteld to touch that judgment in any way.

In my opinion the learned Subordinate Judge had no jurisdiction whatever under section 151 of the Code to re-call the order passed by his predecessor-in-office. I would accordingly allow this application and set aside the order passed by the Court below. The petitioners are entitled to the costs of this application. Hearing fee five gold *mohurs*.

Foster, J.—I agree.

M. D. J. & N. H.

Application allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 31 OF 1923.

April 20, 1923.

Present:—Mr. Justice Daniels.

NANNHU AND OTHERS—DEFENDANTS—APPLICANTS

versus

ROSHAN SINGH—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Order on applicaton to withdraw from suit—Discretion of Court—Revision.

From an order on an application to withdraw a suit with leave to bring a fresh one, if the lower Court has applied its mind to the question whether sufficient cause under O. XXIII, r. 1, of the Civil Procedure Code is established, no revision to the High Court lies, whether the decision is right or wrong. [p. 113, col. 1.]

Ratan Lal v. *Muhammad Hamidullah Khan*, 60 Ind. Cas 899; 19 A. L. J. 47; 2 U. P. L. R. (A) 403 and *Jhunku Lal* v. *Bisheshar Das*, 46 Ind. Cas 71; 16 A. L. J. 495; 40 A. 612, followed.

The High Court has power to revise an order such as the above if the lower Court has failed to exercise a judicial discretion in passing it. [p. 113, col. 1.]

Civil revision against an order of the Munsif, Shikohabad, dated the 8th of January 1923.

Mr. *Shambhu Nath Chaube*, for the Applicants.

Mr. *N. P. Asthana*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the learned Munsif of Shikohabad granting permission to withdraw a suit under O. XXIII, r. 1, with permission to file a fresh suit. The application for withdrawal was made after a considerable amount of evidence had been recorded on both sides. The reasons given for the application were two. (1) The non-joinder of a person who is alleged by the defendants to be a co-sharer in the holding in dispute to be a necessary party

(2) The fact that a Patwari whom the plaintiff wished to produce as rebutting witness had been won over by the other side.

For these reasons the plaintiff alleged that the suit was liable to fail and he asked for permission to withdraw it as stated above.

The second reason was admittedly not a proper reason for allowing withdrawal of the suit. The learned Munsif, however, has not acted on this reason; he has acted on the first reason, saying that in his opinion misjoinder of parties was a formal defect coming within O. XXIII, r. 1 and that as the defendants had themselves alleged Murlidhar, the person in question, to be a necessary party they were not in a position to dispute the point. On the merits I consider that the order passed by the learned Munsif was an unfortunate order. The formal defect of non-joinder

of Murlidhar might easily have been cured by impleading him which could be done at any time before the case was decided. It is probable, therefore, that the real reason for the application was the one of which the Munsif takes no notice in his order. The question which arises in this case and which has been argued before me is whether, under these circumstances, any revision lies. There is ample authority for the proposition that this Court has power to revise such orders where the lower Court has not exercised a judicial discretion in passing them. There is equally strong authority including the cases of *Ratan Lal* v. *Muhammad Hamidullah Khan* (1) and *Jhunku Lal* v. *Bisheshar Das* (2) for the proposition that where the lower Court has applied its mind to the question whether sufficient cause under O. XXIII, r. 1 is established, no revision lies whether its actual decision is right or wrong. It is clear that the present case comes within the latter principle. The Court's decision may have been wrong, in my opinion it was, but the learned Munsif undoubtedly did apply his mind to the question whether there was a formal defect by reason of which the suit was liable to fail and came to the conclusion that there was. I must, therefore, hold that no revision lies and I dismiss the present application Under the circumstances, I make no order as to costs.

M. A. A. *Application dismissed.*

(1) 60 Ind. Cas. 899; 19 A. L. J. 47; 2 U. P. L. R. (A.) 403.

(2) 46 Ind. Cas. 71; 16 A. L. J. 495; 40 A. 612.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 134 OF 1922.

December 4, 1922.

Present:—Mr Justice Piggott and Mr. Justice Walsh.

HARIHAR PRASAD—OBJECTOR—APPELLANT

versus

UDAI NATH SAH—OPPOSITE PARTY—RESPONDENT.

Hindu Law—Widow—Gift to third person with consent of next reversioner—Reversioner an adjudicated insolvent—Donee, rights of.

A conveyance by a Hindu widow of her husband's estate in favour of a third party, with the consent of the next reversioner is based on the notion that she surrenders the estate into the hands of the reversioner, instantly followed by a conveyance to the third party. Where, however, on the date of the conveyance the consenting reversioner is an adjudicated insolvent whose estate has vested in the Receiver in insolvency, the conveyance would confer no rights on the donee, because, if there is any vesting of the estate for a single moment in the reversioner on the day on which the conveyance is executed, in that very same instant whatever rights vest in the reversioner would pass to the Receiver in insolvency, and there would be nothing which the reversioner could convey to the donee. [p. 114, col. 2; p. 115, col. 1.]

First appeal from an order of the District Judge, Bareilly.

Messrs. *M. L. Agarwala* and *A. P. Dube*, for the Appellant.

Mr. *Peary Lal Banerji*, for the Respondent.

JUDGMENT.—This appeal in an insolvency matter raises a pure question of law. The name of the insolvent is Champa Prasad and he was so adjudicated on the 21st of June 1918. Champa Prasad's mother was one Ganeshi Kuer the daughter of one Durga Prasad. This gentleman died possessed of considerable property, which passed with a widow's estate to his widow, *Musammat* Moola Kuer. This lady died in the month of December 1919 and it is admitted that, thereupon, the property passed to Ganeshi Kuer, also with the limited estate of a Hindu widow. That lady, however, proceeded to execute at once a deed of gift conveying the whole estate to her grandson, Harihar Prasad, the son of the insolvent Champa Prasad, who joined with her in the execution of the document.

On the death of *Musammat* Ganeshi Kuer, the creditors of the insolvent claimed to take this property as that of the insolvent Champa Prasad. On objection taken by marihar Prasad the Insolvency Court has gone into the question, but has upheld the contention of the creditors. The finding of the Court below is that this property vested in the insolvent Champa Prasad on the death of his mother, Ganeshi Kuer. It undoubtedly did so vest

unless it had previously passed to Harihar Prasad under the deed of gift of the 11th of December 1919.

There is one complication which ought to be mentioned. One of the creditors held a mortgage affecting a portion of the property concerned, which had been executed by Moola Kuer, Ganeshi Kuer and Champa Prasad, jointly, on the 4th of February 1915. He has obtained a decree on his mortgage in a contested suit to which Harihar Prasad was a party. In that suit the Court tried, as between the mortgagee and all the defendants, the issue whether the deed of gift of December 11th, 1919, conveyed anything to Harihar Prasad beyond the lifetime of Ganeshi Kuer. In substance, the Court found that this was an alienation by a Hindu widow without legal necessity; that it conveyed nothing to the donee beyond a right of possession and enjoyment in the lifetime of the widow, and that, on the death of Ganeshi Kuer, the property had vested in the insolvent Champa Prasad. It is suggested that this finding operates as *res judicata*, at any rate, as between the secured creditors and the appellant Harihar Prasad. The only answer to this is a contention on the part of Harihar Prasad that he was not properly represented in the suit on the mortgage. In the view which we take of the law applicable to the case as a whole, it is not necessary for us to go into this question. We thought it advisable to refer to this previous litigation partly as a matter of record, and also because it is quite clear that in the mortgage suit the question of the validity of the deed of gift in favour of Harihar Prasad was fought out solely on the ground of the presumption or otherwise of legal necessity for the transfer. Now, if this be the right way in which to regard this transfer, then the decision of the Trial Court is unquestionably right. To begin with, a transfer by way of gift, cannot, broadly speaking, be supported by any allegation of legal necessity. If the fact that Champa Prasad, being the nearest reversioner living at the time, expressed his consent to the alienation by joining in the same, be relied upon merely as raising a presumption in favour of legal necessity, then that presumption is in the case now before us abundantly rebutted. Champa Prasad, having been adjudicated an insolvent, could derive no benefit from his succession to the property, which would revert to the Receiver in Bankruptcy on the very day he succeeded to it. It was obviously to his advantage to agree to a transfer of that property in favour of his own son and to the detriment of his creditors. The fact of his doing so raises no presumption whatever in favour of the necessity for the alienation.

It has, however, been contended before us that a transfer in favour of a third person—and for the purposes of the question now before us Harihar Prasad must be treated as a third party, who had no concern whatever in the possible devolution by inheritance of the estate in hands of Ganeshi Kuer—if made by a Hindu widow with the consent of the nearest reversionary heir living at the time of the alienation, so long as it be a surrender of the entire estate in the hands of such widow, operates as a valid transfer *proprio rigore*, and not by reason of the reversioner's consent raising a rebuttable presumption as to legal necessity. This contention is sought to be founded on certain passages in the decision of their Lordships of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1), which is the latest and most authoritative pronouncement on the whole question of a Hindu widow's powers in dealing with the property of her husband to which she had succeeded with a life-estate on his death. It seems to us, however, that, where their Lordships definitely sum up the principles which they propose to lay down for the guidance of the Courts in India, they limit the cases in which the question of necessity does not fall to be considered to those cases in which there has been a surrender by the widow of her whole interest in the whole of the estate in favour of the nearest reversioner or reversioners

(1) 50 Ind. Cas. 498; 42 M. 523; 36 M L J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777 (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

at the time of the alienation. They go on to deal with alienations in favour of persons who are not the nearest reversioner for the time being, and they seem to us to place all such alienations in the second category, that is, of alienations which require to be supported on the ground of necessity. We may add that the present case is a particularly strong one. The older opinion, which was to some extent supported by decisions disclosed in the judgment of their Lordships of the Privy Council above referred to, which treated a conveyance by a widow in favour of a third party as valid *proprio rigore* if made with the consent of the nearest reversioner or reversioners alive on the date of such alienations, was based upon the notion that that was a surrender of the estate into the hands of such reversioner or reversioners, instantly followed by a conveyance to a third party. Such a doctrine could not be applied in the present case because, if there was any vesting of the estate for a single moment in Champa Prasad on the day on which his mother Ganeshi Kuer surrendered it by executing the deed of gift of December 11th, 1919, in that very same instant whatever rights vested in Champa Prasad passed to the Receiver in Insolvency and there was nothing which Champa Prasad could convey to his son. We are satisfied, therefore, that the decision under appeal is correct. We dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 136, 167, 195 AND 196 OF 1920.

April 18, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Ramesam.

IN APPEALS NOS. 136 TO 196 OF 1920.

MANICKA VACHAKA DESIKA GYANA SAMBANDA PANDARA SANNADHI —DEFENDANT NO. 14—APPELLANT

versus

A. VAITHILINGA MUDALIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Charitable endowments—Temple of Sri Thyagarajaswami at Tiruvalur—Katlais, *nature of—Scheme suit—Matters for consideration—Civil Procedure Code (Act V of* 1908), *s.* 92.

The *Katlais* attached to the temple of Sri Thyagarajaswami at Tiruvalur in the Tanjore District are independent institutions. The trustees of one Katlai are not subject to the control of the trustees of the other Katlais, the only common bond between them being that they are supposed to exist for the glorification of the deity in the temple either directly by services rendered within the temple or indirectly by charities carried on outside the temple in the name of the deity. The incomes of the various Katlais do not belong to the idol and cannot be mixed up and utilised for all the purposes of the temple indiscriminately but must be applied and appropriated only for the specific purposes in connection with the temple for which they were endowed. [p. 118, col. 1.]

Any scheme which is framed for a temple with such Katlais as the above, while it must maintain the individuality of the Katlais and not interfere with their essential character, must at the same time provide for some co-ordination of the various Katlais and for some control over them so as to secure the harmonious working of the Katlais when they have to co-operate in the temple service. The scheme must also make provisions for the prevention of the embezzlement of the funds of the Katlais or their diversion by the respective trustees and should contain stringent prohibitions against the borrowing or lending of money from or to the trustees or from one Katlai to another Katlai. [p. 119, col. 2.]

Appeals against a decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 52 of 1913, (Original Suit No. 77 of 1910 on the file of the Court of the Subordinate Judge, Negapatam).

IN APPEALS NO. 136 OF 1920.

Mr. *T. Narasimha Iyengar*, for the Appellant.

Messrs. *S. Srinivasa Iyengar* [illegible] *Iyengar*, *A. C. Shanmuga* [illegible]

and *M. Krishna Bharathi*, for the Respondents.

JUDGMENT.—These appeals arise out of a suit under section 92 of the Civil Procedure Code for framing a scheme with regard to the administration of the temple of Sri Thyagarajaswami at Tiruvalur in the Tanjore District. There are various trusts instituted for the purpose of either supporting the services in the temple or of carrying on charities in the name of the deity, known as Katlais. Each Katlai has its own trustee and separate properties are endowed in connection with each Katlai. There are thirteen of them now and a list of these is given in Schedule A of the plaint. The most important of these are the first four *viz.*, (1) Ulthurai, (2) Abisheka, (3) Annadhana, and (4) Rajan. The fifth and sixth are practically identical with the fourth. The trustees of the first (Ulthurai) are defendants Nos 1 to 3. The trusteeship of the second (Abisheka) and the third (Annadhana) is vested in the head of the Vellukurichi Mutt (in the Tinnevelly District) for the time being, now the 12th defendant. Similarly, that of the fourth (Rajankatlai) (with which go the fifth and sixth) is in the head of the Dharmapuram Mutt (in the Tanjore District) for the time being (now the 14th defendant). These heads of the Mutts discharge the duties of trustee of their Katlais by means of local agents. The 14th defendant is the appellant in Appeal Suit No. 136 of 1920, the 12th defendant in Appeal Suit No. 195 of 1920; the plaintiffs in Appeal Suit No. 167 of 1920 appeal in respect of the seventh (Palayee) Katlai and the defendants Nos. 15 to 17 filed Appeal Suit No. 196 of 1920 in respect of the 11th (Ardhajamam) Katlai.

It may be observed that though, technically speaking, the temple has no income of its own, and has to depend for all its services on the proper performance of the trusts connected with the Katlais still, for all practical purposes, the Ulthurai (internal or central) Katlai represents the temple proper, its object being the internal management of the temple. It has an income of Rs. 8,000 as a Mohini allowance from the Government and some lands (6 Velies and odd). Other Katlais contribute their share of services or things in the various stages of the daily worship and the various festivals of the temple (see paragraph 52 of the Sub-Judge's judgment). The extent of their liability is determined by usage and is ascertained from the dittam or scale prepared by each Katlai, in connection with the daily worshp and festivals. It is said for the plaintiffs that the chief item of expense in connection with the Ulthurai Katlai is that of the Car Festival and it has been found difficult to carry on this festival with the income of the Ulthurai Katlai on account of the rise in wages. Whatever the true cause may be, the fact remains that the Ulthurai Katlai has become hopelessly indebted. Its debt on 16th September 1917 was more than Rs. 31,000 of which Rs. 17,000 was due to the first plaintiff and Rs. 14,000 to the third defendant, one of its trustees. It is suggested for the contesting defendants that the object of this suit is to prop up the Ulthurai Katlai at the expense of the other Katlais and that the suit is the result of collusion between plaintiffs and third defendant. It is frankly admitted by the third defendant that he and first plaintiff are friends, that he co-operated with the first plaintiff in connection with the institution of this suit and he is also spending money along with the first plaintiff for this litigation (*Vide* pages 690 and 692 of the deposition). At the same time, it must be admitted that there has been gross mismanagement of the affairs of the temple and some scheme for the co-ordination of the various Katlais and for some control over the various Katlais in so far as it may ensure the harmonious working of the Katlais, wherever they have to co-operate, is necessary.

An objection was taken by the defendants (Nos. 4 to 11) that the Katlais were distinct trusts and the suit as originally framed was bad for misjoinder of parties and causes of action. Issues Nos. 1 and 2 were framed with reference to this contention, and the arguments were heard on them in 1913. The Subordinate Judge who heard them held "that as the Katlaidars are different and as each of them is in possession of a distinct Katlai charged with a distinct duty and separate accusations of misconduct are made against the several Kat-

lais," the suit was bad for misjoinder of parties and causes of action (Order dated 13th October 1913). He, however, gave leave to amend the plaint, which was accordingly done. The plaint as it now stands in the printed papers is the amended plaint. The prayer for the removal of unfit trustees and the appointment of other trustees in their places has been omitted. Having regard to the amended plaint, the Subordinate Judge who finally tried the case excluded "evidence as to any acts constituting misfeasance, or malfeasance affecting the competency, conduct or character of the defendants individually" (paragraph 16 of the judgment), but he adds in paragraph 38: "Though the 19th issue directly dealt with the misconduct of the individuals and it has been deleted, I had to reluctantly admit the evidence having regard to the fact that, if the past management was unsatisfactory irrespective of any reference to any individuals, a scheme might be necessary to place the administration on a sound basis."

The scheme framed by the Subordinate Judge appoints a Board of Trustees and directs that the various Katlaidars shall deliver over charge to the manager and treasurer after the appointment. No provision has been made for separating the accounts of the Katlais. This arrangement destroys the individual character of the various Katlais and has the effect, in some cases, of removing the trustees and in others, of adding other trustees to the existing sole trustee of each Katlai. This is inconsistent with the basis of the order of the First Subordinate Judge on 13th October 1913. We have, therefore, to ascertain, at the outset, the nature of the various Katlais and see how far the scheme of the lower Court can be justified in this respect.

It is admitted that the several Katlais came into existence at different times and have been managed separately for a long time, probably for centuries. Certain copper plate grants by which some of the lands of the Rajan Katlai were endowed (Exhibits XLI, XLI a (1740), XLI c (1751), XLI b (1754) are available and Exhibit LXIII (1759) is the document by which the Ardhajamam Katlai lands were endowed. But, beyond these, we have no evidence of the original endowments and usage is our only guide. The trustees of some Katlais have added to the original endowed lands by further purchases out of the savings from their income (some of LII series, XXXIV and LXIV, being such sale-deeds). In 1810, the Government assumed management of the temple (Exhibit OOO). The supervision of the Government was exercised through a "*panchayat*" (by which one person was apparently meant and not a body of persons) who was counter-signing the accounts of each Katlai (*Vide* Exhibits G, T, GG, AAAm, H, BBB, D, N, Q, SS, F, S, Z, CC, 2, WW, E, EE, NN, GGG, P).

The Pandarams representing the Abisheka and Rajan Katlais executed documents in 1820 in favour of Government binding themselves to certain details in the performance of the duties connected with the respective Katlais RRR, and FFFF. The Takids issued by the officers of the Government dealt with the Katlais separately (see BBBB, TTTT, PPPP, OOOO, SSS, CCCC, B, JJJJJ). In 1841, by Exhibit LXIII, the Collector of Tanjore reported to the Board of Revenue on the Pagodas of the District and in the statement enclosed with it, the Rajan Katlai was referred to as a separate item and the Abisheka and Annadhana Katlais together were referred to as another item. They were described as 'Athinam' in paragraph 8 of the report on the ground that the right of appointment of local managers belonged to certain Mutts or Colleges of Ta birars. This was followed by similar documents in 1842, when Government divested themselves of the management of Hindu temples—Exhibit LIV for Rajan Katlais and LXXI for the Abhisheka and Annadhana Katlais (see also Exhibit LXXIII). The Exhibits LXVII, LIV a, LXXIV, LVI, LVII, and TTT, EEEE, DDDD, LXVII and LXXVII, relate to the handing over charge of these Katlais. Exhibits LIX, LXII, LXII-a, relate to the appointment of a Pandaram or local agent at Tiruvalur on behalf of the Velukurichi Mutt and LV to the appointment of a similar local agent for the Dharampuram Mutt. In 1847 the Govern-

ment obtained *Muchilikas* from the several Katlaidars to insure the due performance of the trusts (see Exhibits HHHHH, TTTTT, VVVV, FFFF, MMMMM, QQQQQ, RRRRRR, TTTTT MMMMM,). These *Muchilikas* were taken by the Government" "on grounds of expediency" and do not show that the Government had any right in particular over the Katlais [see *Ramiengar* v. *Gnansambanda Pandarasannada* (1)]. Following the last mentioned decision, it was held in 1868 (see Exhibit LIII) that the other Katlais were not subject to the superintendence of the Ulthurai Katlai, and that they were not dependent trusts. The plaintiffs in that case did not press their claim against the Katlais under the Mutts (see paragraph 34 of Exhibit LIII). This judgment was affirmed by the High Court in *Venkatabalakrishna Chettiyar* v. *Kaliyanaramaiyangar* (2).

In 1882, three persons were appointed as *panchayats* for the superintendence of the Ulthurai Katlai (Exhibit QQQQQQ). The present defendants Nos. 1 to 3 are their representatives. It is not necessary to discuss in this case whether these trustees are hereditary. It is clear from the history of the temple from 1870 to 1882, above set forth that the Katlais are independent institutions and that the other trustees are not subject to the control of the Ulthurai trustees, the common bond between them all being that they are supposed to exist for the glorification of the deity (Thyagarajasawmi) either directly by services rendered within the temple—or indirectly by charities carried on outside the temple in the name of the deity. We do not agree with the remarks of the Subordinate Judge at the end of paragraph 32 which imply that the Ulthurai trustees have some right of supervision over the other Katlais. It cannot be said that the income of the various Katlais belongs to Thyagarajaswami (the idol), or can be mixed up and utilised for all the purposes of the temple indiscriminately. These trusts are somewhat analogous to Temple Service Inams. Just as the latter are different from *inams*, properly belonging to a temple, being granted to office holders on condition of rendering services in a temple and do not belong to the idol, though the idol may be interested in the rendering of the services, similarly the incomes of the Katlais do not belong to the idol, though the idol is interested in the proper performance of the distinct duties attached to each Katlai. The remarks of Muthusami Iyer, J. in *Vythilinga Pandara Sannadhi* v. *Somasundara Mudaliar* (3) are instructive in this connection as the decision related to this very temple. After describing two senses of the term Katlai the learned Judge says: "The term Katalai is used in the present suit in this sense" referring to the second sense he had previously described, *viz.*, "a distinct endowment under a separate trustee to which specific items of expenditure are assigned as legitimate charges to be paid therefrom." That suit was a suit by the Ulthurai Katlai against the Abhisheka and Rajan Katlais for contribution for repairs. At page 203, the learned Judge says: "The *Muchilikas* which these executed on that occasion contain a distinct acknowledgment that the Katalai lands were originally granted to Sri Thyagarajaswami and an undertaking to apply the income derived therefrom to the said temple. This is significant as showing that the repair of the temple was a trust to which the surplus income had to be devoted according to the original grant."

The decision then was to the effect that the Rajan and Abhisheka Katlais were liable to effect repairs from the surplus funds of their Katlais. It is now admitted that the duty of repairing the temple is one intimately connected with these two Katlais and that they are liable to contribute funds for that purpose. The learned Judge did not make any observation which is capable of being literally construed to mean that all the funds of the Katlais attached to this temple were then vested in the temple and at the disposal of the Ulthurai Katlaidars for any purpose whatsoever.

Some of the Katlais have now to be separately considered. We have already

(1) 5 M. H. C. R. 53 at p. 61.
(2) 5 M. H. C. R. 18.
(3) 17 M. 199; 6 Ind. Dec. (N. S.) 137.

referred to the admission made by the trustees of the Rajan Katlai and Abhisheka Katlai that their surplus funds are liable for the repairs of the temple. The matter, however, is different as to Annadhanam and other Katlais. In the case of the Annadhanam Katlai the trustee argued (in Appeal No. 195 of 1920) that there are other temples which were the indirect object of the Katlais and the income cannot be solely spent for the benefit (direct or indirect) of the Thyagarajaswami. This point was not raised in the written statement and cannot be considered here. In Exhibit YYYY the Collector, acting as agent to the Court of Wards on behalf of the third defendant's estate, described the duties of the Annadhanam Katlai in paragraph 3 as consisting of (1) shelter to pilgrims (2) distribution, of food, (3) water pandal, (4) lights (5) Pagoda service. The details of the last have to be ascertained from the 'Dittam' or customary list of contributions. In the face of paragraph 3, no weight can be attached to the general and sweeping statement in paragraph 2 that the Annadhana Katlai Chattaram is a minor branch of the great temple of Thyagarajaswami. It must be remembered that there was always a tendency on the part of the Uithurai Katlaidars to claim power of supervision over the Katlais. The judgment of 1866 (Exhibit LIII) this document (Exhibit YYYY) and now the present suit illustrate this. We are of opinion that the surplus income of Annadhana Katlai cannot be utilized for the repairs, or other expenses in connection with the temple. The income of the Katlai can only be spent for the purposes mentioned in Exhibit YYYY—all of them being carried on in the name of Thyagarajaswami and in this way exalting the glory of the idol. The solitary instance appearing from Exhibit KKKKKK-5 of a portion of the expenses of raising the image of the godess from the river being debited to the Annadhana Katlai cannot be taken as establishing a usage. Similar conclusions apply to Ardhajama Katlai. It may be that only the temple of Thyagaraja and subordinate shrines are the temples indirectly (or directly) intended to be benefited by the Mosakulam lands of the said Katlai (*vide* Exhibits MMMMM and KKKKK-1). At the same time, too much weight ought not to be given to the *Muchilikas* (as already pointed out) and the income cannot be appropriated for the purpose of the temple indiscriminately. Only the customary services have to be met out of it. Exhibit JJJJJJ refer to the Dittam of the Katlai. The same remarks also apply to Palayee Katlai (seventh) the subject of Appeal No. 167 of 1920.

A scheme has now to be framed which will ensure the harmonious working of the Katlais, when they have to co-operate in the Pagoda service, and to prevent the embezzlement of the funds of the Katlais or their diversion by the trustees contracting debts as has happened in the case of the Ulthurai and other Katlais. The scheme as framed by the lower Court obliterates the individuality of the various Katlais, pools their resources in one large fund, and makes the Board of Trustees practically a hand of the Court by the direction in paragraphs 4 and 11 that it shall exercise its powers of administration subject to the directions of the Court. As the Katlaidars are themselves the trustees of the various trusts, it is inappropriate that the supervising body should be described as a Board of Trustees, although the trustees are by the scheme eligible for appointment to the Board.

It is very necessary that the scheme should contain stringent prohibitions against the borrowing or lending of money by the trustees from or to the trust funds, or from one Katlai to another Katlai, seeing that the 12th defendant in paragraph 12 of his written statement treats borrowing as a necessary incident to the management of the trust and claims a right to do what he pleases with any surplus that may remain over. The preparation of a budget, the proper keeping of accounts in which the income and expenditure of each of the Katlais may be separately shown, and the periodical audit of these accounts are matters most essentially to be provided for in the Regulations in order to fix the trustees with responsibility for the due performance of their trusts and to avoid waste and indebtedness. The need for supervison and co-ordination by a controlling and inspecting body is also apparent. The

past history of the suit Katlais shows that a *panchayat*, or a *panchayatdar*, once existed for the purpose during Government management. In *Ramiengar* v. *Gnanasambanda Pandarasannada* (1), the appointment of *panchayatdars* is stated to have been simply a coercive act for more effectual supervision. Exhibit A shows that there were five *panchayatdars* in 1842 and Exhibit QQQQQQ1 shows that in 1882 the District Judge appointed three *panchayatdars* to supervise the Ulthurai Katlai. It is argued that defendants Nos. 2 and 3 and defendants Nos. 12 and 14 should not have a seat on the Board of supervision, the former as they have already an interest as trustees of the Ulthurai Katlai and the latter as they are the trustees of the Abhisheka, Annadhana and Rajan Katlais and on account of the misconduct of their predecessors. We think that the Subordinate Judge was right in including them. The second and third defendants are well-to-do *mirasidars*, living in the locality who have always shown an interest in due performance of the religious worship in the temple and are descendants of two of the former *panchayatdars*. The 12th and 14th defendants have succeeded to their offices during the pendency of the suit and have had no opportunity of showing whether they are personally fitted or unfitted for the conduct of a religious trust. As remarked by the learned Judge, there is always the probability that persons residing in other parts of the District may not take sufficient interest to attend the meetings of the Board. The proposals made in the course of the arguments (1) that there should be two treasurers (2), that we should appoint a "visitor" to inspect the temple from time to time and to make recommendations regarding the Katlais do not commend themselves to us, as it is not shown that there will be more work for the treasurer than one man can manage to do and as a splitting of the post would probably imply a division of responsibility fatal to good management; and, secondly, we do not consider that a visitor acting singly would, however well intentioned, exercise an effectual authority in the prevention and cure of abuses of the trust.

We have modified the scheme as drawn up by the lower Court in such a manner as, in our opinion, will have the effect of maintaining the individuality of the Katlias and not interfering with the essential character of the Adhinam (independent) trusts; while, at the same time, providing that the time of the Court shall not be taken up by constant references to it on minor matters of administration and management. The plaintiffs will get their costs in appeal from the funds of the Devastanam. All the other parties will bear their own costs in these appeals. The lower Court's order as to costs will stand. This judgment disposes of the memorandam of objections in Appeal No. 167.

V. N. V. *Order accordingly.*
N. H.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 7 OF 1922.
March 2, 1923.

Present:—Sir Walter S. Schwabe, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

SHUNMUGAPPA AND ANOTHER—APPELLANTS

versus

SANGARYA CHETTY *alias* SANGAPPA CHETTY—RESPONDENT.

Limitation Act (IX of 1908), s. 10, applicability of—Suit by trustee against co-trustee for joint possession and management of trust property—Guardian of minor sons of deceased trustee in possession with consent of co-trustee—Possession, whether adverse.

Section 10 of the Limitation Act applies to a suit by one trustee against his co-trustee for joint possession and joint management of the trust property and the section is not limited to cases where a trustee is called to account by a stranger. [p. 122, col. 1.]

Though, generally speaking, guardians cannot make admissions on behalf of their wards, in considering a question of fact, namely, whether or not the possession of the guardian on behalf of her minor children is adverse to another person, a statement by the guardian as to the character of such possession is perfectly admissible as showing the animus. [p. 122, col. 1.]

Where the guardian of certain minor sons of a deceased trustee is in sole possession by request and with the consent of another co-trustee, the sole possession of such guardian cannot be adverse possession amounting to ouster of the other trustee. [p. 121, col. 2.]

Appeal from a decree and judgment passed by Mr. Justice Kumaraswamy Sastriar, in the exercise of the Ordinary

Original Civil Jurisdiction of this Court, in Civil Suit No. 446 of 1920.

Mr. *T. R. Kothandrama Mudallar*, for the Appellants.

Mr. *V. Radhakrishnayya*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—In this case plaintiff claims joint possession of certain trust property in respect of which he was appointed a co-trustee with his brother, now deceased. It would appear that he and the brothers lived together for some time and the brother was the person who for many years was the only executor under the Will by which they were appointed trustees and was also the acting trustee of this trust which was created for certain charitable purposes. The brothers seem to have fallen out somewhere about 1907 and litigation ensued. The brother died in 1910 leaving two infant sons surviving him and a widow. From that time till now the widow and her sons continued to manage the trust property. The plaintiff now claims to be entitled to joint possession and joint management of the trust property.

It is admitted that the plaintiff was a trustee but it was said that his rights are barred by limitation. There seem to me to be three complete answers to that. In the first place, section 10 of the Limitation Act says that, notwithstanding anything contained in the Limitation Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives for the purpose of following in his or their hands such property, shall be barred by any length of time. In my judgment this is an action by one of two co-trustees it is true but against a trustee for the purpose of following in his hands a trust property. In my judgment, the words are wide enough to cover a case by one of two trustees who claims against the other that the property ought to be held by the two. It would have been very remarkable if it were not so; for one of two trustees would be left in possession and the other who is liable for the acts of his co-trustee would be unable in any way to control his co-trustee, because if he sued his co-trustee for joint possession, he would be met by a plea of limitation.

Even if this view of section 10 of the Act is wrong, there remains to be considered the effect of some correspondence within two years of the launching of this suit. The plaintiff had written to the widow stating that he had taken out Probate, he being the sole surviving executor under the Will which appointed him and his brother trustees, and he claimed from her and his nephews possession of the property. The answer that was given by the widow and guardian of the infant children written by a Vakil on her behalf was this: "I am further instructed to state that on the death of my client's husband you * * * declined to have any thing to do with the management of the estate and asked my client to manage the same on behalf of her sons." I entirely fail to see how possession obtained or retained under those circumstances can be adverse possession amounting to ouster for she writes through her own legal advisers saying that she is managing by request and with the consent of the co-trustee, the plaintiff, jointly with her sons acting through herself; and it passes my comprehension to understand an argument put forward on the basis that, when one of two trustees says to the other "you take possession and hold possession of the property," that other can afterwards say that he is in adverse possession.

The other point turns on the next paragraph of the letter and it is in these terms: "I am further instructed to state that even if your client has now obtained Probate as mentioned in your letter under reply, my client on behalf of her sons and your client are jointly entitled to administer the properties of the estate in accordance with the Will." There one has, in words, an admission of the plaintiff's right made by the Vakil on behalf of the defendants within two years of the suit being brought, which is in itself sufficient evidence that the possession held by her on behalf of her sons was

not possession adverse to the plaintiff.

For these reasons, I agree with the judgment of the learned Judge and this appeal must be dismissed with costs.

Coutts-Trotter, J.—I am of the same opinion. There are two points which appear to me to be fatal to the appellants in this case. The first is section 10 of the Law of Limitation to which the only answer of the learned Vakil who has argued the case with great fulness, is that that section only applies when the trustee is being called to account by a stranger, and not when the person who seeks to investigate the affairs of the trustee is a co-trustee; for that position, I find no authority, and none was suggested to exist, and it seems to me to be a proposition that, on the face of it, you do away with half the benefit that the section of the Act intended to confer.

The next is the letter, Exhibit V, written by the mother of the infants. It is argued against that by Mr. Kothandarama Mudaliar that guardians cannot make admission on behalf of their wards. That, no doubt, as a general proposition, is perfectly sound, but here we are investigating a certain fact, namely, was the possession of the guardian on behalf of her minor children adverse to the plaintiff or was it not, it being in her possession. The answer is, that what she said about it is perfectly admissible as showing *quo animo* she, representing her children remained in possession of the property. She could perhaps have given some evidence by her words or her acts that she believed herself and intended herself on their behalf to be occupying adversely to the plaintiff. But if she did not, you cannot impute to the minors an intention and a character in possession which was not the intention or the character in which their guardian who represents them acts for them. You cannot manufacture *ex post facto*, merely because they were minors, the adverse quality which the actual possession was never clothed with.

In my opinion, this appeal fails, and I agree to the order proposed by my Lord.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2191 OF 1918.

November 27, 1922.

Present:—Mr. Justice Martineau and Mr. Justice Campbell.

RALIA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMIR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Lease in favour of mortgagor—Distinct transactions—Suit on lease—Subsequent suit on mortgage, whether barred—Civil Procedure Code (Act V of 1908), O. II, r. 2.

Where a mortgage and a lease of the mortgaged property in favour of the mortgagor, are executed on the same day, but the mortgage-deed contains no reference to the lease and the mortgagee is not restricted in his choice of tenants, the mortgage and the lease are two distinct transactions even though the amount of rent is equal to the amount of interest. [p. 123, col. 2.]

In such a case a suit for rent on the basis of the lease, would not operate, under O. II, r. 2 of the Civil Procedure Code, to bar a subsequent suit on the mortgage-deed to recover the money due thereunder. [p. 123; col. 2.]

Muhammad Hussain v. *Abdul Ghafur*, 65 Ind. Cas. 102; 3 L. 1; 8 P. W. R. 1922; (1922) A. I. R. (L) 111, followed.

Natha Singh v. *Chuni Lal*, 47 Ind. Cas. 364; 69 P. R. 1918; 112 P. W. R. 1918; 117 P. L. R. 1918, distinguished.

First appeal from a decree of the Senior Subordinate Judge, Amritsar, dated the 24th June 1918.

Pandit *Sheo Narain*, R. S., and Lala *Fakir Chand*, for the Appellants.

Bakhshi *Tek Chand* and Kunwar *Dalip Singh*, for the Respondents.

JUDGMENT.—The plaintiffs sue for the recovery of money due on a mortgage-deed executed by the defendants on the 9th December 1906. The suit has been dismissed as barred by O. II, r. 2, Civil Procedure Code, by reason of the plaintiffs having brought a suit in 1910 for rent on the basis of a lease executed on the same date as the mortgage-deed, the lower Court holding that the interest on the mortgage is identical with the rent, and that the cause of action was the same in both suits. The plaintiffs have appealed, and the only question is whether O. II, r. 2, applies.

The mortgage-deed provided that the property was mortgaged to the plaintiffs with possession for Rs. 30,000, that the

defendants were to pay interest monthly at the rate of 10-annas per cent. per mensem, and that the rent realized by the plaintiffs from the property mortgaged would be credited towards the payment of the interest. The defendants were to redeem within six months, and if they failed they would continue to pay interest till the date of redemption. In case of default on the part of the defendants the plaintiffs were at liberty to realize the amount due with interest from the mortgaged property or from the other property or persons of the defendants whenever they liked.

In the lease it was stated that the defendants took the mortgaged property from the plaintiffs on a rent of Rs. 187-8 per mensem for six months. The rent was to be paid monthly and in default the mortgagees could realize the amount at any time they liked.

The lower Court has followed *Natha Singh* v. *Chunt Lal* (1), in which it was held that there was only one covenant between the parties and that the lease was granted simply to provide a mode for realizing interest payable on the mortgage. But that decision was based on the fact that the mortgage-deed contained a reference to an agreement between the parties to draw up a lease of the mortgaged property. There is no such clause in the mortgage-deed on which the present plaintiffs are suing, so that *Natha Singh* v. *Chunt Lal* (1) is distinguishable from the present case.

Most of the cases cited by Mr. Sheo Narain on behalf of the appellants also present distinctive features, but there is one case which is in point and supports his contention, namely, *Muhammad Hussain* v. *Abdul Ghafur Khan* (2), in which it was held that the lease, though executed on the same day as the mortgage, was a separate contract. Mr. Tek Chand contends that that case is distinguishable because there was a provision in the mortgage-deed that the mortgagee could lease the property to any one he liked.

But although the mortgage-deed executed by the defendants in the present case does not contain such a provision it imposes no restriction on the power of the mortgagees to choose their tenants and it recites that the mortgagors have delivered possession to the mortgagees, so that there is no essential distinction between the two cases.

The case relied on by Mr. Tek Chand is *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (3) in which it was held that the striking identities in the provisions of the mortgage and the lease, which had been executed on the same day, pointed to the view that the two instruments were parts of the same transaction. But the similarity between the provisions of the two instruments in that case was greater than it is in the present case. In default of payment of interest on the mortgage, compound interest was to be charged at a certain rate and the lease also provided that if the rent were not paid by the due date it would carry interest at the same rate. Further, it was pointed out in the judgment that the particular expression used in the lease to denote interest on the rent was the same as that used in the mortgage for interest on the interest, and that it was not appropriate in the lease except upon the view that what was spoken of as rent was in the contemplation of the parties only interest.

In the present case, although the mortgage-deed and the lease were executed on the same day and the rent was equal to the amount of interest, yet in view of the facts that the mortgage-deed contained no reference to the lease, and that the mortgagees were not restricted in their choice of tenants, we think that the mortgage and the lease were two distinct transactions. The institution of the former suit, which was based on the lease, is, therefore, no bar to the present suit.

We accordingly accept the appeal, reverse the decree of the Subordinate Judge, and remand the case to his Court under O. XLI, r. 23, Civil Procedure Code, for decision on the merits. The Court-fee paid on the memorandum of appeal will be refunded, and other costs will be costs in the case.

W. C. A. & N. H.

Appeal accepted; Case remanded.

(1) 47 Ind. Cas. 364; 69 P. R. 1918; 112 P. W. R. 1918; 117 P. L. R. 1918.

(2) 65 Ind. Cas. 102; 3 L. 1; 8 P. W. R. 1922; (1922) A. I. R. (L.) 111.

(3) 26 M. 662.

SURWAN PRASAD *v.* BASDEO NARAIN SINGH.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 291 OF 1920.
November 20, 1922.
Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

SURWAN PRASAD TEWARI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BASDEO NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Arazidars of village Dudhi, Gorakhpur District, rights of.

The *Arazidars* of village Dudhi in the *pargana* of Sidhua Jobna in the Parauna Tahsil of the Gorakhpur District are not co-sharers and have no community of interest or responsibility with the proprietary body and consequently have no right of pre-emption.

First appeal from a decree of the Additional Subordinate Judge, Gorakhpur.

Messrs. *M. L. Agarwala* and *Lakshmi Narain Tewari*, for the Appellants.

Messrs. *Haribans Sahai*, *Harnandan Prasad* and *Surendro Nath Varma*, for the Respondents.

JUDGMENT.—The question we have to decide in these two appeals, in both of which the same parties are appellants, is whether or not they had a right of pre-emption according to custom.

The Court below has dismissed the claim of the plaintiffs holding that, on their status as disclosed by the evidence, they are not entitled to pre-empt.

The property which was sold, and in respect of which pre-emption was sought, is situated in a village called Dudhi, in the *Pargana* of Sidhua Jobna, in the Parauna Tahsil of the Gorakhpur District.

The lower Court held that as the plaintiffs admitted themselves to be what are called *arazidars* and as they are so called in the village papers, they had no right of pre-emption, and for this purpose the learned Subordinate Judge relied upon a Full Bench ruling of this Court [*Uman Kuari* v. *Jarbandhan Pathak* (1).] If that ruling applies to the case which is now before us, then there can be no question that the decision of the lower Court is correct, but Dr. Agarwala, who has addressed a very learned and able argument to us on behalf of the appellants, has asked us not to decide the case merely upon the dictum contained in the judgment to which we have just referred and has asked us to deal with the case after an examination of the real position of these plaintiffs in the village in question.

So far as the Full Bench ruling is concerned, it certainly lays down that persons who are called *arazidars* are not members of the co-parcenary body and are not entitled to pre-empt. The judgment on this point is a very short one and is not supported by much in the way of reasoning. The learned Judges, before whom the case was up, stated that it did not clearly appear what the nature of *arazidari* land was, but after reference to various Settlement Reports, they found that *arazidars* were not treated as members of the co-parcenary body.

The expression *arazidar* has been defind in the Settlement Report of the Gorakhpur District prepared by Mr. Cruickshank and published in 1891. The earlier Settlement of this District had been conducted by Mr. Lumsden, who was a well-known authority on all Revenue matters. At paragaraph 201, page 56 of Mr. Cruickshank's report he refers to Mr. Lumsden's description of the people who are known as *arazidars*. We think it advisable to quote this passage in full. It is as follows:—

"In *Pargana* Sidhua Jobna Mr. Lumsden, at the last Settlement, noted:—In describing the tenures of this *pargana* mention of the immense number of *birt* and independent *arazi* holdings must not be omitted. These are small tracts of land situated in almost every village which were originally, in most cases, held rent free. They had their origin in that general transaction of property into the hands of strangers which took place in this *paragana* in the early part of the present century and which has already been alluded to in describing the origin and past history of the principal *taluqdars*. Weak and impoverished *zemindars*, anxious to have some one between them and the ruling power, voluntarily transferred their villages to one or other of the powerful *taluq-*

(1) 5 A. L. J. 447; A. W. N. (1908) 195; 4 M. L. T. 162; 30 A. 479 (F. B.).

dars who, at that time, gained a footing in the *pargana*, reserving only for themselves a small tract of land sufficient for their immediate subsistence. In the case of other villages which were forcibly usurped by the *taluqdars*, the latter compromised matters so far as to allow the old proprietors to retain possession of certain defined parcels of land in their respective villages In this way were created most of these *birt* and independent *arazidari* holdings which are so numerous in this *pargana* and which have been a source of infinite trouble to the Settlement Officer both on account of the frequency of disputes regarding their exact limits and the difficulty of apportioning to each its fair *quota* of the Government demand. The proprietors of these parcels of land hold and manage independently of the village *zemindar*, the latter in the case of *birt arazidars* only receiving a *malikana* allowance calculated at 10% over the revenue *jama*,"

We have already adverted to the fact that the property with which we are now concerned is situate in this *pargana* of Sidhua Jobna referred to in Mr. Lumsden's definiiton.

We may also refer to another paragraph of this same Settlement Report, namely, 187, at page 52. There the Settlement Officer quotes a definition by Mr. Reid who had been the Settlement Officer of Azamgarh—a definition of the term *arazidars*.

Mr. Reid defined the term *arazi* as " plot of land which, though included within the area of *mauzas* and *mahals*, are held on a distinct tenure from and convey no title to rights or interests in other parts of the *mauzas* and *mahals*."

Turning now to the documentary evidence in the case, the first paper which calls for notice is the *wajib-ul-arz* which was prepared in the year 1860. A small extract of this document has been printed at page 17 of the printed book in First Appeal No. 291 of 1920. We have, however, referred to the certified copy of the whole *wajib-ul-arz* which is upon the record and a great deal of which has not been printed. According to what is set out in this document, a declaration was made in or about the year 1860 by certain persons whose names are mentioned at the beginning of the document and who presumably were the proprietors of the village at that time. We have compared these names with the pedigree set out in the Court below and we are satisfied that the declarants were members of the proprietary body in this village.

In the 5th paragraph of this document there is recorded what purports to be the custom of pre-emption. It is declared that every co-sharer has power to transfer by sale and mortgage his land or his share to the extent of his possession. At the time the transfer is made the condition to be observed is that if any body wants to transfer his share, then, first of all, his near co-sharer shall be entitled to have it and, in case of refusal, his other co-sharers shall be entitled ; and if all refuse or do not offer a suitable price, then the share can be transferred to a third person, and no co-sharer shall have any right of pre-emption.

Paragraph 11 of this document which has not been printed but which, as we have said, is on the record, contains a further portion of the declaration made by the village proprietors at this time, namely, 1860. They set out that in this *Mauza* of Dudhi there is an area of 49 *bighas* 10 *biswas* Settlement *arazi bandobasti* belonging to two persons Indar Dat and Sundar Dat Pande. There is a further reference to two other plots which are described in the similar way. Dealing with all these plots the declaration of the proprietors of the village is, that the persons named, Indar Dat and others, are in possession of these *arazi* lands upon payment of Government revenue. It is further set out that the declarants, *i.e.*, the proprietors, will not interfere with them in any way (*un se kuchh muzahimat na karenge*).

The next document to which we have been referred is printed at page 11 of the paper-book in First Appeal No. 291 of 1920. This is called a Supplementary *khewat* of *Mauza* Dudhi and appears to have been prepared in 1293 *Fasli* corresponding to the year 1886 A. D. at which time Settlement operations in Gorakhpur were going on.

This document sets out that *Mauza* Dudhi is an inhabited village in the form

of an imperfect *pattidari* tenure. The first two entries relate to two shares of eight annas each, one belonging to Shiam Baran Singh and others mentioned in *khewat Khata* No. 1, and the other described as belonging to Udaibhan Partab Singh and others mentioned in *khewat Khata* No. 2.

The first of these shares of eight annas is described as being in possession of the proprietors, and it is said that both the co-sharers collect rent from the tenants and, after payment of Government revenue, cesses and village expenses, the account is adjusted at the end of the year. The second share of eight annas is described as being in the possession of a lessee, and according to the column of remarks this lessee, after making collections from the tenants, deposits his lease money, according to the conditions of his lease, with the proprietors, who themselves pay the Government revenue and cesses into the Government Treasury and obtain revenue receipts.

Following these two entries we have two entries Nos. 3 and 4 relating to parcels of *shamilat* land. One is *shamilat* of Udaibhan Partab Singh and others measuring 8 *bighas* odd; the other is *shamilat deh* or village common land amounting to 19 *bighas*.

These four entries are followed by four other entries Nos. 5, 6, 7 and 8. The entries Nos. 5, 6 and 7 are shown to relate to two persons who are styled '*arazidars*.' That is the title above the entries in question. The first of these, entry No. 5, relates to the *arazi* of one Indar Dat who, we understand, is now represented by the appellants. Entries Nos. 6 and 7 relate to the *arazi* holdings of other persons with whom we are not concerned in the present case. The last entry, No. 8, relates to a small area which is held by one Shankar Dat as *shankalap*. He is described in the paper as a *Sahankalapdar*.

Attached to this statement of the share and areas in the village there is the usual statement which accompanies papers of this kind and which is construed as being a *wajib-ul-arz*, and in this a custom of pre-emption is set out in paragraph 5 as follows:—

"If any person wants to transfer his property (*haqiat*) he should transfer it first to his own brother and near relation and then to a distant relation. In case of refusal he should transfer it to the co-sharers in the *patti* and then to the co-sharers in the village. If none of these persons should take it or pay a proper price, the transferor shall have power to transfer his share to whomsoever he likes."

The appellants have taken their stand upon the passage which has just been cited and they maintain that they are entitled for the purposes of pre-emption to be treated as co-sharers in the village. It is to be noted in this connection that the *wajib-ul-arz* attached to this *khewat* prepared in the year 1293 *Fasli* is signed not only by persons who are undoubtedly the proprietors of the village but also by Indar Dat and one at least of the other *arazidars*. Great stress, we may observe, has been laid upon this fact by Dr. Agarwala in his argument.

Lastly, we have before us Exhibit 4 which is a copy of the Settlement *khewat* of *Mauza* Dudhi prepared at the recent Settlement, in the year 1223 *Fasli*, corresponding to 1916-17 A. D.

By this time apparently the constitution of the village had somewhat altered and we find that instead of two *pattis* of eight annas each there is one share amounting to sixteen annas which is recorded as being the property of Udaibhan Partab Singh, the *lambardar*. Opposite this entry we find the statement of Government revenue and in the last column we find a schedule showing who the present proprietors are. This column also sets out that at the time the record was prepared two annas out of the sixteen annas were in possession of the owners and that the remaining fourteen annas share was in the possession of mortgagees.

The second entry in this document stands in the name of one Sahdeo Prasad Tiwari *lambardar*. This entry relates to an area of 46·52 acres.

The Government revenue assessed on this area is set out as Rs. 76 and the names of the persons who are interested in this area and who are called *arazidars* are set

out in the column of remarks. Those names include the names of the appellants.

The third entry relates to another area of *arazi* in the posesession of Mahabir Das, *lambardar*, and the fourth entry also relates to a similar holding in the possession of the same person. The total area of the *arazi* holding is given as 54·85 acres and the total revenue on this area is given as Rs. 72-14-0, and then for the last entry we have it stated that the entire area of the *mauza* is 543·96 acres and the total Government revenue including the revenue assessed on the *arazidari* holding comes to Rs. 614 for the first five years of the period of Settlement.

In the remarks column opposite this last entry it is stated that this is the total of the (*mahal kul*).

These are the relevant papers which we have to consider and it has been argued very forcibly by Dr. Agarwala that on these entries his clients ought to be treated as persons who had the status of co-sharers in the village.

We have omitted to state in dealing with Exhibit No. 2, which is the *khewat* of the village prepared in the year 1293 *Fasli*, that in describing the holding of Indar Dat *arazidar* the column of remarks sets out the following particulars :—

" He is the sole proprietor (*malik wahid*). He deposits into the Government Treasury the Government Revenue and cesses and obtains revenue receipts and defrays the village expenses from his own pocket. "

Similar entries are made in respect of two other persons whose names are entered as *arazidars*.

The learned Judge of the Court below has, in his judgment, referred to another judgment of this Court, apart from the Full Bench ruling which we have already cited. This is the case of *Mahadeo Prasad* v. *Jagar Deo Gir* (2). That was a case in which a certain area in a village which had once been held revenue-free had become assessed to revenue in the year 1840. There it was found that the holder of this plot of resumed *muafi* paid his revenue direct to Government, and the question arose, in that case, whether or not this person would be entitled to claim the status of co-sharer in the 16-annas *mahal*. A number of rulings of this Court were referred to and it was laid down, as it has been laid down in other cases, that the ultimate test in a litigation of this kind in which a right of pre-emption is claimed is, whether or not the person who seeks pre-emption is a co-sharer either in the profits or in the liability for revenue with the vendors. It was held, under a long series of rulings, that owners of resumed *muafi* plots had been treated as not being co-sharers within the meaning of the *wajib-ul-arz*. The learned Judge of the Court below was, we think, right in relying upon this ruling although it does not appear, as a matter of certainty, whether the *arazi* lands, with which we are now concerned in the present case, were once held revenue free and were afterwards assessed to revenue. Judging from the definition given by Mr. Lumsden, we should imagine that at some remote period they had been held free of revenue and had been subsequently assessed. The point, however, is not of much importance for it seems to us that if this case is to be decided upon the principles which are laid down in the case just cited [*Mahadeo Prasad* v. *Jagar Deo Gir* (2)], then we must agree with the lower Court and hold that the appellants here have no right of pre-emption.

Dr. Agarwala, in pressing his claim for the recognition of his clients as co-sharers in the village, has laid considerable stress on the provisions of section 142 of the Land Revenue Act, U. P. Act (III of 1901) which lays down that all the proprietors of a *mahal* are jointly and severally responsible to Government for the revenue, for the time being assessed thereon. He claims that having regard to the present constitution of this village, his clients are persons who ought to be deemed proprietors within the meaning of this section and his argument implies, therefore, that there is, as between his clients and the persons who are the proprietors of the village, a community of interest and also a community of responsibility for the Government revenue.

(2) 33 Ind. Cas. 23; 38 A. 260; 14 A. L. J. 313.

That argument, however, does not seem to us to be borne out by what we find recorded in the various papers to which we have referred. In the first place, we must lay stress upon the declaration which was made in the year 1860. At that time the *arazi* lands in which the appellants are co-sharers were in the possession of Indar Dat and Sundar Dat and the persons who are making the declaration on that occasion declared most distinctly that these *arazidars* were in possession on payment of their own Government Revenue and that they (the proprietors) would not exercise any interference whatever with them. That is a very solid piece of evidence for the purpose of showing that there is no community of interest between the proprietary body of this village and the *arazidars*. Then, again, we refer to the remarks which are set out against the names of these *arazidars* in the *khewat* of 1203 *Fasli*. We have already mentioned that Indar Dat is there described as being the "sole proprietor" of the area entered against his name. It is further stated that he (Indar Dat) deposits the revenue in the Treasury and obtains receipts and defrays village expenses from his own pocket. We take this entry to mean that the responsibility for the Government revenue assessed upon the area in Indar Dat's possession was a responsibility which was confined to himself and with which the proprietors of the two *pattis* of eight annas each had no concern whatever.

Dr. Agarwala's argument really rests in a great measure upon the form in which the *khewat* of the recent Settlement of 1323 *Fasli* has been prepared. He has pointed out that after the various interests of the village have been set out in detail with particulars of the areas and the Government revenue assessed, a total has been made of the whole, and he, therefore, asks us to hold that the inference from all this is, that his clients, who are interested in the property specified in the second entry, are, for that reason, persons who have an interest in the *mahal*. If there were no other evidence in the case except this bare statement, it might be possible to say something in favour of this argument, but having before us the previous history of the village set out in the various papers, we must hold that the *arazidars* of this village are not co-sharers and have no community of interest or responsibility with the proprietary body. All this brings us again to the definition of Mr. Reid quoted in paragraph 187 of the Settlement Report of Gorakhpur to which we have referred. Mr. Reid, who was a great authority on all revenue questions in this Province, has distinctly laid it down that *arazis* are plots of land which, though included within the area of *mauzas* and *mahals*, are held as a distinct tenure from and convey no title to rights or interests in other parts of the *mauzas* and *mahals*.

That appears to us to be exactly the situation here. These plots of *arazi* lands may be within the area of *Mauza* Dudhi or in the area of the *mahal* which goes by that name, but they are held on a distinct tenure from that of the *mauza* or *mahal*, and their ownership conveys no title to any right or interest in other parts of the *mauzas* or *mahals*. We think, therefore, that the learned Subordinate Judge came to a right decision in this case and both the appeals, therefore, fail and are dismissed with costs.

N. H. *Appeal dismissed.*

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 123 OF 1922.
August 1, 1922.

Present:—Mr. Justice Maung Kin.

MG SHWE THE—APPELLANT

versus

MA E BON—RESPONDENT.

Contract—Breach of promise to marry—Implied promise—Damages, whether recoverable.

In a suit for damages for a breach of promise to marry, the promise need not be an express promise, but can be implied from the circumstances of the case. [p. 129, col. 2.]

Second civil appeal from the judgment and decree of the District Court, Maubin, in Civil Appeal No. 83 of 1921.

Mr. *Maung Lal*, for the Appellant.

Mr. *Robertson*, for the Respondent.

MG SHWE THE v. MA E EON.

JUDGMENT.—This is a suit for damages for a breach of promise to marry.

The plaintiff lost the case in the Trial Court, but won it in the lower Appellate Court.

The Trial Court held that there was no promise of marriage although seduction was proved.

The lower Appellate Court held that there was a promise of marriage.

This appeal has been made on the ground that there was no evidence to prove the promise.

The lower Appellate Court held that the evidence of Kyaw Thaung showed that there was a promise of marriage. Besides that evidence, there is nothing.

So, the whole question is, whether the lower Appellate Court was right in its construction of Kyaw Thaung's evidence.

It is shortly as follows:—

Kyaw Thaung was asked to go to the plaintiff and see whether she would receive the defendant with a view to matrimony.

Kyaw Thaung went. The plaintiff said, "your man is very bad with women. Will he be honest with me?" Kyaw Thaung then returned to the defendant, and reported the message. The defendant said, "I would be honest with her." Kyaw Thaung then told him to come along with him, and the two went together to the plaintiff's house. There the plaintiff asked the defendant if he was going to be honest with her. He said that, although he had a bad reputation with reference to women, he would be honest this time.

Now, what was in the mind of the two parties must have been as to whether matrimony was possible between them, and they had met to see if that was possible, and the words I have given were used.

The question then is—What do those words mean?

I think the lower Appellate Court's view of the evidence is correct. I have never heard of a Burman man even in civilized towns in the country say to the woman he loves "will you marry me or, will you be my wife?" What generally would, I think, take place is, although I know very little about this matter, the man says, "I love you," or, I have affection for you," and the woman says, "Do you mean it?" Are you honest in what you say?" He says, "Yes. I am quite honest. I mean what I say." Then the young lady says, "Go and see the father." In some cases the woman asks if it is.... which is a slang expression, and the man says that it is....and, when the conversation is construed in the light of the circumstances under which it occurs, then it is just as good as the man saying "Will you be my wife?" and the woman saying "Yes".

The law does not say that there must be an express promise of marriage. Such a promise can be implied from the circumstances of the case.

The parties in this case are Karens, and the language they used must be construed as they would themselves do.

If there is evidence of a promise, and I hold that there is on the record, then there will be no second appeal in this case under the Lower Burma Courts Act. If there is a point of law, *viz.*, the construction as to the meaning of a piece of evidence, there would be no appeal under the Civil Procedure Code to this Court, because the case is an unclassed one.

As I have held, there is evidence, and the evidence, if true, means that there was a promise of marriage. There is nothing more to do but to dismiss the appeal, because this Court is not entitled to go into the question whether the evidence is trustworthy or not.

The appeal must, therefore, be dismissed with costs.

W. C. A. & N. H. *Appeal dismissed.*

JAGO MAHTON *v.* KHIRODHAR RAM.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 258 OF 1922.

May 23, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

JAGO MAHTON—JUDGMENT-DEBTOR—APPELLANT

versus

KHIRODHAR RAM—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Application for execution—Limitation, objection as to, not entertained—Subsequent application—Objection, whether can be reviewed.

Once a Court has decided either directly or indirectly that an execution case is a fit one to try and, therefore, not barred by limitation, there is an end to the matter and it is not open to either of the parties thereafter to raise the same question in a fresh execution. [p. 133, col. 1.]

An instalment order was passed against a judgment-debtor whereby he was allowed to pay a certain sum in 14 instalments. Some instalments were paid and then there was a default. The decree-holder then applied for execution and it was contended on behalf of the judgment-debtor that the application was time-barred. The objection was, however, dismissed for default of both the parties on the date fixed for the hearing thereof and an order was made that the decree-holder should take further steps. No steps having been taken by the decree-holder, his application for execution was dismissed for default of prosecution. To a subsequent application for execution objection was taken on the ground that the previous application was time-barred:

Held, that the previous application having been treated as a valid and subsisting execution case, it was not open to the judgment-debtor to raise that objection now, and the question of limitation was no bar to the execution case proceeding. [p. 132, col. 2.]

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.), *Sheoraj Singh* v. *Kameshar Nath*, 24 A. 282; A. W. N. (1902) 63, followed.

Bholanath Dass v. *Prafulla Nath Kundu Chowdhry*, 28 C. 122; 5 C. W. N. 80, *Khosal Chandra Roy Chowdhury* v. *Ukiladdi*, 3 Ind. Cas. 47; 14 C. W. N. 114, distinguished.

Appeal from an order of the Judicial Commissioner, Chota Nagpur, dated the 8th September 1922, reversing that of the Munsif, Giridih, dated the 12th January 1922.

Mr. S. N. *Bose*, for the Appellant.
Mr. B. N. *De*, for the Respondent.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the judgment-debtor from an order of the Judicial Commissioner of Chota Nagpur passed in appeal ordering an execution case to proceed. The facts, in so far as it is necessary to state them for the purpose of this appeal, are these:—

On the 10th November 1910 an instalement order was passed against the appellant whereby he had to pay a certain sum in 14 instalments. A number of these instalments were paid and then there was default. In 1921 the decree-holder applied for execution of the decree. In that execution case the judgment-debtor filed an objection contending that the execution was barred by limitation. Whether or not the execution was barred by limitation was purely and simply a question of fact depending upon whether the 7th instalment under the instalment order had been paid or not. It was contended by him that it had not been paid. It was contended by the decree-holder that it had. The hearing of this objection in the execution case was fixed for the 8th April 1921. Upon that occasion the judgment-debtor did not appear in support of his objection and as there was nothing before the Court to show that the execution case was barred by limitation the Court dismissed the objection for default and on the same day passed an order that the decree-holder should take further steps and directed the case to be put up again on the 11th of the month for orders. On the 12th of the month no steps having been taken by the decree-holder his execution was dismissed for default of prosecution. The next execution case was filed in September following, that is to say, well within three years of the last execution case. The appellant now objects that the case is barred by limitation on the ground that the previous execution case in which his objection was dismissed was itself barred by limitation. It seems to me that the case is governed by the decision of the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) where a very similar

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

question arose although in that case there had been no direct adjudication in the previous execution case upon the question of limitation. In that case a sixth petition for execution was filed on the 5th September 1874 the previous one having been filed on the 26th July 1871. The sixth execution case came to nothing and on the 22nd September 1877 a seventh application was presented. It was contended there that the last application was barred by limitation because upon the actual facts then disclosed it would appear that the previous petition had been barred by limitation although that question had never been directly decided. Their Lordships in that case refused to give effect to the contention of the judgment-debtor and it seems to me that the ground upon which they refused to allow the question to be raised was that the sixth petition for execution, even though it may have been out of time, had been treated by the Court as a valid and subsisting execution case. No objection had been taken by any body and certain orders had been passed in that case and it did not in the circumstances lie in the mouth of the judgment-debtor to contend afterwards that that case was barred by limitation. Their Lordships pointed out that the Subordinate Judge had jurisdiction upon an application of the 8th October 1874, which was an application in the sixth execution petition, to attach certain properties and to determine whether the decree was barred or not at that date and an order was made that the attachment should issue. I may point out that no point had been taken in that case by any body as to whether or not the case was barred by limitation but their Lordships decided, that the question not having been raised the order made that the attachment must issue must be taken as having concluded the matter and that the orders so made were proper and valid orders and could not afterwards in another execution case be questioned on the ground of limitation. Their Lordships further pointed out that whether the Judge was right or wrong he must be taken to have determined that the application for attachment was not barred. The judgment proceeds thus:—"A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal, and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." It seems to me that what happened in the present case was this. When the judgment-debtor filed an objection to the execution that was a matter which the learned Judge had to decide and that was a matter which was to be determined upon questions of fact. The judgment-debtor had appeared in that execution case and had every opportunity of placing evidence in support of his objection before the Court. When the time came, however, he failed to take advantage of that opportunity. Nothing was done and, therefore, the learned Judge dismissed his application and at the same time passed an order which was tantamount to this that the execution case should proceed. What he did really was to order that the decree-holder should take necessary steps to proceed with his execution case. That was according to the view I take of the ruling in the case of *Mungul Pershad Dichit* v *Grija Kant Lahiri* (1) a determination by the Court that the execution case was not in fact barred by limitation and whether that decision was right or wrong it cannot afterwards, I think, be questioned in a subsequent proceeding and, therefore, it is no longer open to the judgment-debtor to contend that that execution case was not valid.

The same point arose for determination in the Allahabad High Court in the year 1902 and the facts of that case were very similar to those of the present case. In the case of *Sheoraj Singh* v. *Kameshar Nath* (2) the head-note is as follows:—"Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous,

(2) 24 I.A. 282; I.A. W. N. (1902) 63.

must, if unreversed, be treated as valid." The facts of that case, as I have said, were very similar to the present. There an application for execution of a decree was struck off on the 15th January 1894. The next application was not made until May 1907 more than three years later. Notice of this application was served on the judgment-debtors and they filed objections but on the day fixed for the hearing failed to support them and their objections were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holder in that case. It was held that it was not open to the judgment-debtors, on a subsequent application for execution being made, to plead limitation in respect of the previous application as a bar to the execution of the decree. Almost precisely the same facts arose in that case as arose in the present and I confess I can see no reason for differing from the views taken by the Allahabad High Court in that case.

Two other cases were, however, referred to which were decided in the Calcutta High Court and were relied upon by the appellant. The first was that of *Bholanath Dass* v. *Praful la Nath Kundu Chowdhry* (3). In that case, after several adjournments granted at the instance of the decree-holder, neither party having appeared at the date of the hearing, the Court by its order refused an application for execution and at the same time disallowed the objection of the judgment-debtor. On a subsequent application by the decree-holder the judgment-debtor again objected to the execution alleging that inasmuch as the previous application was barred by limitation the subsequent application was also barred. It was held in such circumstances that the judgment-debtor was not precluded from raising the objection that the previous application was barred by limitation. It appears to me that that was an entirely different case from the present and one in which entirely different considerations arose because no decision of any sort was come to in that case by the Court in the previous execution case. An execution case was started no doubt and certain objections were taken by the judgment-debtor but nobody after that appeared and the Court came to no decision upon any question. All that the Court did was to dismiss the execution case and at the same time dismissed the objections. In fact, having dismissed the execution case it was not necessary for the Court any longer to consider the objections. It cannot be said in such a case that the Court had determined whether the question of limitation was or was not a bar to the execution case proceeding. In the present case it must be taken that the Court had decided that there was no such bar because the very point was taken and decided although it was decided merely upon the default of appearance of the objection still at the same time the Court did make an order which showed that it considered that the execution case was a valid and subsisting execution case, and not barred.

The other case referred to of the Calcutta High Court was that of *Khosal Chandra Roy Chowdhury* v. *Ukiladdi* (4). Again, the facts of that case were very different from the present. In that case it appears that in the previous execution case nothing was done, that is to say, that no order for execution was made. Nor was any order made from which it could be judged that the Court had considered one way or the other that the execution case could proceed, and the learned Judges there considered that it was clear that no order for execution was made in the course of the proceedings taken on the basis of the previous application for execution. Nothing was done beyond the issue of notices under section 248 of the Code of Civil Procedure requiring the judgment-debtors to show cause why the decree should not be executed against them. After service of notice the execution proceedings were dismissed for default of the decree-holder. There was no adjudication by the Court, directly or indirectly, that the decree-holder was entitled to proceed with the execution and on that ground the Court held that as there had been nothing in the previous execution case from which it could be said that the Court

(3) 28 C. 122; 5 C. W. N. 80.

(4) 3 Ind. Cas. 47; 14 C. W. N. 114.

had decided one way or the other as to whether the proceedings were barred by limitation it was still open to the judgment-debtor in subsequent proceedings to take the point. Both those cases appear to me to be materially different from the facts of the present case. Once one arrives at the conclusion that the Court has decided either directly or indirectly that the previous execution case was a fit one to try and, therefore, not barred by limitation there is an end to the matter and it is not open to either of the parties thereafter to raise the same question in a fresh execution. For these reasons it seems to me that the present appeal must fail and is accordingly dismissed with costs.

Kulwant Sahay, J.—I agree.

K. S. D. & N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 80 OF 1922.

December 5, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

JHINKU SINGH—PLAINTIFF—APPLICANT

versus

SITAL SINGH—DEFENDANT—NON-APPLICANT.

Minor—Arbitration award—Minor party—Compromise for fresh submission to arbitration—Court, duty of—Benefit to minor—Civil Procedure Code (Act V of 1908), Sch. II.

As an arbitration award is binding on the parties, where one of the parties to it is a minor, the Court should not uphold a compromise by the parties to refer the dispute to arbitration a second time, unless the award is set aside on any of the grounds mentioned in Schedule Second to the Civil Procedure Code or unless the Court considers the compromise to be in the interest of the minor. [p. 134, col. 1.]

Per *Walsh, J*—The jurisdiction of Equity Courts over the interests of a minor has always been considered parental and of very solemn obligation, and a Judge sitting in any civil suit has to exercise that jurisdiction when the facts arise and the question of a minor's consent is involved. No contract amounting to an apparent surrender or variation of an infant's right ought to be sanctioned or listened to for one minute by any Court without satisfying its mind that the proposed arrangement is *bona fide* intended for the benefit of the minor. [p. 134, col. 2.]

Civil revision from an order of the Subordinate Judge, Gorakhpur.

Mr. *Shiva Prasad Sinha* (with him Dr. *S. M. Sulaiman*), for the Applicant.

Pandit *Narmadeshwar Prasad Upadhya* for Mr. *Haribans Sahai*, for the Opposite Party.

JUDGMENT.

Piggott, J—As the order we propose to pass at present will not finally dispose of this application, we need not say more than absolutely necessary to make our order clear to the lower Court. In a suit, in which certain minor plaintiffs were suing through their next friend, there was a reference to arbitration. An award was returned in favour of the plaintiffs. The contesting defendant filed an affidavit of objections assailing the award upon a great variety of grounds. The Court had fixed a certain date for hearing these objections. Before that date arrived, an application was made orally to the Court to the effect that the parties were agreed together that the arbitration award, in favour of the plaintiffs, should be set aside and a fresh reference made to the arbitration of two persons who were Counsel appearing for the respecting parties. We have it from a subsequent order of the Trial Court that the learned Subordinate Judge thought that he had no option upon such an application having been made, but to set aside the award and submit the dispute to what we may call the second set of arbitrators. He refers o a reported decision of this Court in the case of *Lutawan* v. *Lachiya* (1) in which it was held that the next friend or guardian *ad litem* of a minor litigant can refer the case to arbitration without obtaining the leave of the Court. The learned Subordinate Judge has altogether overlooked the fact that he had before him an arbitration award, which was valid and binding upon the parties unless set aside for any of the reasons stated in

(1) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 (F. B.).

the Schedule dealing with references to arbitration. The question which he had to consider was whether the next friend of the minor plaintiffs, in whose favour an award had been made, could so compromise the dispute as to the validity of that award as to give the Court no option but to accept the compromise and, therefore, to preclude the Court altogether from considering whether it was one which in the interest of the minors ought to have been entered into. A peculiar feature of the present case is that one of the arbitrators named in this second submission was the Counsel appearing for the minor plaintiffs who, we find, actually obtained a fee of Rs. 100 for his services as arbitrator. If he had advised his clients to throw up the first award, which was in their favour, we think his conduct in consenting to act as one of the second set of arbitrators was improper, because he put himself in such a position that his interest and his duty were in conflict. However, as the record now stands, we think the most suitable orders for us to pass are that there should be an enquiry into the objections taken by the contesting defendants to the first award and that the result of the enquiry should be certified to us before we pass any final orders on this application. The said application will, therefore, remain on the pending file of this Court but the record will be sent down to the Court below with the request that the said Court should enquire into, after proper notice to the parties concerned, the objections filed by the contesting defendants to the first award and should report to this Court the result of such enquiry. The case will then be put up again for hearing as soon as possible after the receipt of the lower Court's report.

Walsh, J.—I entirely agree with everything that has been said. I only want to add one word on a matter of principle about which I am satisfied that some Judges of the lower Courts require serious warning. In the order under revision the learned Judge has used this language: "The award is set aside with the free consent of the parties and the Court had no option in the matter but to set it aside." That is a total misunderstanding. One need not feel surprised. Judges in the lower Courts are not trained in equitable jurisdiction but nonetheless they have sometimes to exercise it. The jurisdiction of Equity Courts over the interest of the minor has always been considered parental and of very solemn obligation and a Judge sitting in an ordinary Common Law suit or in a civil suit of any kind, has to exercise that jurisdiction when the facts arise and the question of a minor's consent is involved. No contract or consent order amounting to an apparent surrender or variation of infant's right ought to be sanctioned or listened to for one moment by any Court without requiring some material calculated to satisfy its mind and without being satisfied, as far as it can be, on materials which are necessarily imperfect that the proposed arrangement is *bona fide* intended for the benefit of the infant. In this case the learned Judge has not only utterly failed to consider that question but has used language showing that he was not aware of the duty imposed upon him.

N. H. *Enquiry ordered.*

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREE NO. 250 OF 1919 AND NO. 11 OF 1920.

December 7, 1922.

Present:—Mr. Justice Das and Justice Sir John Bucknill, KT.

KEDAR NATH GOENKA—DEFENDANT—APPELLANT

versus

Mahant JAGAR NATH DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Religious endowment—Mahant, *powers of*—*Sale of* Asthal *properties*—*Necessity*—*Benefit*—*Sale*—*Vendo having no saleable interest*—*Suit to set aside sale, whether maintainable*—*Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 93—*Auction sale set aside*—*Refund of purchase-money*—*Sale confirmed on appeal*—*Purchaser, whether bound to re-deposit purchase-money.*

The *Mahant* of an endowment is the proprietor of the properties, although he holds the properties in trust. [p. 137, col. 1.]

KEDAR NATH *v.* JAGAR NATH DAS.

Vidya Varuthi Thirtha Swamigal v. *Balusami, Ayyar*, 65 Ind. Cas. 161; 26 C. W. N. 537; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), referred to.

The *Mahant* of an establishment has very large administrative powers over the affairs of the *Asthal*, and undoubtedly he has power to sell or mortgage the property in case of need or for the benefit of the *Asthal*. [p. 137, col. 2.]

Shankar Bharati Svami v. *Venkapa Naik*, 9 B. 422; 5 Ind. Dec. (N. S.) 280, referred to.

In execution of a money-decree against one *S*, who claimed to be the *Mahant* of an *Asthal*, the decree-holder had the properties appertaining to the *Asthal* sold. *S*. applied to have the sale set aside and the application was allowed. The auction-purchasers thereupon applied for a refund of the purchase-money and were allowed to withdraw it on the condition that they would re-deposit the amount in case the order was set aside on appeal. The High Court allowed the appeal and confirmed the sale. The auction-purchasers having then been ordered to re-deposit the purchase-money filed a suit for a declaration that they were not liable to do so:

Held, (1) that *S*. had a good title to convey the properties and, therefore, the properties could be seized in execution of a decree which was properly obtained against *S*.; [p. 138 col. 1.]

(2) that the plantiffs had acquired a good and valid title to the properties by the purchase made by them and were not entitled to have a declaration that they were not liable to deposit the purchase-money in Court. [p. 138, col. 2.]

A suit lies for setting aside a sale on the ground that the vendor had no saleable interest in the property. [p. 136, col. 2.]

Prasanna Kumar Bhattacharjee v. *Ibrahim Mirza*, 41 Ind. Cas. 924; *Rustomji Ardeshir* v. *Vinayak Gangadhar Bhat*, 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723, referred to.

Quaere.—It is very doubtful whether a suit lies for a declaration that the auction-purchasers are not liable to deposit purchase-money in Court. [p. 138, col. 2.]

Appeals from the decision of the Subordinate Judge, Monghyr, dated the 8th September 1919.

Messrs. *Purnendu Narain Singh, Naresh Chandra Sinha* and *Nitai Ch. Ghosh*, for the Appellants.

Messrs. *Siva Nandan Ray, Ram Prasad* and *Dinesh Chandra Varma*, for the Respondents.

JUDGMENT.

Das, J.—On the 8th September 1898 *Mahant* Jagar Nath Das, who was the head of Suja *Asthal*, died and on his death Siaram Das took possessison of the *Asthal*, and of the properties appertaining thereto. On the 10th January 1899 Mahabir Das, claiming to be the disciple of Jagar Nath Das, instituted a suit against Siaram Das in the Court of the Subordinate Judge of Monghyr for a declaration of his title to, and for recovery of possession of, the properties appertaining to Suja *Asthal*. On the 23rd September 1899 a Receiver was appointed to take charge of the properties appertaining to the *Asthal*. Siaram Das was thus deprived of all means either of supporting himself or of defending the suit. He, therefore, borrowed money from Baijnath Goenka on certain *ekrarnamas*. Baijnath Goenka is represented in these appeals by Kedar Nath Goenka, the defendant-appellant. Siaram Das borrowed money, as I have said, from Baijnath Geonka to defray the expenses of the litigation which had been commenced by Mahabir Das. Mahabir's suit was dismissed in the Court of the first instance, but on appeal the parties entered into a compromise by which each admitted the right of the other to be the *Mahant* of the *Asthal* and they agreed to divide the income of the *Asthal* in equal shares In 1903 Baijnath Goenka instituted a suit against Siaram Das and Mahabir Das for recovery of over a lac of rupees on the foot of the *ekrarnamas* which had been executed by Siaram Das in his favour. This suit was Suit No. 500 of 1903. He got a decree for Rs. 22,073 in the Calcutta High Court as against Siaram Das, his suit against Mahabir Das being dismissed. In 1907 Baijnath Goenka commenced execution proceedings against Siaram Das. Some of the properties appertaining to the *Asthal* were put up for sale and were purchased by the plaintiffs in these suits. *Mahant* Jagarnath Das, plaintiff in Suit No. 477 of 1918, purchased the properties set out at the foot of his plaint for Rs. 6,476 and Bikramajit Singh, plaintiff in Suit No. 408 of 1918, purchased the properties set out at the foot of his plaint for Rs. 4,525. These purchases were on the 18th and 21st of January 1908. Siaram Das then applied to the Subordinate Judge of Monghyr for setting aside the sale under the provisions

of section 311 of the Code of Civil Procedure. The learned Subordinate Judge on the 11th May 1908 set aside the sale. The plaintiffs thereupon applied to the Court for refund of the purchase-money. Baijnath Goenka objected as he had filed an appeal to the High Court against the order of the learned Subordinate Judge setting aside the sale. The plaintiffs undertook to re-deposit the purchase-money in case the order of the learned Subordinate Judge was set aside on appeal. On that undertaking being given they were permitted to withdraw the purchase-money from the Court. During the pendency of Baijnath Goenka's appeal in the High Court, a suit was instituted in 1909, under the provisions of section 92 of the Civil Procedure Code, for removal of Siaram Das from the *Mahantship* of Suja *Asthal*. On the 30th September 1910 the learned District Judge of Bhagalpur, by his decree removed Siaram Das from the *Mahantship* of the Suja *Asthal*. The effect of this decree was to put Mahabir Das in sole possession of the *Asthal* properties. Siaram Das appealed against the judgment of the learned District Judge of Bhagalpur to the Calcutta High Court and, on the 28th May 1912, the Calcutta High Court dismissed the appeal of Siaram Das. Baijnath Goenka's appeal against the order of the learned Subordinate Judge of Monghyr setting aside the sale came up for hearing before the Calcutta High Court on the 4th February 1913. The Calcutta High Court set aside the order of the learned Subordinate Judge and remanded the case for trial by the Court of the first instance. On remand Siaram Das, having no further interest in the *Asthal* properties, did not appear to support the application for setting aside the sale. The application was accordingly dismissed for default and, in due course, the sales were confirmed. Baijnath Goenka thereupon applied for an order directing the plaintiffs in these actions to deposit the purchase-money in Court in terms of their undertaking. The plaintiffs objected but their objections where disallowed on the 28th July 1917 and they were directed to deposit in Court the sums witdhrawn by them with interest from the date of the withdrawal. They appealed to this Court anh their appeals were dismissed on the 27th May 1918.

These actions were then brought on the 28th August 1918 for a declaration that they were not liable to deposit the purchase-money in Court on the grounds, first, that the properties sold at the execution sale were *debuttar* properties and that Siaram Das had no right to transfer them, and that the plaintiffs as purchasers have acquired no title in them; secondly, that Mahabir Das, the present *Mahant*, will not allow the plaintiffs to take possession of those properties, and, thirdly, that as Baijnath Goenka omitted to notify the encumbrances of Dalip Narain Singh subsisting on the properties purchased by them he was guilty of fraudulent concealment and that he ought not to be allowed to compel the plaintiffs to deposit the purchase-money in Court. The learned Subordinate Judge has come to the conclusion that the title in the *Asthal* properties did not pass to the plaintiffs at the auction-sale and he has accordingly made a declaration in favour of the plaintiffs that they are not liable to refund the purchase-money in respect of the purchases made by them in Execution Case No. 427 of 1907.

I am wholly unable to agree with the decision of the learned Subordinate Judge. I doubt very much whether a suit lies for a declaration that they are not liable to deposit the purchase-money in Court. Under O. XXI, r. 91, the purchaser decree-holder in execution of a decree has the right to apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. It appears to me that, when the matter has passed the domain of contract to the domain of sale the purchaser can only have the sale set aside on the ground that there was some fraudulent misrepresentation on the part of the decree-holder. But it seems to be settled law in this country that a suit lies for setting aside the sale on the ground that the vendor had no saleable interest in the property. See *Prasanna Kumar Battacharjee* v. *Ibrahim Mirza* (1) and *Kustomji*

(1) 41 Ind. Cas. 924.

Ardeshir v. *Vinayak Gangadhar Bhat* (2). It is not necessary for me to express a final opinion on this point, because I am satisfied that the plaintiffs are not entitled to succeed in this case.

The basis of the judgment of the learned Subordinate Judge seems to be this—that *Mahant* Siaram Das was a trespasser and never had a good title to the *Asthal*. It is, in my opinion, impossible to support this view in the face of the admitted history of the *Asthal* from 1896 up to 1912. Siaram undoubtedly took possession of the *Asthal* and of the properties appertaining thereto upon the death of the *Mahant* Jagar Nath Das. It is true that suit was instituted by Mahabir Das against him but that suit failed in the Court of the first instance and in the High Court it was compromised on the footing that *Mahant* Siaram Das, had a good and a valid title to the *Asthal*, Siaram Das himself admitting that Mahabir Das had an equally good and valid title to the *Asthal*. After the decision of the Calcutta High Court in the suit instituted by Mahabir Das against Siaram Das, Siaram Das remained in undisputed possession of the properties until he was removed by the decree of the Court in 1912. Nobody seems to have questioned his right to be the *Mahan* of the *Asthal*. In fact the suit which was filed under the provisions of section 92 of the Code of Civil Procedure admits by implication that he was rightfully in possession of the properties as the *Mahant* of the *Asthal*. In my opinion, it is impossible to hold that Siaram Das was a trespasser and was not rightfully in possession of the *Asthal*.

That being so, it is necessary to consider whether Siaram Das had a valid title at any time to convey the properties. Now the *Mahant* of an endowment is the proprietor of the properties although he holds these properties in trust. This is how the Judicial Committee has described the position of the *Mahant* in the recent case of *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (3).

The *Mahant* of an establishment has very large administrative powers over the affairs of the *Asthal* and undoubtedly he has power to sell or mortgage the property in case of need, or for the benefit of the *Asthal*. That being so, it is impossible to maintain that he has no saleable interest in the property. Apart from any other consideration, when the facts in connection with Baijnath Goenka's loans are examined it must follow that there was a legal necessity for those loans. As I have said before, directly after the institution of the suit by Mahabir Das a Receiver was appointed to take charge of the properties appertaining to the *Asthal*. Siaram was accordingly deprived of all means either of supporting himself or of defending the suit. It was absolutely necessary for him to raise a loan in order to defend his title against the hostile attack made on it by Mahabir Das. It was, in these circumstances, that Baijnath Goenka lent him the money and, in my opinion, it is impossible to say that there was no legal necessity in respect of those loans. The case of *Shankar Bharati Svami* v. *Venkapa Naik* (4) is decisive on this point. That was also a case where an attack was made on the title of one Vidya Shankar who held the *Math* properties. Vidya Shankar borrowed money in order to maintain himself and to defend the suit brought against him. Sargent, C. J., came to the conclusion that a loan effected under such circumstances to meet the exigencies of the presiding *swami* and to restore tranquility to the *Math* would, according to the custom and usage of the *Math*, be regarded as properly contracted.

This case was cited before the learned Subordinate Judge, but he thought

(2) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723.

(3) 65 Ind. Cas. 161; 26 C. W. N. 537; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.);

(4) 9 B. 422; 5 Ind. Dec. (N. S.) 280.

that the case did not apply because it was not shown first, that *Mahant* Siaram Das was a real *Mahant* of the Suja *Asthal*; secondly, that the loan was *bona fide* advanced for defending his title, and, thirdly, that Baijnath Goenka in good faith believed that he was advancing the loan for the interest of the *Asthal*. So far as the first ground is concerned, I have dealt with it fully. There is no sort of reason for holding that *Mahant* Siaram Das was not the *Mahant* of the Suja *Asthal*. So far as the second point is concerned, the loan was undoubtedly taken in order to enable Siaram Das to defend his title as against the hostile attack made on it by Mahabir Das. That was held in the suit between Baijnath Goenka and *Mahant* Siaram Das, and, so far as the last point is concerned, upon the finding that Baijnath Goenka did advance the money in order to enable Siaram Das to defend his title as against the attack made on it by Mahabir Das there is no reason to doubt that it was advanced in good faith. No doubt, Baijnath Goenka stipulated that he would receive over a lac rupees in return for the money which he spent on behalf of Siaram Das, but then he did not get a decree for the sum which he claimed in the action against Siaram Das. His decree was for the sum actually expended by him in defending the title of Siaram Das with reasonable interest upon the money so expended by him. There is, in my opinion, no reason to doubt that the money was *bona fide* advanced by Baijnath Goenka in order to enable Siaram Das to defend his title. The case of *Raja Peary Mohan Mookerjee* v. *Narendra Nath Mookerjee* (5) is directly in point. If there was legal necessity in respect of the loan, it must follow that Siaram Das had a good title to convey the property and if he could convey the properties voluntarily those properties can be seized in execution of a decree which was properly obtained by Baijnath Goenka against Siaram Das for a debt which was properly incurred by Siaram Das. In my opinion, the plaintiffs in these actions have acquired a good and valid title to the properties by the purchase made by them and they were not entitled to have a declaration that they are not liable to deposit the purchase-money in Court.

So far as the other point is concerned, namely, that there was fraudulent concealment on the part of Baijnath Goenka in so far as he did not notify the encumbrances of Dalip Narain Singh the judgment of the learned Subordinate Judge is in favour of the appellant. It appears from the judgment that Baijnath Goenka did file a petition in the previous execution case which was Execution Case No. 668 of 1905 notifying the encumbrances affecting the properties. It is quite true that the sale proclamation did not set out these encumbrances but it is impossible to uphold the contention of the plaintiffs that there was fraudulent concealment on the part of the decree-holder. The case of *Khetro Mohan Datt* v. *Sheikh Dilwar* (6) is conclusive on this point. This Court in that case held that if a purchaser has bought a property the title as to which is defective or if he has been misled on account of fraud or omission on the part of the decree-holder it is open to him to seek his remedy as the law allows. But there is no reason why a Court should interfere on behalf of the auction-purchaser and set aside the sale simply because an auction-purchaser has bought a bad title. Mullick and Thornhill, JJ., in delivering the judgment of the Court pointed out that every man buys at an auction-sale with his eyes open and the general principle, that an auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor had no saleable interest in the property must apply. In my opinion, the decree passed by the learned Subordinate Judge in this case cannot be supported. I would allow the appeal and set aside the judgment and the decree passed by the Court below and dismiss both the suits with costs in both the Courts. The auction-purchasers must forthwith deposit the purchase-money in Court with interest at 6 per cent. from

(5) 9 C. W. N. 422, 32 C. 582.

(6) 46 Ind. Cas. 614; 3 P. L. J. 516; 5 P. L. W. 151.

the 10th May 1913, that being the date when the sale in their favour was first confirmed.

Bucknill, J.—I agree.

K. S. D. & N. H. *Appeals dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 31 OF 1922.
March 23, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Ramesam.

ROSE CHARLOTTE PRITCHARD—APPELLANT

versus

WALTER EDGAR PRITCHARD—RESPONDENT.

Divorce suits—Costs to wife—Principle applicable.

In an application for divorce, the general principle in the matter of awarding costs is, that the wife who is charged, rightly or wrongly, by the husband in a Divorce Court is entitled to be given her costs which will be taxed costs in defending the suit, except in cases where the wife has ample means of her own to defend herself or where the Solicitor who is employed has been guilty of misconduct.

Appeal from the judgment and decree of Mr. Justice Phillips, dated the 31st January 1922, and made in the exercise of the Ordinary Original Matrimonial Jurisdiction of the High Court in Original Matrimonial Suit No. 9 of 1921.

Messrs. *Short, Bewes & Co.*, for the Appellant.

Messrs. *Grant and Greatorex*, for the Respondent

JUDGMENT.

Schwabe, C. J.—This is an appeal from an order of Phillips, J., granting a decree *nisi* to a husband against his wife. He found, as a fact, that the wife was leading an immoral life since her marriage, that she committed adultery with persons unknown and that, therefore, the husband was entitled to a decree.

I agree with the learned Judge that a great deal of the evidence is not a very clear and definite, but you cannot expect, in such a case, to get very definite evidence. There is evidence, which the learned Judge accepted, that the wife after the marriage lived in a notorious house of ill-fame, that she at night time hung about outside Bioscopes where she, at any rate, conversed with soldiers and that on one occasion she quarrelled in the street with another woman of bad reputation, the cause of the quarrel being, according to the public evidence, that the respondent accused the other lady of taking away soldiers from her who had promised to go to her place. The learned Judge having seen the witnesses and heard the evidence, accepted it and I think there was ample evidence on which he could come to that conclusion, and this decree must, therefore, stand.

Another point is taken and that is the question of costs. In this case the learned Judge has, before the hearing of the case, given Rs. 75 costs to the respondent. It was something, at any rate, to go on with, but I do not think that it was intended to be a final order at all. He says that some of the witnesses who were called were possibly unnecessary, and he refused to make any further order, having found the wife guilty. I do not think he attempted to apply the right principle to the matter at all. Except, at any rate, in two cases, firstly, where the wife has ample means of her own to defend herself and, secondly, where the Solicitor who is employed has been guilty of misconduct, she would have to be provided with funds by the husband: but apart from that, the general principle, to my mind, is that the wife, who is charged, rightly or wrongly, by her husband in a Divorce Court, is entitled to be given her costs in defending that suit. The proper way of doing that is to give her taxed costs, and I think in this case the order must be varied by giving her taxed costs of the suit—of course, it will be for the Taxing Officer in taxing the bill to say whether any of the witnesses were necessary or not. However, when you go to the Court of Appeal, the position is different and the respondent would naturally have to be paid his costs of the appeal; but as the appellant has succeeded in the matter of costs though she has failed as regards the main part of the appeal, the

fair order woud be that there will be no costs of the appeal.

Ramesam, J.—I agree.

V. N. V. *Order varied.*

PATNA HIGH COURT.

CIVIL REVISION PETITION NO. 150 OF 1923.

June 8, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

Babu BISHUN MOHON SAHAY—PETITIONER

versus

Babu NARAYAN PRASAD ASTHANA—OPPOSITE PARTY.

Government of India Act, 1915 (5 & 6 *Geo. V, C.* 61), *s.* 107—*Civil Procedure Code* (*Act V of* 1908), *ss.* 73, 115—*Rival decree-holders—Decision under s.* 73—*Revision—High Court, when will interfere —Proviso to s.* 73, *applicability of—Rateable distribution.*

Although decisions under section 73 of the Civil Procedure Code, made with reference to the claims of rival decree-holders, are not ordinarily revisable under section 115 of the Code, yet where such a decision is hopelessly inadequate, in that it contains no particulars as to the claims made by the contending parties, the evidence given, the arguments advanced and the reasons upon which the decision is based, the High Court will interfere under section 107 of the Government of India Act. [p. 140, col. 2.]

The proviso (*b*) to clause (1) of section 73 of the Civil Procedure Code applies only to a mortgagee whose charge is valid against the executing decree-holder, and it is open to such mortgagee to apply for rateable distribution in the proceeds of a sale held in execution of a decree in favour of the executing decree-holder where he, the mortgagee, holds a money-decree against the judgment-debtor apart from the mortgage. [p. 141, col. 2.]

Mr. *S. N. Ray* for Mr. *Satdeva Sahai*, for the Petitioner.

Messrs. *Parmeshwar Dayal* and *Sambhu Saran*, for the Opposite Party.

Appeal from an order of the Subordinate Judge, Second Court, Chapra, dated the 6th February 1923.

JUDGMENT.

Mullick, J.—This application has been made against an order, dated the 6th February 1923, made by the Subordinate Judge of Chapra in a case under section 73, Civil Procedure Code. Decisions made under this section with reference to the claims of rival decree-holders are not ordinarily revisable under section 115, Civil Procedure Code, and the only reason that I can see for admitting the present application is that the learned Judge's judgment is so hopelessly inadequate that our interference is called for under section 107 of the Government of India Act. The learned Judge observes that argument was heard at great length, but his decision occupies exactly 7 lines and contains no particulars as to the claims made by the contending parties the evidence given, the arguments advanced and the reasons upon which he bases his order. The matter was sufficiently complicated to require considerable argument before us and I certainly think that the learned Subordinate Judge failed in his duty in omitting to write a more considered and careful judgment.

Now the facts appear to be these. On the 28th July 1917 one Bishun Mohon got a decree against one Ram Gharib for Rs. 6,135-9-0 in the Court of the Subordinate Judge at Gorakhpur. On the same date one Hira Lal got a decree for Rs. 4,000 against the same judgment-debtor in the same Court. A third suit was brought by the Liquidator of the Kayesth Trading and Banking Corporation in liquidation in the Court of the Subordinate Judge of Gorakhpur against the same defendant for a sum of Rs. 76, 000 on the allegation that Ram Gharib was the Manager of the Kayesth Trading and Banking Corporation and that he had misappropriated the sum in question and spent it in the purchase of properties for the benefit of himself and his co-sharers. Accordingly, the Liquidator impleaded in his suit not only Ram Gharib but also the members of his joint family. While that suit was pending the Liquidator brought a suit against the Manager under the Indian Companies Act in the High Court of Allahabad and in consequence of some proceedings by way of compromise he withdrew the suit in the Court of the Subordinate Judge at Gorakhpur and obtained on the 31st July 1922 a consent decree in

the High Court for the sum of Rs. 76,000. At the same time, in accordance with the compromise, the Manager and his co-sharers executed a security-bond in favour of the Liquidator, the relevant portion of which ran in the following terms:---

"And it is also stipulated therein that we the declarants should mortgage and hypothecate our properties described below by way of security for payment of the said decretal amount. Accordingly, acting under the said settlement, we the declarants mortgaged the properties described below by way of security for the said decretal amount to Munshi Narayan Prasad Asthana, Advocate of the Allahabad High Court and the Official Liquidator of the Bank, and we do declare that the said Official Liquidator be at liberty to realise the said sum of Rs. 76,000 (seventy six thousand) by taking out execution of the decree against me the declarant No. 1 and to file a petition for rateable distribution of share in the properties of me the declarant No. 1 which have been attached or to have them attached by taking out execution of the said decree; if (entire) decretal amount be not realised in this way then the Official Liquidator may recover the balance of the money due under the decree not realised in this by sale of the properties given below."

All these three decrees were thereafter sent for execution to the Court of the Second Subordinate Judge of Chapra. There Bishun Mohon applied for execution on the 11th September 1922 and on the 16th September 1922 the Court caused to be attached Ram Gharib's share in certain properties. Hira Lal applied for execution on the 14th December 1922 and on the 22nd January 1923 he attached some of Ram Gharib's properties. The Liquidator's application for execution is dated the 10th January 1923 and on the 12th January 1923 he made an application under section 73, Civil Procedure Code, for rateable distribution along with Bishun Mohon. Bishun Mohon objected and the Subordinate Judge has decided against him. The present application for revision has been made against that order.

Now, it appears that after Hira Lal attached Ram Gharib's properties in execution of his decree, the Liquidator stepped in and produced the security-bond which had been executed on the 22nd September by Ram Gharib and his co-sharers and asked that the properties covered by that security-bond which had been attached and were about to be sold should be sold subject to his mortgage lien. The Court allowed the prayer, but in fact none of the properties covered by the security-bond were sold and some other properties belonging to Ram Gharib were sold in that execution.

It is contended that as the Liquidator is a mortgagee he cannot have the benefit of section 73. It is urged that proviso (*b*) of clause (1) of section 73 compels the mortgagee to give up his encumbrance and to sell the property free of his mortgage charge if he should desire to share in the proceeds of the sale; if he does not do this, it is not open to him to ask for rateable distribution even though he may be the holder of of a money-decree against the judgment-debtor apart from the mortgage. In my opinion the contention is not well founded.

The proviso applies only to a mortgagee whose charge is valid against the executing decree-holder. In the present case the Liquidator's charge having come into existence after Bishun Mohon's attachment the sale could not have been in any way affected by the encumbrance, and if the Liquidator is debarred from applying for rateable distribution in respect of his decree for Rs. 76,000 there will be no property left against which he can enforce either that decree or his mortgage charge.

Whether the security-bond effects a mortgage on Ram Gharib's share in the sense that it enables the Liquidator to sue Ram Gharib and his co-sharers for the realisation of the whole of the Rs. 76,000 is open to some doubt the bond itself stipulates that the Liquidator shall proceed against Ram Gharib's properties in execution of his money-decree and that it is only for the balance that the mortgage shall be enforced against the shares of the remaining co-sharers of Ram Gharib. That point, however, is not really material to the decision of the present application.

The result is, that the application is dismissed with costs: hearing fee two *mohurs*.

Bucknill, J.—I agree.

W. C. A. & N. H. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 487 OF 1922.
June 1, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Daniels.

MOHAMMAD ZAIN KHAN AND OTHERS —PLAINTIFFS—APPELLANTS
versus
NURUL HASSAN KHAN AND ANOTHER —DEFENDANTS—RESPONDENTS.

[*Muhammadan Law*—Waqf—Waqif *first* Mutwalli—*Mutation of names not affected, effect of* —Waqif *and his wife retaining control over whole income for their lives*—Waqf, *validity of.*

If a person dedicating his property appoints himself the first *Mutwalli* and holds the property as such *Mutwalli*, the *waqf* is not invalid for want of delivery of possession even if the *waqif* has not got the mutation of his name effected as such *Mutwalli*. [p. 43, col. 1.]

Mohammad Abdul Jalil Khan v. *Mohammad Ubedullah Khan*, 62 Ind. Cas. 725; 19 A. L. J. 227; 43 A. 416, followed.

If a *waqif* reserves the whole of the income of the *waqf* property, as distinct from the corpus, for his life or for his life and after him for the life of his wife, the *waqf* is still valid, if the property is ultimately devoted to the proper object of the *waqf*. [p. 143, col. 1.]

Jaun Beebee v. *Abdollah Barber*, (1838) Fulton 345; 1 Ind Dec (o. s.) 848, *Cassamally Jairajbhoy Peerbhoy* v. *Sir Currimbhoy Ebrahim*, 12 Ind. Cas. 225; 36 B. 214; 13 Bom. L. R. 717, followed

Bikani Mia v *Sukk Lal Poddar*, 20 C. 116; 10 Ind. Dec. (N. S.) 79 (F. B), *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*, 17 C. 498; 17 I. A. 28; 5 Sar P. C. J. 470; 8 Ind. Dec. (N. S.) 871 (P. C.), referred to.

Second appeal from the decree of the Additional District Judge, Cawnpore, dated the 4th January 1922.

Dr. *K. N. Katju*, for the Appellants.

Messrs. *Iqbal Ahmad* and *S. Raza Ali*, for the Respondents.

JUDGMENT.—The question for decision in these two connected appeals is as to the validity of a deed of *waqf* executed by Abdul Ali Khan and his wife on 26th March 1909. Abdul Ali Khan died on the 7th May 1917 and his wife shortly afterwards, and the present suit was brought by his brother Muhammad Ali Khan claiming possession of his legal share of the property as his heir under Muhammadan Law. Muhammad Ali Khan has died during the pendency of the proceedings and the appellants are his legal representatives. The parties to the suit are Sunnis. Muhammad Ali Khan in his plaint denied that any *waqf* was ever dedicated and urged further that if there was a *waqf* it was fictitious and illusory. That a *waqfnama* was executed has never been seriously disputed. The Trial Court, however, treated it as a *waqf* which would not really take effect until after the deaths of Abdul Ali Khan and his wife. It accordingly treated it as valid only to the extent of one-third of the property covered by it and decreed the suit as to the remainder. The learned Additional Judge, however, has upheld the *waqf* as valid and dismissed the the suit. His findings are:—

(1) That the dedication was substantial and real,

(2) that the dedication of the corpus was absolute and immediate;

(3) that the reservation of a life interest in the income, even if it were the entire income, which it is not, limited to the life of the two settlors, does not render the *waqf* illusory and testamentary.

The third finding is one of law. The first two findings are findings of fact, except in so far as the reality of the dedication may be a matter of legal inference from the facts found. The points which are taken in this Court are two (1) that the *waqf* was invalid for want of delivery of possession; and (2) that the settlor and his wife retained complete control over the income during their joint lives and that this renders the *waqf* illusory and invalid either altogether, or, in the alternative, as held by the Trial Court, for the period of their lives.

The only ground on which the *waqf* is assailed under the first head is that no application for mutation of names was made by Abdul Ali Khan, though he lived for 8 years after the execution of the deed of *waqf*. On the other hand, it is proved

that under the deed of *waqf* he appointed himself as first *Mutwalli* and expressly declared that he was holding the property henceforth as *Mutwalli* and not as owner. This, according to the accepted rule of Muhammadan Law, is sufficient, and it was so held by this Court in *Mohammad Abdul Jalil Khan* v. *Mohammad Ubedullah Khan* (1). This ground of attack, therefore, fails.

As regards the second plea, the suggestion that the *waqf* can be treated as a testamentary *waqf* may be rejected at the outset. A Will is a document which may be cancelled by the testator at any time up to his death and only comes into operation at the latter event. Here there was an irrevocable dedication of the corpus of the property from the date of the deed. The provisions of the deed which are relied on as showing that the dedication was illusory are set out in the judgment of the Trial Court. They amount to this, that during the lifetime of the settlor and his wife the amount to be spent on charitable and pious purposes was left entirely to their discretion, both as to the sum to be expended and as to the purposes for which it was to be spent. They were to spend as much of the profits as they deemed proper on charitable and pious purposes recognised by Muhammadan Law and the remainder for their support, and no one was to have the right to call them to account. This state of things was, however, confined entirely to the lifetime of Abdul Ali Khan and his wife. It is not disputed that after their death the objects of the *waqf* were carefully specified and were proper objects, and that the *Mutwalli* was directly bound to spend the money on those objects. The question is, therefore, substantially that stated by the learned Additional Judge, namely, where the reservation of what practically amounts to a life interest in the income as distinct from the corpus is it sufficient to invalidate the *waqf*. This question was first raised in the case of *Jaun Beebee* v. *Abdollah Barber* (2). In that case five questions were referred to the *Maulvies* for decision. The first question was

"Whether, according to Muhammadan Law, an endowment to charatible uses is valid, when qualified by a reservation of the rents and profits to the donor himself during his life?"

The *Maulvies* alluded to the difference of opinion between the Imam Muhammad and the Imam Abu Yusuf on this point and agreed that the opinion of most of the learned upheld the view of Abu Yusuf who considered the *waqf* legal. Judgment was given accordingly. The same view was taken by the Bombay High Court in the case of *Casamally Jairajbhoy Peerbhoy* v. *Sir Currimbhoy Ebrahim* (3). It was suggested that *Jaun Beebee's case* (2) had been dissented from in the Full Bench case of *Bikani Mia* v. *Shuk Lal Poddar* (4) but this is not the case. The judgment was cited at some length by Ghose, J., (pp. 185-188) and also by Trevelyan, J., (p. 223 of the report) and was distinguished from the case before them, but neither of the Judges pronounced it to be incorrect.

The appellants have also referred to the Privy Council ruling in *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (5). This ruling is in no way contrary to the view taken by the Court below. The test laid down by the Privy Council for the validity of the endowment was that there must be a substantial dedication of the property to charitable uses *at some time or other*. Their Lordships also quote with approval the opinion of Kemp, J., in an earlier case, "that the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family, and which, after they lapse, will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law."

In this case there was admittedly an ultimate dedication of the entire property to religious and charitable uses. The weight of authority is entirely in favour

(1) 62 Ind. Cas. 725; 19 A. L. J. 227; 43 A. 416.

(2) (1838) Fulton 345; 1 Ind. Dec. (O. S.) 848.

(3) 12 Ind. Cas. 225; 36 B. 214; 13 Bom. L. R. 717.

(4) 20 C. 116; 10 Ind. Dec. (N. S.) 79 (F. B.).

(5) 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind. Dec. (N. S.) 871 (P. C.).

of the validity of the *waqf*. We accordingly dismiss both the appeals with costs including in this Court fees on the higher scale.

M. A. A. *Appeal dismissed.*

G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 14 OF 1923.

June 5, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

CHAURASI AHSARICK AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

BHAGAN SAHU AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 17, O. XXXIV, r. 14, scope of—Mortgage suit—Compromise decree—Decree directing execution against properties of judgment-debtor in certain order—Decree-holder whether can bring mortgaged properties to sale—Execution petition—Prayer for sale of immoveable property in case of moveable property proving insufficient—Alternative prayer, whether constitutes amendment of petition.

The class of case contemplated in O. XXXIV, r. 14, of the Civil Procedure Code appears to be that class of case in which a suit is brought upon the covenant to repay contained in a mortgage deed or upon the debt arising out of that covenant or in respect of some other obligation arising out of the mortgage and not to a suit which is brought in order to enforce a sale of the mortgaged properties. [p. 145, col. 2.]

Where a mortgagee has obtained a decree against the mortgagor not in the form of a mortgage-decree but merely in the form of a personal decree, the mortgaged properties cannot be allowed to be sold in execution of such a decree until there is another decree directing the enforcement of the charge against the mortgaged properties. [p. 145, col. 2; p. 146, col. 1.]

In a mortgage suit a compromise decree was passed directing that the udgment-debtor should pay the decretal amount by certain instalments and in case of failure to pay 3 consecutive instalments, execution for the amount due should issue against the othe p operties of the judgment-debtor and in the event of the amount not being realised in that manner against the mortgaged properties. Default having taken place, the decree-holder applied for execution against the properties referred to in the compromise decree in the order in which they became liable. There being no moveable properties of the judgment-debtor, the decree-holder applied for attachment and sale of the mortgaged properties:

Held, (1) that the decree was nothing more than a decree for the payment of money in satisfaction of a claim arising under the mortgage; [p. 145, col. 2.]

(2) that inasmuch as the decree itself provided, in the event of default and in the event of the other property of the judgment-debtor proving insufficient, for a sale of the mortgaged property itself, it was not necessary for the decree-holder to bring another suit asking again for the sale of the property merely because the other remedy given under the decree had proved infructuous; [p. 146, col. 1.]

(3) that the application to be allowed to proceed against the mortgage properties came directly withinthe execution petition itself, and it required no amendment of the execution petition to enable the Court to proceed against those properties. [p. 146, col. 2.]

Gnanendra Kumar Rai v. *Shayama Sunder Jen* [*Rishendra Kumar Roy*], 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398, *Ram Sumran Prasad* v. *Babu Ram Bahadur*, 71 Ind. Cas. 741; (1923) Pat. 61; 2 Pat. 328; 4 P. L.T. 99; (1923) A. I. R. (Pat.) 224, referred to.

Appeal from an order of the District Judge, Santal-Parganas, dated the 7th December 1922, confirming that of the Subordinate Judge, Santal-Parganas, dated the 21st December 1921.

Mr. *S. K. Mittra*, for Mr. *S. C. Mittra*, for the Appellants.

Mr. *Rai T. N. Sahay*, for the Respondent.

Miller, C. J.—This is an appeal on behalf of the judgment-debtors in a suit brought upon a mortgage in which a compromise decree was passed. The respondents, who are the decree-holders, sought to execute their decree. The judgment-debtors raised certain objections. The Court rejected those objections and on appeal the District Judge affirmed the decision of the Subordinate Judge. From the decision of the District Judge the judgment-debtors have apealed to this Court.

It appears that the decree-holders instituted a suit against the judgment-debtors in order to enforce a mortgage executed in their favour by the judgment-debtors. The result of that suit was a compromise. The compromise provided that the judgment-debtors should pay the sum due upon the mortgage amounting to the sum of Rs. 3,800

by certain instalments and in the event of default of three consecutive instalments, the decree-holders were to be allowed to realise the entire amount remaining due from the person and other properties of the judgment-debtors, and in the event of the amount due not being so realised the decree-holders were to be entitled to realise the amount from the mortgaged property by sale. The mortgage property is a four-annas share of *Mauza* Ghat Majbonarah, Touzi No. 445, and if the whole amount was not realised in that manner then certain provision was made for proceeding against other property, which is not material for the purpose, of this appeal.

In June 1921 the decree-holders applied for execution of the decree, there having been a default in respect of three consecutive instalments under the terms of the decree. It is important to bear in mind how the application for execution was framed. The application for execution was framed as an application for execution against the property referred to in the compromise decree and for execution against that property in the order in which it became liable under the compromise decree. The mode in which the assistance of the Court was required was, first of all, by attachment and sale of the moveable properties of the judgment-debtors; and, secondly, by attachment and sale of the mortgaged properties. The moveable properties were set out in a schedule, the mortgaged properties were merely mentioned under the description given in the decree as the four-annas share of *Mauza* Ghat Majbonarah, Touzi No. 445. The moveable properties apparently could not be found, at all events they were not attached and, as far as one can gather from the judgment of the lower Courts, the judgment-debtors contended that they had no such moveable properties. Having failed to effect execution by attachment of those moveable properties, the decree-holders applied to the Court for attachment and sale of the mortgaged properties. In objection to that application certain points were taken on behalf of the judgment-debtors. As already stated, both the lower Courts dismissed those objections and ordered the execution to proceed by attachment and sale of the mortgaged properties.

The only points which have been urged before us in this appeal are, first, that the case comes within the provisions of O. XXXIV, r. 14, and, therefore, a further suit is necessary before the mortgaged properties can be sold; and, secondly, that the application for sale of the mortgaged properties in the present execution proceedings is in fact an amendment of the execution petition which, under the decided cases, the Court has no power to grant after registration of the petition.

With regard to the first point, I think it is clear that the decree obtained in the present case is something more than a decree for the payment of money in satisfaction of a claim arising under the mortgage. Order XXXIV, r. 14, applies to a decree of that nature and it provides that the mortgagee having obtained such a decree shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage; and it further provides that he may institute such suit notwithstanding anything contained in O. II, r. 2. The class of case contemplated in O. XXXIV, r. 14, appears to me to be that class of case in which a suit is brought upon the covenant to re-pay contained in the mortgage-deed, or upon the debt arising out of that covenant, or in respect of some other obligation arising out of the mortgage, and not to a suit which is brought in order to enforce a sale of the mortgaged properties. This rule corresponds to, or rather takes the place of, section 99 of the Transfer of Property Act which is repealed by the Civil Procedure Code and under the previous Act it had been held that a suit of the nature described in O. XXXIV, r. 14 did not entitle the mortgagee to put to sale the mortgaged properties. The old enactment was, with a slight modification, re-enacted in the Civil Procedure Code and still remains the rule. It seems quite obvious that there may be very good reasons for refusing to allow the mortgaged properties to be sold merely because the mortgagee has obtained a decree against the mortgagor not in the form of a mortgage-decree but merely in the form of a personal decree against the mortgagor, a decree which does not in any way affect the mortgaged properties. In such a case it is clearly

desirable that before the charge upon the mortgaged properties can be enforced there should be a decree directing the enforcement of that charge. The present case is one entirely different. The decree obtained in the present case was with a slight modification exactly the sort of decree obtained in an ordinary mortgage suit. The suit was a mortgage suit and a suit praying for the sale of the mortgaged properties; but a compromise between the parties instead of the ordinary form of mortgage-decree being passed which would order the judgment-debtor to pay the decretal sum within a certain time failing which it would order the mortgaged properties to be sold, the compromise decree provided that the judgment-debtor should pay the decretal amount by certain instalments and if he should fail in the payment of three consecutive instalments then execution for the whole amount due should issue against the other properties of the judgment-debtors and in the event of the amount not being realised in that manner against the mortgaged properties. It is, therefore, clear that the decree itself in this case orders, in the event of default and in the event of the other properties of the judgment-debtors proving insufficient, a sale of the mortgaged property itself, and I can see no reason why it should be necessary in the event which has happened for the decree-holders to have to bring another suit asking again for the sale of the property merely because the other remedy given under the decree has proved infructuous. This case is altogether different to my mind from the case contemplated in O. XXXIV, r. 14, and the appeal on that ground must fail.

With regard to the second point, it has no doubt been held in the case of *Asgar Ali* v. *Trollokya Nath Ghose* (1) that, under the provisions of O. XXI, r. 17, no amendment of the execution petition is permissible after the petition has been registered. It would follow, therefore, that if the decree-holder wishes to execute his decree in some manner not provided for by the execution petition, he must bring a fresh execution case for that purpose. In later cases, however, more particularly in the case of *Gnanedra Kumar Rai* v. *Shayama Sunaer Jen* [*Nishendra Kumar Roy*] (2) and a more recent case in this Court *Ram Sumran Prasad* v. *Babu Ram Banadur* (3), it has been held that an application to file a fresh list of properties against which execution is sought is not an amendment of the execution petition. The present case, however, is even a clearer case than either of those mentioned, because in the present case, upon looking at the execution petition filed, it appears that execution was asked for not merely by attachment and sale of the moveable properties of the judgment-debtors but also by attachment and sale of the mortgaged properties, if the former should prove to be insufficient. It is, therefore, abundantly clear that the present application to be allowed to proceed against the mortgaged properties comes directly within the execution petition itself and it requires no amendment of the execution petition to enable the Court to proceed against those properties.

For these reasons I think that this appeal must fail on both grounds. The result is, that the appeal is dismissed with costs to the respondents who have appealed.

Kulwant Sahay, J.—I agree.

K. S. D. & N. H. *Appeal dismissed.*

(1) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.).

(2) 44 Ind Cas 553; 22 C. W. N. 540; 27 C. L. J. 398.

(3) 71 Ind. Cas. 741; (1923) Pat. 61; 2 Pat. 328; 4 P. L. T. 99; (1923) A. I. R. (Pat.) 224.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2053 OF 1920.
January 6, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

GULLI—PLAINTIFF—APPELLANT
versus
SAWAN AND OTHERS—DEFENDANTS—
PURAN CHAND AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Legal representative, object of appointing—

GULLI *v.* SAWAN.

Suit by son attacking alienation by father—Death of son—Father whether legal representative of son—Legal representative brought on record and case decided, whether can be re-opened on the application of another legal representative.

The object of appointing a legal representative of a deceased party to a suit, is that the suit might proceed and a decision be arrived at. [p. 148, col. 1.]

N. brought a suit attacking an alienation made by his father *G.*; during the pendency of an appeal by the vendees *N.* died without issue, and on the application of the vendees appellants *G.* was substituted on the record as *N.*'s legal representative:

Held, that *G.* could not, for the purposes of the suit, be regarded as the legal representative of his son, and that as the proper legal representative of *G.* had not been brought on the record the vendees' appeal had abated. [p. 148, col. 2.]

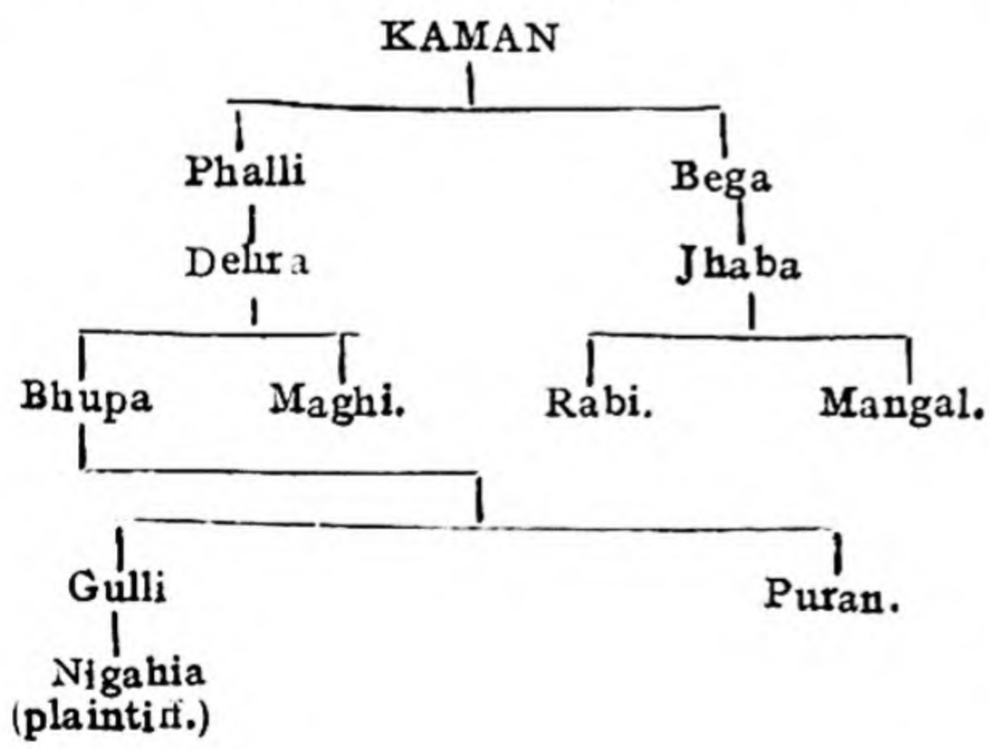
Once the legal representative of a deceased appellant in a case is brought on the record and the case disposed of, it cannot be re-opened if some other legal representative of the deceased comes to Court within six months of his death and claims to be made a legal representative. [p. 148, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 12th June 1920, reversing that of the Senior Subordinate Judge, First Class, Ludhiana, dated the 13th May 1919.

Mr. *Jai Gopal Sethi*, for the Appellant.

Bakhshi *Tek Chand* and Mr. *B. A. Cooper*, for the Respondents.

JUDGMENT.—The following pedigree-table will afford assistance:—



On the 9th of March 1898 Jhaba sold certain lands for Rs. 2,200. On the 6th of June 1902 Gulli and Puran sold some of their lands for Rs. 1,000, and on the 7th of August 1902 Rabi and Mangal sold some land belonging to them for Rs. 900. On the 25th February 1919 Nigahia, son of Gulli, instituted three suits relating to the aforesaid alienations alleging that the lands alienated were ancestral and that the alienations had been made without consideration and for no necessity. He prayed that the said sales should not affect his reversionary rights. The Trial Court dismissed the suit relating to the first alienation (by Jhaba), but decreed the other two suits, holding necessity proved in the second alienation to the extent of Rs. 570 and in the third to the extent of Rs. 565. The vendees, Sawan, etc., appealed against these decisions. They also appealed in the suit relating to Jhaba's alienation as they had not been allowed costs. Nigahia himself preferred an appeal against the dismissal of the suit in connection with Jhaba's sale. Gulli, Nigahia's father, was a respondent in all the appeals. While the appeals were pending, on the 6th of March 1920, Nigahia died. The vendees-appellants applied to the Court in their appeals asking that Gulli, the father of Nigahia, be brought on the record as Nigahia's legal representative, as being his sole heir and legal representative, and at the same time urging that Gulli had forfeited any rights he might have had in the land. In the appeal filed by Nigahia, Gulli himself made an application, alleging that he was the legal representative of his son and asking that he be brought on the record as such.

The learned District Judge (Misra Jwala Sahai) held that Gulli could not himself question the validity of the sale in question and dismissed the appeal by Nigahia and, accepting the appeal by the vendees-appellants in the other two cases, dismissed all the suits. The learned District Judge's order was passed on the 12th of June 1920 and on the 6th July 1920, one Arjan Singh, acting through Sardar Attar Singh, Vakil, who had been for Gulli throughout, filed an application acting in connection with the appeal filed by Nigahia relating to the alienation by Jhaba, alleging that he and certain other persons named in the application, were Nigahia's legal representatives and should

be brought on the record. This application was dismissed on the 7th of July 1920, the learned District Judge recording the fact that the appeal had already been decided.

Arjan Singh has now come up to this Court in revision *qua* the order dismissing his application and Gulli has preferred appeals in the other three cases. The revision and the appeals have been filed through Mr. Jai Gopal Sethi, and we have heard Mr. Tek Chand for the vendees-respondents. This judgment will dispose of all the appeals and the revision.

Turning to the revision (No. 728 of 1920) it was contended by Mr. Sethi that the learned District Judge should have re-opened the appeal in question (relating to the alienation by Jhaba), inasmuch as Arjan Singh had come into Court within six months of Nigahia's death. Reliance was placed on *Vellayam Chetty* v. *Jothi Mahalinga Aiyar* (1) and *Janardhan* v. *Ramchandra* (2). Neither of these authorities appear to us to be in point. In the first case it was held that an unsuccessful appellant could not insist upon having a re-hearing of the case because it turned out at the time of the hearing the respondent was dead. In the Bombay case the facts were entirely different. We are unable to see any ground for revision and the order admitting the petition clearly shows that it was admitted because in it was asserted that Nigahia had left a son. Mr. Jai Gopal Sethi has admitted before us that this was wrong and that Nigahia died without issue. The petition is, therefore, dismissed with costs.

Turning now to the appeals relating to the alienation by Jhaba and Rabi and Mangal. The learned District Judge appears to have been under the impression that the disabilities of the legal representatives should be taken into account. In this view we are unable to agree. When a party to a suit dies a legal representative is appointed merely in order that the suit might proceed and a decision be arrived at. It is the original parties' right and disabilities that have to be considered and the mere fact that Gulli could not have brought a suit to set aside these alienations on the ground of limitation is not, in our opinion, sufficient to render the suit by Nigahia liable to dismissal. Gulli in these two cases was undoubtedly the legal representative of his son and the learned District Judge should have decided the appeals on the merits. We accordingly accept these two Appeals Nos. 2054 and 2055 of 1920 and remand them to the learned District Judge for disposal in accordance with law. Costs will follow the event, and the stamps will be refunded.

Turning now to the appeal relating to the alienation by Gulli and Puran (Appeal No. 2053 of 1920), it appears to us that here again the learned District Judge has erred. Mr. Tek Chand contended that Nigahia was really suing as representative of all the reversioners of Gulli and that Gulli could not be regarded as his own reversioner. For the purposes of this suit it seems to us that, strictly speaking, Gulli could not be regarded as the legal representative of his son. The alienation attacked in the suit was made by him (Gulli) and his brother Puran, and Gulli was not, therefore, the proper legal representative. The appellants in the case were the vendees and it was incumbent on them to move the Court to bring on the record the proper legal representatives. The pedigree-table shows that there were other reversioners, for instance, Rabi and Mangal, and the vendees were to blame for having brought the wrong person on to the record. Their appeal accordingly abated and no proper application having been made within the prescribed period from the death of Nigahia, this appeal has abated.

We accordingly accept this appeal as well and setting aside the order of the learned District Judge restore that of the learned Senior Subordinate Judge. As, however, Gulli himself claimed to be the legal representative of his son, we direct that the parties in this appeal should bear their own costs in this and in the lower Appellate Court.

W. C. A. & S. D. *Appeals accepted.*

(1) 28 Ind. Cas. 831 28 M. L. J. 138; 2 L. W. 166; (1915) M. W. N 201; 39 M. 386.
(2) 26 B. 317; 4 Bom. L. R. 23.

VITHU *v.* GANESH RAMCHANDRA.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 131 OF 1920.
March 7, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

VITHU *Bin* DAULATA PATIL AND OTHERS—DEFENDANTS—APPELLANTS

versus

GANESH RAMCHANDRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 41—Execution of decree—Transfer of decree—Certificate, when to be sent—Jurisdiction to execute decree.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution is withdrawn from it, or until it has fully executed the decree, or has executed it so far as it has been able to execute it within its jurisdiction or has failed to execute it and has certified the result to the Court which forwarded the decree. It is only when one of these stages has been reached that the Court to which a decree has been sent is bound to send a certificate under section 41 of the Code of Civil Procedure to the Court which sent the decree, and in the case of a failure to execute, it is intended that there should be a complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure. [p. 149, col. 2; p. 150, col. 1.]

Abda Begam v. *Muzaffar Husen Khan*, 20 A. 129; A. W. N. (1897) 218; 9 Ind. Dec. (N. S.) 443, relied on.

It does not follow that because one application for execution fails in a Court to which a decree has been sent for execution, that that Court is bound to send a certificate under section 41 of the Civil Procedure Code to the Court in which the decree was passed. [p. 150, col. 1.]

Second appeal against the decision of the First Class Subordinate Judge, Satara, in Appeal No. 437 of 1917.

Mr. *K. N. Koyajee*, for the Appellants:—My submission to your Lordships is two-fold. First, the lower Court is wrong in saying that the Islampur Court had jurisdiction to entertain the present application for execution. On the transfer of the decree by the Satara Court to the Islampur Court, the decree-holder made many abortive attempts to execute the decree and as the Islampur Court failed to certify to the Satara Court, as it ought to have, its failure to execute the decree, I submit its jurisdiction is gone and any order by the Islampur Court is without jurisdiction.

Secondly, I submit the present *Darkhast* of 1915 though within three years from the previous *Darkhast* of 1912 is time-barred on the ground that the *Darkhast* of 1912 was illegal and could not, therefore, save limitation. The judgment-debtor died in 1912; his legal representatives were brought on the record by the Islampur Court after the decree for execution had been transferred to it by the Satara Court. I submit the Islampur Court had no jurisdiction to bring the heirs on record. In support of my contention I rely upon *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1). No doubt the issue as to whether an application for bringing the heirs on record was not made to the Satara Court before the execution was transferred was not raised. The issue may be sent down and it will be found that it was the Islampur Court that brought the heirs on record.

Mr. *R. A. Jahagirdar*, for the Respondents, was not called upon.

JUDGMENT.—This is an attempt by the judgment-debtors to evade execution of the decree passed by the Satara Court in Suit No. 162 of 1901, which was transferred by the Satara Court to the Islampur Court for execution. It is contended that the jurisdiction of the Islampur Court under the certificate which had been issued by the Satara Court had exhausted itself. Section 41, Civil Procedure Code, is relied upon. It was urged that, because the certificate was not sent by the Islampur Court, as ought to have been done, therefore, its jurisdiction is gone. But the jurisdiction of the Islampur Court would continue until it had sent a certificate under section 41, Civil Procedure Code. In *Abda Begam* v. *Muzaffar Husen Khan* (2), which was a case under the corresponding section 223 of the Code of Civil Procedure of 1882, it was held that the Court to which a decree was sent for execution retained its jurisdiction to execute the decree until the execution had been withdrawn from it, or until it had fully executed the decree and had certified that fact to the Court which sent the decree, or had executed it so far as that Court had been able to exe-

(1) 28 M. 466; 15 M. L. J. 116 (F. B.).
(2) 20 A. 129; A. W. N. (1897) 218; 9 Ind. Dec. (N. S.) 443.

cute it within its jurisdiction and had certified that fact to the Court which sent the decree or until it had failed to execute the decree and certified that fact to the Court which forwarded the decree. It does not follow that, because one application for execution fails in a Court to which the decree has been sent, that that Court is bound to send a certificate to the Court in which the decree was passed. The judgment-creditor might still be anxious to execute his decree in the former Court and if that interpretation which is now sought to be placed on section 41 is correct, it would result in the decree being transferred from one Court to another without any corresponding advantage to the judgment-creditor. It is only when the Court to which the decree is sent has executed it, or has failed to execute it that that Court is bound to send a certificate under section 41. It seems it was intended that there should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure.

It is also urged that the *Darkhast* of 1912 was illegal, and, therefore, would not save time. Gopal, one of the judgment-debtors, having died in 1912, the *Darkhast* proceeded against his sons as his legal representatives. The Islampur Court, it is urged, would have no power to put the representatives of Gopal on the record, and we are asked to assume that such an application was made to the Islampur Court, which was not competent, instead of the Satara Court, which was the proper Court. But it was for the appellants to prove the fact they contended for. An issue on that point was never raised in the Trial Court. It was never suggested that all the proper steps were not taken to place the legal representatives of Gopal on the record, and, whatever the actual facts may be, the appellants cannot ask us to assume that proper steps were not taken to put Gopal's representatives on the record. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM REMAND ORDER NO. 1 OF 1922.

November 24, 1922.

Present:—Justice Sir B. K. Mullick Kt. and Mr. Justice Ross.

ARJUN SAHU—APPELLANT

versus

KELAI RATH—RESPONDENT.

Evidence Act (I of 1872), s. 70—Admission of execution of document, effect of.

The admission of the execution of a document is sufficient proof as against the executant himself but does not make it binding upon other persons who were not parties to it.

Appeal from the decision of the District Judge, Cuttack, dated the 3rd March 1922, reversing a decision of the Munsif, Puri, dated the 3rd February 1921.

Mr. *B. N. Sinha*, for the Appellant.

Mr. *B. R. Chaudhuri*, for the Respondents.

JUDGMENT.

Mullick, J.—The plaintiffs brought a suit against the defendant No. 1 on a mortgage-bond alleging that it had been executed by defendant No. 1. The remaining nine defendants are alleged to be transferees from the plaintiffs.

The Munsif found that the witnesses who were alleged to have attested the deed had not really attested it according to law but had signed their names on the document before the executant had signed it. He accordingly dismissed the whole suit.

There was an appeal to the District Judge who was of opinion that, inasmuch as the executant had in his written statement admitted the execution of the document, no further proof of attestation was necessary, and he has remanded the suit to the Munsif for the trial of the remaining issues in the suit. The present appeal has been preferred against that order of remand by defendant No. 2 only.

Now, it is clear that, under section 70 of the Indian Evidence Act, the admission of the execution of the document is sufficient proof as against the executant himself, but there is no authority for the proposition that the document is for that reason binding upon the other defendants who were not parties to it. The document must be proved according to law as against them unless section 58 of the Indian Evidence Act applies to the case and relieves the plaintiffs from the burden of prov-

ing attestation in respect of any of the defendants who have admitted the fact of attestation. The learned District Judge must find on the evidence whether the Munsif's finding on the question of attestation is correct, and in considering this question he will, no doubt, refer to the written statement of the defendant No. 2 which is alleged by the respondents before us to contain an admission that there was attestation.

The result is that the appeal will be decreed and the case remanded to the District Judge in order that he may dispose of it according to law. Costs will abide the result.

Ross, J.—I agree.

K. S. D. *Appeal decreed; Case remanded.*

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 72 OF 1921.

March 29, 1922.

Present:—Mr. Justice Pratt and Mr. Justice Duckworth.

N. N. V. CHETTY FIRM—PLAINTIFF—APPELLANT

versus

K. A. P. L. CHETTY FIRM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV—Decree for sale in favour of puisne mortgagee—Prior mortgagee not party to suit—Prior mortgagee, rights of.

When a prior mortgagee, who has obtained a decree under O. XXXIV of the Civil Procedure Code, is sued by a puisne mortgagee, whom he did not join in his suit, he, the prior mortgagee, is entitled to use his prior mortgage as a shield and to have the discharge of his decree made a condition precedent to the grant of a sale decree in favour of the puisne mortgagee. [p. 52, cols. 1 & 2.]

Special second appeal against the decree of the Divisional Court, Bassein, in Civil Appeal No. 28 of 1920.

Mr. *Ormiston*, for the Appellant.

Mr. *Bannerjee*, for the Respondent.

JUDGMENT.—Plaintiffs, the N. N. V. Chetty Firm, the assignees of a mortgage in favour of the K. P. A. Firm, sued the mortgagors first and second defendants and the K. A. P. L. Firm third defendant, who were in possession of the land, having purchased it by auction in execution of a mortgage-decree obtained by them against first and second defendants. In the previous suit plaintiff was not made a party although third defendant was aware of his mortgage.

Third defendant pleaded not only the mortgage on which he had obtained a decree and became the purchaser, but also a prior mortgage as a shield. The Court of first instance found that the second mortgage which had been admitted in the previous suit by the mortgagors was not proved, and further that the first mortgage in favour of the third defendant was not proved.

Accordingly, a decree for sale was granted.

On appeal the Divisional Court found that the second mortgage, in execution of the decree in which the K. A. P. L. Firm became purchaser, was not proved. This mortgage, therefore, cannot affect the plaintiff except in so far as explaining how third defendant came to be in possession of the suit land. The Divisional Court found, however, that the evidence as to the first mortgage was adequate and on persual of the evidence there can be no doubt that the decision was correct.

The relief which the Divisional Court intended to grant is not quite clear and the form of the decree is defective, but it would seem that from the form of the decree referred to in the judgment, the intention was to pay off the decree of the first mortgagee before plaintiff received anything.

The main point in this appeal is whether the third defendant is entitled to use his prior mortgage as a shield and prevent plaintiff from realising anything by sale of the mortgaged property till the prior mortgage is satisfied.

For the plaintiff, the holder of the puisne mortgage, it is contended that he is entitled to bring the property to sale, and that he has impleaded the third defend-

ant in his capacity as auction-purchaser in possession and not as mortgagee, he is entitled to sell the property subject to any interest which the third defendant may have under his prior mortgage. It is further contended that the order for sale subject to the prior mortgage should only be made in subsequent execution proceedings.

In *Ram Naraln Sahoo* v. *Bandi Pershad* (1) a Bench of the Calcutta High Court held that a first mortgagee in possession under a prior sale may always shield himself under his mortgage and purchase, though his right to possession may be defective.

The puisne mortgagee's right, when he was not a party to the first mortgagee's suit, is limited to a right of redemption or sale of the mortgage premises, subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter. He cannot compel the first mortgagee to part with possession without redeeming the first mortgage.

The facts here are not quite similar, as the mortgage under which defendant purchased has not been established, but, he is in possession under a decree on sale and holds a prior mortgage. The inference would seem to be from this ruling that, as argued by the Advocate for the respondent, plaintiff is not entitled to bring the property to sale until he has redeemed third defendant's first mortgage.

In the recent case of *Sukhi* v. *Ghulam Safdar Khan* (2) their Lordships of the Privy Council held that where a puisne mortgage (as in this case) has not been made a party to suit in which a prior mortgagee has obtained a decree, the puisne mortgagee is entitled to occupy the position which he would have done as a party.

When the prior mortgagee, having obtained a decree under O. XXXIV, is sued by a puisne mortgagee, whom he has not joined in a former suit, he is entitled, in all cases in which he would have been entitled before the coming into force of the Act of 1882, to use the prior mortgage as a shield and to have the discharge of his decree made a condition to a sale decree in favour of the puisne mortgagee.

In the present appeal the mortgage on which defendant obtained his decree is not proved, but he is in possession under the decree and alleges a prior mortgage, which has been established in evidence. The position is, therefore, similar and we are of the opinion that the principle involved is the same. We consider that the discharge of the defendant's prior mortgage should be made a condition precedent to the grant of a sale decree in favour of the plaintiff-appellant.

We do not think that the fact that it is now alleged that the third defendant was impleaded merely in his capacity as auction-purchaser makes any material difference to the merits of the case. It was alleged in the plaint that defendant purchased at the sale in execution of his mortgage-decree. The first mortgage was explicitly pleaded in the written statement and under the circumstances defendant was entitled to use it as a shield, since there is strong authority for holding that, having sold the property under one mortgage, he could not bring it to sale again under another. If, as is also argued, the first mortgage must be regarded as having merged in the second, then defendant's title to use it as a shield would be considerably strengthened.

The appeal, therefore, fails substantially, but the decree of the lower Appellate Court is incorrect in form and must be varied. The respondent will be given his costs in this Court. The order of the lower Appellate Court as to costs will stand.

Our order is that, on the appellants paying Rs. 796-12-0 due on the first mortgage to respondents within two months from date of decree, the appellants may apply for sale of the mortgaged property in satisfaction of the sums of Rs. 3,000 principal and Rs. 1,124 interest due up to 30th September 1920. In each case further interest at the contract rate will be permitted. Otherwise the decree will be in the Form 8, Appendix D.

W. C. A. *Appeal dismissed.*

(1) 31 C. 737.
(2) 65 Ind. Cas. 151; 43 A. 469; 48 I. A. 465; (1921) M. W. N. 445; 42 M. L. J. 15; 14 L. W. 162; 24 Bom. L. R. 590; (1922) A. I. R. (P. C.) 11; 26 C. W. N. 279; 30 M. L. T. 175 (P. C.).

NAGENDRA BALA *v.* BEJOY CHAND.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1032, 1137 AND 1138 OF 1920.

February 19, 1923.

Present:—Mr. Justice C.C. Ghose and Mr. Justice Panton.

IN APPEAL NO. 1032 OF 1920.

Srimati NAGENDRA BALA CHOUDHURANI—PLAINTIFF—APPELLANT

versus

HON'BLE SIR BEJOY CHAND MAHATAP BAHADUR MAHARAJA DHIRAJ OF BURDWAN, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Chaukidari chakran *lands—Suit by* putnidar—*Adverse possession—Limitation, commencement of.*

A *putnidar* is entitled to the *chaukidari chakran* lands within the *putni* and the recovery of possession of such lands by the *putnidar* is not barred unless for more than twelve years prior to the institution of the suit, the possession of the *Zemindar* had been adverse to the plaintiff, and, having regard to the language of Art. 144 of the First Schedule to the Limitation Act, the Court must in each case ascertain on the facts on record when the possession of the *Zemindar* became adverse to the plaintiff. [p. 154, cols. 1 & 2.]

The possession of the *Zemindar* may become adverse to the *putnidar* in a variety of ways, *e.g.*, when the lands are settled by the *Zemindar* with tenants or when the *putnidar* after being invited to come and take the lands does nothing and the *Zemindar* thereafter makes other arrangements either for holding the lands in *khas* possession or for settling the same with *ijaradars* or the like. [p. 154, col. 2.]

Appeals against the decree of the District Judge, Hoogly, dated the 24th January 1920, affirming the decree of the Officiating Sub-Judge, 2nd Court of that District, dated the 20th September 1918.

Babu *Mahendra Nath Ray*, Dr. *Jadu Nath Kanjilal* and Babu *Benode Lal Mookerjee*, for the Applleant.

Babu *D. N. Chukerbutty*, Dr. *D. N. Mittra*, and Babu *Sarat Kumar Mitter*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar in No. 1138.

JUDGMENT.—These three appeals arise out of three suits for recovery of possession of certain *chaukidari chakran* lands after establishment of the plaintiff's title thereto. It is alleged that the *putni mehal* known as Lot Udaynarainpore was originally held by one Ram Narayan Mookerjee under the *Zemindar*, the Maharajadhiraj of Burdwan, and that the plaintiff *Srmati* Nagendra Bala Choudhurani purchased on the 8th April 1905 the *patni* tenure in respect of the said Lot Udaynarainpore comprising 13 *Mouzahs* at a sale held by a Receiver appointed by this Court on its Original Side in a suit for partition of certain plaint properties among the representatives of the said Ram Narayan Mookerjee, and that thereafter the plaintiff tried to obtain possession of certain *chaukidari chakran* lands comprised in the said *Mouzahs* which had been resumed by the Government under Bengal Act VI of 1870 and which had been settled during the years 1896 to 1899 with the *Zemindar*, the Maharajadhiraj of Burdwan. The main defence of the *Zemindar* was that the suits were barred by limitation. As regards the defendant Provash Chundra Chatterjee, who was made party in one of the said three suits and who, it appeared, had taken settlement of some of the said lands from the Maharajadhiraj of Burdwan, it was alleged on the latter's behalf that he was merely the *benamidar* of the plaintiff Nagendra Bala Choudhurani. The three suits referred to above were Suits Nos. 29, 30 and 54 of 1916. Suit No. 29, in which Provash Chundra Chatterjee was a defendant, related to the lands of six *Mouzahs* comprised in the said *putni* and the two other suits related to the lands of three other *Mouzahs*. The learned Sub-Judge decided the question of limitation in favour of the plaintiff and the question of *benami* in favour of the defendant Maharajadhiraj of Burdwan. Accordingly, on those findings, the Subordinate Judge gave a decree to the plaintiff in all the three suits declaring her title to the said *chaukidari chakran* lands and directing that she should get *khas* possession of the same except the lands settled with Provash Chundra Chatterjee who was found to be the *benamidar* of the plaintiff.

As regards the question of limitation, the learned District Judge, agreeing with the learned Subordinate Judge, held that Art. 144 of the Second Schedule of the Limitation Act was the Article applicable in the circumstances of these cases, but while the Subordinate Judge held that the defendant *Zemindar* had not succeeded in establishing that he had held the

lands adversely to the plaintiff for more than 12 years before the institution of these suits on the ground that the *Zemindar* had not, within a period of over 12 years prior to suit, taken direct posession of the lands after the resumption thereof under the Choukidari Act and the settlement of the same with him by the Collector, the learned District Judge was of opinion that time ran against the *putnidar* from the date of the settlement of the lands by Government with the *Zemindar*.

On behalf of the plaintiff-appellant it has been argued before us that. having regard to the decisions of their Lordships of the Judicial Committee of the Privy Council in the cases of *Ranjit Singh* v. *Kali Dasi Debi* (1) and *Ranjit Singh* v. *Maharaj Bahadur Singh* (2), there can arise no question now as to the right of the plaintiff to the lands in question, nor can the recovery of possession of these lands by her be barred unless for more than 12 years prior to the dates of the institution of these suits, the possession of the *Zemindar* had become adverse to the plaintiff. This argument is, no doubt, correct; the real question is to ascertain when the possession of the *Zemindar* in a case like this became adverse to the plaintiff. Does the possession of the *Zemindar* become adverse to the *putnidar* at the moment the lands are settled with the *Zemindar* by the Government without more or does the possession of the *Zemindar* become adverse only at the moment when some act is done by him indicative of a hostile attitude on his part towards the *putnidar*?

No doubt it has been held in the case of *Rang pal Mandal* v. *Kumar Kamala Ranjan Roy* (3) that in cases of this description, time runs against the *putnidar* from the date of the settlement of the lands with the *Zemindar* by the Government. That decision may be reconcilable with the facts of that case and with the pleadings therein; we think, however, having regard to the language of Art. 144 of the First Schedule of the Limitation Act, that, in each case the Court must ascertain on the facts on record when the possession of the defendant, who is usually the *Zemindar*, became adverse to the plaintiff. The possession of the *Zemindar* may become adverse to the *putnidar* in a variety of ways, *e.g.* when the lands are settled by the *Zemindar* with tenants or when the *putnidar* after being invited to come and take the lands does nothing and the *Zemindar* thereafter makes other arrangements either for holding the lands in *khas* or for settling the same with *ijaradars* or the like. In each case, the facts, in our opinion, have got to be investigated having regard to the language of Art. 144 of the Limitation Act. In the cases before us, there is no finding by the lower Appellate Court as to when on the facts in these cases the possession of the *Zemindar* became adverse to the plaintiff and we are, therefore, of opinion that the matter should go back to the lower Appellate Court for clear and specific findings on that point in the cases out of which these Appeals from Appellate Decrees Nos. 1032, 1137 and 1138 have arisen in respect of all the lands other than the lands settled with Provash Chundra Chatterjee. Either party may adduce further evidence upon the question of possession and such evidence may be taken by the lower Appellate Court itself or under its direction by the Court of first instance. Costs of the Appeals Nos. 1032, 1137 and 1138 will abide by the decision of the lower Appellate Court on the point indicated above.

S. C. M. *Cases remanded.*

(1) 40 Ind. Cas. 981; 44 C. 841; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1; 22 M. L. T. 489; 44 I. A. 117 (P. C.).

(2) 48 Ind. Cas. 262; 46 C. 173; 29 C. L. J. 193; 16 A. L. J. 964; 35 M. L. J. 728; 23 C. W. N. 198; 25 M. L. T. 8; 1 U. P. L. R. (P. C.) 23; 21 Bom. L. R. 506; 10 L. W. 83; 45 I. A. 162 (P. C.).

(3) 53 Ind. Cas. 955; 30 C. L. J. 522.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 152 OF 1922.

August 1, 1922.

Present:—Mr. Justice Maung Kin.

U KYO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MG. PAN YO AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Mortgage-deed

containing forfeiture clause—Oral agreement suppressing forfeiture clause, whether admissible.

A deed of mortgage contained a forfeiture clause to the effect that the mortgagor would be debarred from redeeming the property after the expiration of two years from the date of the mortgage. Some considerable time after the forfeiture clause had taken effect, the mortgagor brought the present suit for redemption alleging a subsequent oral agreement whereby the mortgagee promised to allow redemption at any time:

Held, that the subsequent agreement not being in writing and registered, the plaintiff was precluded under proviso (4) to section 92 of the Evidence Act, from proving the oral agreement.

Second appeal against a decree of the Divisional Court, Myaungmya, in Civil Appeal No. 147 of 1921.

Mr. *Ko Ko Gyi*, for the Appellants.

JUDGMENT.—The learned Judge of the Divisional Court saw the real points in the case which appear to be simple.

In the Trial Court the points were in a state of confusion. The facts are shortly these:—The plaintiff mortgaged a piece of paddy land to the defendants for Rs. 200. About a year afterwards the plaintiff says, he, by a *pyatpaing*, made over the land to the defendants who promised to allow redemption at any time.

In the mortgage there is a forfeiture clause to the effect that the mortgagor was to be debarred from redeeming the property after the expiration of two years from the date of the mortgage.

The plaintiff asked for redemption in March 1921. I understand that by this he held the defendants to their promise made about a year subsequent to the mortgage as stated above. By that time, if there was nothing else between the partis, the forfeiture clause in the mortgage would have taken effect and the property would have become, by reason of such forfeiture, the absolute property of the mortgagees, that is, the defendants. But plaintiff says that that is immaterial because he has this subsequent promise which is a new contract in substitution of the registered mortgage.

This new contract is a verbal one.

Mr. Ko Ko Gyi has read to me two sections of the Indian Contract Act bearing upon the subject of novation of contracts but it appears to me that a knowledge of these two sections gives no light to a proper decision of this case.

The parties having entered into a contract, can substitute another in its place, and the substituted contract is the one to be looked to, not the one which was first entered into.

But the question is: How is the subsequent agreement, which is claimed to be the substitute for the first, to be made? If the law requires that it should be made in a certain way, it must be made in that way otherwise it will not take effect as a contract; therefore, it will never be a substitute for the old contract.

This subsequent oral agreement set up by the plaintiff is to rescind the mortgage. It requires to be in writing and registered; in other words, section 92, proviso (4) of the Indian Evidence Act precludes the plaintiff from proving this oral agreement. If he cannot prove it, then his allegation goes to the ground.

What remains is the mortgage which has a forfeiture clause to take effect within two years of it, but the suit was filed in 1921, a long time after the forfeiture clause had taken effect. Therefore, the property at the time of the suit belonged to the mortgagees under the terms of the mortgage, and the plaintiff had no right of redemption. Therefore, his suit was rightly dismissed by the lower Appellate Court.

W. C. A. *Appeal dismissed.*

MADRAS HIGH COURT.
FULL BENCH.

APPEAL AGAINST APPELLATE ORDER No. 106 OF 1921.

April 6, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, Justice Sir Francis Oldfield, KT., and Mr. Justice Ramesam.

V. C. T. N. CHIDAMBARAM CHETTI —PLAINTIFF—APPELLANT

versus

KANDASAMI GOUNDAN AND ANOTHER —PETITIONER—DEFENDANT No. 3 HIS LEGAL REPRESENTATIVE—RESPONDENTS.

Res judicata—*Execution proceedings—Notice*

to judgment-debtor for settlement of sale proclamation —Terms of proclamation settled ex parte *—Question of liability of property to attachment, whether* res judicata—*Civil Procedure Code (Act V of* 1908), s. 11.

A party who is sought to be affected by the bar of *res judicata* should have had notice of the point that was to be decided and should have had an opportunity of putting forward his contentions against the decision. [p. 161, col. 1.]

Subramania Iyer v. *Rajeswara Sethupathi*, 38 Ind. Cas. 627: 40 M. 1016, followed.

A decree-holder applied for attachment of the moveable property of his judgment-debtor but the proceedings came to nothing. Within a year of these proceedings an application was made for attachment of the immoveable property. No notice was given to the judgment-debtor as none was required by law under the circumstances. An application was then made for the sale of the property and notice was given to the judgment-debtor for settlement of the terms of the sale proclamation. The latter did not attend on the date fixed and the terms of the sale proclamation were settled *ex parte*. Afterwards, the judgment-debtor applied for release of the property alleging that it was not liable to be attached. The decree-holder contended that the question of the liability of the property to attachment was *res judicata* as it must be taken to have been decided on the hearing of the application for settling the terms of the sale proclamation:

Held, that notice to the judgment-debtor to be present at the settlement of the terms of the sale proclamation could not be regarded as raising the question of the liability of the property to be attached and, therefore, it could not be said that the judgment-debtor was invited to object to the attachment, and, that being so, the order that followed could not be regarded as an implied adjudication that the property was correctly attached. [p. 161, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Dindigul, in Appeal Suit No. 8 of 1921, preferred against an order of the Court of the District Munsif, Palni, dated the 7th December 1920, and made in Execution Application No. 171 of 1920, in Execution Petition No. 9 of 1920 in Original Suit No. 840 of 1918.

This appeal coming on for hearing on the 26th of January and the 2nd day of February 1923, respectively, upon perusing the grounds of appeal the order of the lower Court and the record in the case, upon hearing the arguments of Mr. *S. Ganapathi Ayyar*, for the Appellant, and of Mr. *V. Sundara Aiyar*, for the Respondent, and having stood over for consideration till the 12th of February 923, the Court (Oldfield and Venkatasubba Rao, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Plaintiff, the present appellant, obtained a decree against Kathaperumal Goundan, who afterwards died and was subsequently represented by Kandasami, his brother. Kandasami claimed the property attached by plaintiff as his own and not that of Kathaperumal in his hands and his claim was rejected by the District Munsif. He, however, appealed successfully and this second appeal is against the order allowing his claim. It is opposed by his legal representative, to be referred to as respondent.

One ground, on which she opposes the appeal, that she is not and Kandasami was not a party to the proceedings and that, therefore, no second appeal lies, can be dealt with shortly. Kandasami's own appeal to the lower Appellate Court involved the admission that he was or represented a party and the applicability of section 47, Civil Procedure Code, and his representative cannot allege the contrary.

The substantial question for decision then is whether Kandasami's claim is concluded by his failure to advance it in the proceedings taken by plaintiff to bring the property now claimed to sale. That he advanced it only in his claim petition, Execution Application No. 171 of 1920, on 12th August 1920, and not in the proceedings which resulted in the District Munsif's order of 8th June 1920, is not disputed. It is urged only that (1) the order of 8th June 1920 can in no circumstances be regarded as an adjudication actual or constructive against his right to the property, and (2) even if that order is such an adjudication, it was not passed after any valid notice to him and he can now show that it was not, in spite of his failure to take proceedings in respect of it under O. IX, r. 13.

On the question whether the order of 8th June 1920 was in effect an adjudication against Kandasami's claim and in favour of the liability of the property to sale in his hands we have not before us the petition which initiated the proceedings. But there is no reason for doubting what has throughout been assumed and not disputed that it was for attachment and sale of the property; and the text of the order

of 8th June 1920, "Proclaim and sell on 14th August 1920. Upset price Rs. 1,000," shows what would ordinarily be the case, that the proceedings were to obtain an order for sale and to fix the terms of the sale-proclamation and the date on which the sale would be held; and, so far as plaintiff asked for an order for sale, the contention that the property was not liable under the decree on which Kandasami based his subsequent claim, would have been open to him and would, if established, have resulted in the dismissal of the petition. His failure to adopt this ground of defence would accordingly, if section 11, Explanation IV is applicable, debar him from adopting it later. Against this it is first urged, generally, that neither section 11, Explanation IV, nor the principle of constructive *res judicata* applies to execution proceedings. But, whether the explanation or any broader principle is applicable, this is unsustainable, at least, when, as was here the case, those proceedings are between parties to the suit or their representatives and result in an adjudication on a question in issue between them. This has been established since *Ram Kirpal* v. *Rup Kuari* (1) and maintained in the very recent decision in *Rajeswara Sethupati Avergal (Rajah of Ramnad)* v. *Velusami Tevar* (2), the latter case dealing directly with the consequence of failure such as plaintiff before us relies on, to adopt ground of defence. It is then necessary only to make sure that the ground in question was open to Kandasami; and respondent in fact urges that it was not, because he was a party to the proceedings, not in their wider scope above referred to, when the plaintiff's right to sell the property was in issue, but only for the settlement of the sale proclamation, and decisions at that stage are administrative and not judicial This also, however, is unsustainable. It is true that, as this Court held in *Sivagami Achi* v. *Subrahmania Ayyar* (3), proceedings for the settlement of a sale proclamation under section 287 of the former Code, corresponding with the present O. XXI, r. 66, are of that character, and, therefore, not appealable. But the reference there to such proceedings as excluded from the purview of the then section 244, now section 47, shows that they were not regarded as concluding the enquiry, if any is necessary, into the decree-holder's right to bring the property to sale. Such enquiry can be, and is held if an issue entailing it is raised, in the disposal of the application for sale, the settlement of proclamation bring a distinct stage therein, which in case of the making of a valid objection would never be reached; and the fact that orders passed in the course of that settlement are not appealable or binding in other proceedings cannot affect the character of those passed in the decision of the substantive question whether the sale shall be held at all. No doubt, and this is the tenor of the decision in *Subramania Iyer* v. *Rajeswara Sethupathi* (4), caution is necessary before orders of the latter class are treated as conclusive and the Court must be satisfied that the matter, in respect of which they are relied on, was in issue and that the party to be affected had clear notice that it would be so. But, although the notice alleged to have been given to Kandasami in the persent case is not before us, it is not alleged and there is no reason for supposing that it was not in general terms and, even if it referred specifically only to the settlement of the proclamation, it would still have been notice that a sale had been asked for, to which, until the passing of the order "Proclaim and sell" of 8th June 1920, he could and should have made his objection.

There remains the contention that all this is immaterial, because that notice in fact was not served. The service relied on was by affixture: and the lower Appellate Court has now found, differing from the Court of First Instance, that, as a matter of fact, it was insufficient. If it is open to us to act on that finding, one which we should ordinarily accept, the order of 8th June 1920 and Kandasami's failure to advance his claim before it will not stand

(1) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.)

(2) 59 Ind. Cas. 880; 40 M. L. J. 197; 19 A. L. J. 168; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218 25 C. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345 (P. C.).

(3) 27 M. 259; 14 M. L. J. 57 (F. B.).

(4) 38 Ind. Cas. 627; 40 M. 1016.

in the way of his advancing it now. But we have to deal with plaintiff's contention that we cannot act on such a finding or disregard that order, because it has not been set aside in the only way authorized by law, proceedings under O. IX, r. 13. This contention is substantial and cannot be met by treating, as we are asked to do, the subsequent claim petition as an application under that provision. For it does not contain the appropriate prayer or averments or anything to show how it was presented within the prescribed period of limitation, the contrary being *prima facie* the case.

The question is, then, whether O. IX, r. 13, applies to and affords the only remedy open to a party against who an order has been made in his absence in execution proceedings. In accordance with *Subbiah Naicker* v. *Ramanathan Chettiar* (5) this should be answered in the affirmative; and in fact such answer would exclude the anomaly involved in allowing the validity of an order passed *ex parte* to be disputed, perhaps after long delay, whenever it is necessary to dispute it in subsequent proceedings, after the period allowed by Art. 164, Schedule I, Limitation Act has elapsed. On the other hand, it is said that O. IX, r. 13, does not in terms apply to proceedings other than suits and that there is authority irreconcilable with *Subbiah Naicker* v. *Ramanathan Chettiar* (5).

The first of these contentions was rejected in the case last mentioned on the ground that, although O. IX refers only to decrees not orders, such orders as that then and now in question are decrees with reference to the definition in section 2 of the Code; and it is now pointed out with some force that, although this may justify the application of Art. 164 above referred to, it is no answer to the consideration that the whole order including rule 13 is applicable in terms only to suits and, therefore, it is to be inferred, to the description of decrees passed in them. And, next, reference has been made to the argument from the history of those provisions based by Jenkins, C. J., in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (6) on the decision of the Privy Council in *Thakur Prasad* v. *Fakir-Ullah* (7) in which what (with great respect) is the real and better justification for the conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar* (5) the present section 141, corresponding with the former section 647, is referred to. With all due deference, that argument is not convincing, because, first, it is based on a conjecture as to the intention of the Legislature, which is inconsistent with the plain and unrestricted terms of section 141, is unnecessary in order to explain them and would nullify the action of the Legislature in deliberately omitting, when the Code was re-enacted in 1908, the explanation inserted in 1892. Next, the case before the learned Chief Justice was an ordinary claim by a third party, to which section 47 was inapplicable, the further remedy being by a suit, in which the previous order would not be conclusive. Last, *Thakur Prasad* v. *Fakir-Ullah* (7) the foundation of the judgment, to adopt the only view reconcilable with *Ram Kirpal* v. *Rup Kuari* (1) and *Rajeswara Sethupati Avergal (Rajah of Ramnad)* v. *Velusami Tevar* (2), decided only that the dismissal of an execution application not prosecuted by the decree-holder did not debar him from applying again, not that an order passed after notice to the judgment-debtor was not binding on him and did not require to be set aside before the adjudication on any substantive question involved in it could be disregarded.

This failing, reliance is placed on the course of authority against the application of O. IX, r. 13 and the correctness of the decision of this Court already referred to. But, although it is true that *Subbiah Naicker* v. *Ramanathan Chettiar* (5) was dissented from on this point in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (8) and is irreconcilable with other cases cited therein and with *Ritu Kuer* v.

(5) 22 Ind. Cas. 899; 37 M. 462 at p. 475; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

(6) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

(7) 22 I. A. 44; 17 A. 106; 5 M. L. J. 3; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

(8) 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.).

Alakhdeo Narain Singha (9), that would not be material, if the conclusions reached after full consideration in our own Court were clear. It is true that the only one of those other cases which was decided in Madras *Balasubramania Chetti* v. *Swarnammal* (10), would seem either irreconcilable with *Rajeswara Sethupati Avergal (Rajah of Ramnad)* v. *Velusami Tevar* (2) above referred to are distinguishable on the ground that no previous adjudication in the particular matter in issue was in question. But the difficulty arises from the *dictum* in it that section 141 is intended to apply to proceedings in Civil Courts, such as Probate, etc., and not to execution, anticipating the reasoning of Jenkins, C. J., above referred to in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (6) and negativing the foundation on which it has been suggested that the conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar* (5) might more properly have been based. *Balasubramania Chetti* v. *Swarnammal* (10), although reported after, was decided before, but is not referred to in *Subbiah Naicker* v. *Ramanathan Chettiar* (5) and it is doubtful whether the two decisions can be reconciled.

The question whether they can be and, if not, which is correct, is one for a Full Bench, and there is nothing to add except that the matter has since been considered in Madras, so far as we have been shown, in two cases only, to both of which Sadasiva Ayyar, J., was a party, his decision in *Periakaruppan Chetty* v. *Chidambara Tambiran* (11) and *Kali Shettathi* v. *Shama Rau* (12) being the one consistent and the other inconsistent with his previous conlusion in *Subbiah Naicker* v. *Ramanathan Chettiar* (5). In the second of these two cases, however, there was no reference to that or any recent authority.

The matter standing thus, we refer for the decision of a Full Bench the question:—

Whether O. IX is applicable to proceedings in execution between parties to the decree or their representatives?

(9) 47 Ind. Cas. 154; 4 P. L. J. 330; (1918) Pat. 265; 5 P. L. W. 208.

(10) 21 Ind. Cas. 32; 38 M. 199; (1913) M. W. N. 685; 14 M. L. T. 196; 25 M. L. J. 367.

(11) 33 Ind. Cas. 443; 3 L. W. 339; (1916) 2 M. W. N. 64.

(12) 37 Ind. Cas 229; 21 M. L. T. 297; 5 L. W. 124.

This appeal coming on for hearing in pursuance of the Order of Reference to a Full Bench, dated the 12th February 1923, upon perusing the petition and the order of the lower Court and the record in the case and the said Order of Reference to a Full Bench and upon hearing the arguments of Mr. *K. S. Ganptai Ayyar*, for the Appellant, and of Messrs. *T. S. Rama Ayyar* and V. *Sundaram Ayyar*, for the Respondents, the Court expressed the following

OPINION.

Schwabe, C. J.—The present appellant is the decree-holder. The respondent is the legal personal representative of a brother of the decree-holder who had been brought upon the record for the purpose of execution. An application has been made for attachment of the moveable property of the original defendant, the judgment-debtor. Those proceedings had come to nothing by reason of the fact that the present appellant failed to find the necessary expenses. Within a year of those proceedings, application was made for attachment of the immoveable property. By reason of the operation of O. XXI, r. 22, no notice of those proceedings was required to be given to the representative of the judgment-debtor and no notice was given. An application was then made for the sale of the property and in due course a notice for settling the sale-proclamaton, in Form No. 21 of Appendix E of the Code of Civil Procedure, was issued. That notice stated that the decree-holder had applied for a sale of the property and continued, "you are hereby informed that the 14th day of August 1920, has been fixed for the purpose of settling the terms of the proclamation of sale." That notice was served by affixing it to some place alleged to be the residence of the respondent. The respondent, who alleged that he never received the notice, did not attend on the date fixed for settling the terms of the proclamation. He was declared *ex parte* and the terms of the proclamation were settled in his absence. He then applied to the District Munsif for the release of the property on the ground that it was not liable to

be attached. The District Munsif dismissed that application, and on appeal to the Subordinate Judge, the Subordinate Judge remanded it to the District Munsif to enquire into the facts as to whether or not the property was the property of the judgment-debtor, holding that the notice of the proceedings in which he has been declared *ex parte* was not properly served upon him. That raises an interesting point as to whether or not it was open on these proceedings to the District Munsif or the Subordinate Judge to discuss the question whether or not notice had been properly served or whether it was necessary for the respondent to take some different form of proceedings to challenge that notice, but, in the view we take of another point in this case, it is unnecessary for us to express any opinion on that point.

The appellant contended that the question of the ownership of this property was *res judicata* and that it had been decided or must be taken to have been decided on the hearing of the application for settling the terms of the proclamation of sale. Under section 11 of the Civil Procedur Code "no Court is to try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit." Several cases have decided that matter must be taken to have been substantially in issue in a former suit or proceeding if the point was open and could have been raised in the former proceedings. In this case the respondent had no notice at all that the matter of the ownership of the property would or could come up for decision on the hearing of the application for settlement of the terms of the proclamation of sale. He did not even get a draft of the proposed terms. All that he was told was that a certain date had been fixed for settling those terms and it would be a very remarkable thing if, on receipt of such notice, it were to follow that, if he did not attend on that occasion, he must be taken to have attended and raised the question whether or not the property was the property of the judgment-debtor. Our attention has been called to no authority in support of that contention and it seems to me to be quite wrong, because that was not the time for discsusing the question of the ownership of that property, although it is possible that the Court would on an application then made have listened to some argument on the point nor did the terms of the notice that he got suggest that it was. Our attention has been called to the case of *Subbiah Naicker* v. *Ramanathan Chettiar* (5). But I think, on this point, the whole of that decision turns on these words: "Now the order of August 1909 was no doubt an *ex parte* order but it was passed after notice was issued to the 2nd defendant to show cause why such an order should not be passed and after the Court had satisfied itself on the affidavit and the return of the process-server that the notice had been duly served." If in this case the respondent had been asked to show cause why the property should not be sold the reasoning of that decision would apply, but in this case by the formal notice that he got he was not asked to show cause as to anything and he had no intimation at all that the matter would be open to him to raise or that it would be discussed. Under those circumstances, I cannot see that it is possible to hold that his non-appearance on that occasion amounts to a decision against him that the property was the property of the judgment-debtor

Our attention has also been called to the decision of the Full Bench of this Court in *Sivagami Achi* v. *Subrahmania Ayyar* (3) that what takes place on the hearing of the application to settle the terms of the proclamation of sale is more of an administrative character than judicial and that, therefore, no appeal lies against the decision of a Court on that occasion as to what that proclamation is to contain. That being the decision of the Full Bench, unless it is possible to say that part of what takes place on that occasion is judicial and part administrative, it would be a strong ground for contending that the matter cannot be *res judicata* by reason of the non-attendance at a sitting of the Court, such sitting being held administrative and not judicial.

I desire to say that our decision in this case must be taken to be confined to the particular facts of this case, that is to say,

that where you have nothing more than the non-attendance at the hearing of an application to settle the terms of a sale-proclamation, the respondent cannot be taken to be estopped by the principle of *res judicata* thereafter in respect of the liability of the property to execution by reason of that non-attendance.

On these grounds I think the Subordinate Judge was right in remanding this case to the District Munsif. The result will be that this case must go back to the Referring Bench with that direction.

Oldfield, J.—I agree. As one of the Referring Judges, I add that, speaking for myself, I am now clear that in stating the effect of the obligation imposed by the notice to Kandasami, we had not sufficient regard to the fact that it was given in proceedings which originated without notice to him of the attachment.

Ramesam, J.—I agree: but I wish to add a few words. The leading decision on the application of the principle of *res judicata* to execution proceedings is the decision of the Privy Council in *Mungul Pershad Dichit* v *Grija Kant Lahiri* (13). It was held in that case that if, after notice, a decision was passed on an execution petition, it would not be open to parties to object to that decision when a subsequent application is presented. In applying that case a Bench of this Court in *Subramania Iyer* v *Rajeswara Sethupathi* (4) say: "One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. In the present case notice went to the respondents to show cause why they should not be brought on the record as the legal representatives of the deceased judgment-debtor for the purpose of execution. They had no notice that any particular property was going to be attached...We must, therefore, overrule this plea" I entirely agree with the principle underlying these remarks. Another example of the application of this principle is the decision in *Sheik Budan* v. *Ramchandra Bhunjgaya* (14). Notice to the judgment-debtor to be present at the settlement of the terms of the proclamation cannot be regarded as raising the question of the liability of the property to be attached and, therefore, it cannot be said that the judgment-debtor was invited to object to that attachment. That being so, the order that followed cannot be regarded as an implied adjudication that the property was correctly attached. I agree with the order proposed.

V. N. V. *Case sent back.*
N. H.

(13) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(14) 11 B. 537; 6 Ind. Dec. (N. S.) 354.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 332 OF 1922.
March 15, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

MOHIDDIN *valad* KAKA PATANKAR —DEFENDANT No. 5—APPELLANT
versus
IBRAHIM *alias* KAKA *valad* MAINUDDIN PATANKAR AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Adverse possession—Khoti khasgi *lands*—*Partition, absence of*—*Division among different branches, effect of.*

Where there has been no general partition of *khoti khasgi* lands, members of different branches would hold their shares for reasons of convenience and not for the purpose of partition in the strict sense of the term, and no member of a branch would acquire title by adverse possession in any of the lands. [p. 162; col. 1.]

Second appeal against the decision of the District Judge, Ratnagiri, in Appeal No. 247 of 1920.

Mr. *H. C. Coyajee* (with him Mr. *G. B. Chitale*), for the Appellant.

Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.—The suit was filed by the plaintiffs to recover possession of a certain *thikan* which was *khoti khasgi* land in the *khotki* belonging to the defendants' family. The evidence showed that Jainu owned 16 pies share in the Khoti. He had four sons. The first defendant through whom the plaintiffs claim had a 5⅓ pies share which was represented by certain lands separately owned for many years by Bapu and his father Balu, while the other members of Jainu's branch also held the other *khasgi* lands belonging to Jainu's share in separate possession. The plaintiffs purchased from the first defendant what rights of possession he had and do not claim possession as absolute owners. True, in the Trial Court it was held that the branch of the first defendant had acquired title by adverse possession to the suit *thikan*, and there are passages in the judgment of the District Judge which seem to point to his having come to the same conclusion. There are also other passages inconsistent with the finding, as, for instance, where he said that defendant, No. 1's title to hold the suit *thikan* was adverse as there was no general partition. If it is still possible for the members of Jainu's branch to file a suit for partition so as to readjust the division of the *Khasgi* land which had been made many years ago amongst the branches, then it would follow that no member of the branch would acquire title by adverse possession in any of the lands as he would hold his share for reasons of convenience and not for the purpose of partition in the strict sense of the word. We see no reason why the first defendant should not pass on a possessory right to the plaintiffs or why the 5th defendant should object to such possession. The 15th defendant has no objection, and the other defendants except No. 5 have not appealed. We make it clear that defendant No. 1 had a possessory right in the suit *thikan* although the right to partition still remained with the members of the Jainu's branch, so that the partition of the *khasgi* lands was not final. The plaintiffs have succeeded to the rights of the first defendant in the suit *thikan*, and, presumably, if they do not do anything more then they would acquire no further rights. But if they assert absolute ownership openly in the suit *thikan* then the other members of Jainu's branch would have to take steps to prevent them acquiring absolute rigths by prescription. We think the plaintiffs were entitled to the decree which was given them, and we make the real position clear. The appeal will be dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEALS NOS. 22 AND 23 OF 1922.

November 27, 1922.

Present:—Mr. Daniels, A. J. C.

RAM RUP AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

GHANI AHMAD *alias* ZAMIN ALI AND OTHERS—DECREE HOLDERS AND ANOTHER—DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 92, 93—Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XXXIV, rr. 7, 8—Limitation Act (IX of 1908), Sch. I, Art. 181—Redemption decree passed under Transfer of Property Act—Death of defendant after decree, effect of—Application to deposit money, nature of—Limitation.

Order XXII, r. 4, of the Civil Procedure Code, does not a ply to execution proceedings, it only applies where a defendant dies before the passing of the final decree of the Original or Appellate Court as the case may be. [p. 163, col. 2.]

Under sections 92 and 93 of the Transfer of Property Act only one decree for redemption was passed, and the application to deposit the decretal amount under such a decree is made in execution proceedings, to which O. XXII, r. 4, of the Civil Procedure Code has no application. [p. 163, col. 2.]

RAM RUP v. GHANI AHMAD.

A judicially declared right of redemption is a valuable right, according to the ordinary meaning of the word. Once a mortgagor has obtained a decree for redemption his right is definite, ascertained and final, subject only to his depositing the decretal amount. [p. 164, col. 1.]

A decree for redemption obtained under the provisions of the Transfer of Property Act, is not affected by the provisions of the Civil Procedure Code relating to such decrees. [p. 163, col. 2.]

A decree for redemption was obtained in 1906 under sections 92 and 93 of the Transfer of Property Act. An application to deposit the decretal amount was made in 1920. It was discovered that one of the defendants had died in the meanwhile and no application had been made within time to bring his legal representatives on the record:

Held, (1) that the redemption decrees still continued to be governed by the provisions of the Transfer of Property Act; [p. 163, col. 2.]

(2) that, therefore, the application to deposit the decretal amount was an application in execution; [p. 163, col. 2.]

(3) that O. XXII, r. 4 of the Civil Procedure Code had no application to such a case, and, therefore, there had been no abatement; [p. 163, col. 2.]

(4) that the right to deposit the decretal amount was a continuing right which could be exercised at any time until an order absolute was passed, and the application was not governed by Art. 181 of Sch. I to the Limitation Act. [p. 164, col. 1.]

Vidyasagar v. *Ratipal*, 25 Ind. Cas. 752; 17 O. C. 347; 1 O L. J. 433; *Gokaran Singh*, v. *Mangli*, 66 Ind. Cas. 673 8 O. L. J. 407; followed.

Appeal against an order of the Subordinate Judge, Bara Banki, dated the 29th April 1922, confirming that of the Munsif, Fatehpur, dated the 23rd January 1922.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Mr. *Niamat Ullah*, for Respondents Nos. 1 to 4.

JUDGMENT.—These are two similar appeals in execution proceedings. Ghani Ahmad and Nisar Ahmad, predecessors of the decree-holders, obtained a redemption decree on 24th August 1906 against Mahesh Pershad and three other persons. The date fixed for payment of the mortgage-money was 24th February 1907. Mahesh Pershad died in May 1908. No applications was made by the mortgagors to have his legal representatives brought on the record. No application for an order absolute or final decree was ever made by the mortgagees. On 14th June 1920 the respondents put in an application against the three surviving mortgagees and the legal representatives of Mahesh Pershad to deposit the amount of the two decrees and for an order putting them in possession of the mortgaged property by redemption. To this application it was objected that the mortgagor's right to deposit the money and obtain redemption had abated by reason of their failure to implead the legal representatives of Mahesh Pershad within six months of his death. This plea has been overruled by both the Courts below. It is now raised again in second appeal to this Court.

The case has been mainly argued on the question whether the proceedings are governed by the present Code of Civil Procedure or by the law in force at the time of the redemption decree which was that embodied in sections 92 and 93 of the Transfer of Property Act. Order XXII, r. 4, on which the appellants rely, does not apply to execution proceedings. It only applies where the defendant has died before the passing of the final decree of the original or Appellate Court as the case may be.

The present Code provides for a preliminary decree for redemption followed by a final decree when the decree-holders have deposited the amount due from them. It is only in execution of the final decree that they can get back actual possession of the property. Under the old law contained in sections 92 and 93 of the Transfer of Property Act only one decree for redemption was passed. If the mortgagor paid the amount due from him he could under section 93 claim to be put in possession of the property in execution of his decree. If he failed to pay the money the mortgagees were entitled to apply for an order, not a decree, debarring him absolutely of all right to redeem. If, therefore, the old Code is applicable the proceedings under which the mortgagees have applied to be put in possession of the property are proceedings in execution and O. XXII does not apply to them. It was in fact by application in execution that they have proceeded.

By section 6 of the General Clauses Act the repeal of any Act is not to affect any right or liability acquired or incurred under the repealed enactment or any

legal proceedings or remedy in respect of such right or liability. The contention of the appellants is that the manner in which a redemption decree shall be enforced is a mere matter of procedure and not a question of right, but a judicially declared right of redemption is certainly a right, and a valuable right, according to the ordinary meaning of the word. The position of a mortgagor who has obtained a decree is very different from that of a mortgagor who has still to bring a suit. In the latter case all sorts of defences may be pleaded. It may be found that his right is barred by limitation or by renunciation, or that the claimant is not in fact the legal representative of the original mortgagors, or that the integrity of the mortgage has been broken up. In fact, until a decree has been passed there is no certainty whether or under what conditions he may be entitled to recover the property, but once he has got a decree in his favour his right is definite, ascertained and final, subject only to his depositing the money. The lower Courts were, therefore, right in holding that this case is governed by section 6 of the General Clauses Act and that the respondents' right to deposit the money is not barred.

A subsidiary plea was raised that the application was barred by Art. 181 of the Limitation Act. This matter was dealt with by a Judge of this Court in *Gokaran Singh* v. *Mangli* (1) He referred to the decision in *Vidyasagar* v. *Ratipal* (2) and showed that there was considerable authority of this Court against the contention, and that the right to deposit the money under a decree *nisi* has been held to be a continuing right which might be exercised at any time until an order absolute was passed.

For these reasons I dismiss both appeals with costs.

Z. K. *Appeals dismissed.*

(1) 66 Ind. Cas. 673, 8 O. L. J. 407.
(2) 25 Ind. Cas. 752; 17 O. C 347; 10 L. J. 433.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 240 OF 1920.
March 15, 1922.
Present:—Mr. Justice Pratt and Mr. Justice Duckworth.

MI SAN MA KHAING AND ANOTHER—APPLICANTS
versus
SHWE BA—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 91, 120—Suit for declaring instrument inoperative—Limitation applicable—Specific Relief Act (I of 1877), ss. 39, 42—Holder of money-decree—Suit to declare sale by judgment-debtor inoperative, whether competent.

Art. 91 of Sch. I to the Limitation Act can only be applied when the plaintiff has been himself, or through his predecessor-in-interest, a party to the instrument assailed. Where a third party sues for a declaration that an instrument is inoperative as against him, Art. 120 is applicable. [p. 165, col. 1.]

A person who holds a mere money-decree, and who has not put that decree into execution and attached the property of his judgment-debtor, has no *locus standi* to sue for a declaration that a sale by the judgment-debtor of his property is fraudulent and inoperative. [p. 165, col. 2.]

Mr. *Keith*, for the Respondent.

JUDGMENT.—The respondent held what he considered to be a mortgage on the immoveable property in question. The deed was dated December 3rd 1912.

About two years after the date the principal mortgagor, appellant No. 1 sold the property by a registered conveyance to the husband (since deceased) for the second appellant.

Nearly four years later, or in January 1919, the respondent sued the mortgagors on his mortgage, but he only obtained a money-decree it being held that the mortgage was invalid and inoperative for want of legal attestation.

He then brought this suit on September 27th, 1919 in order to set aside the sale by the mortgagor to the second appellant's husband.

Two days later, or on September 29th 1919, he applied for attachment and sale of a one-half share in this property in execution of his money-decree, his case being that San Ma Khaing could not dispose of the one-fourth share of her *orasa* son and that one-fourth share was attached on or about October 6th 1919.

MI SAN MA KHAING v. SHWE BA.

The attachment so made was removed by the second appellant in January 1920.

In February 1920 respondent amended his plaint, so as to add a prayer for a declaration that the sale to Shwe Ban U was fraudulent and inoperative.

The present suit was not one under O. XXI, r. 63, Civil Procedure Code, and never purported to be so.

It is admitted that the suit was filed more than three years after the sale but respondent claimed that he only became aware of the sale in February 1919 so that his suit could not be barred by time under Art, 91 of Schedule I of the Limitation Act. Moreover it is urged further that in view of the prayer for a declaration the suit is governed not by Art. 91 but by Art. 120.

Two main questions emerge from these facts (1), whether the suit was within time, and if so (2) whether the respondent had any cause of action; or, in other words, whether the suit was maintainable.

The respondent not being a party to the sale-deed, Art. 91 cannot apply. The suit was in effect a suit for a declaration and it is perfectly clear that the Art. 120 is applicable. It is now settled law that Art. 91 can only be applied when the plaintiff has been himself or through his predecessor-in-interest a party to the instrument assailed. As stated , this was not the case here. The suit cannot, therefore, be held to have been time-barred.

As regards the maintainability of the suit it seems clear that, inasmuch as respondent had no mortgage on the property and only obtained a mere money-decree, he had no lien on the premises in question and at the time of suit had no more than a mere right to attach this or other property. Further, in order to attach this property he must, of course, annul the conveyance in question. There was as yet no attachment and no removal of attachment on any portion of the property and obviously he was powerless until the sale was set aside.

The question, therefore, is whether he could sue to set it aside in the circumstances stated otherwise than by a proper suit to declare his right to attach the property.

In our opinion he could not do so. His proper relief would have been to attach the property and wait till that attachment had been removed and then to have sued to have his right to attach it declared within the statutory period of one year. Had he done this, it is possible that he might have succeeded. However, he elected to sue before making an attachment and to this day he has never prayed for a declaration of his right to attach. In this way, he failed to have any tangible cause of action whatever.

It has been suggested that, inasmuch as his case is that the sale was made in view to defraud him of his mortgage (of course this is not possible) he has, on that account, an independent cause of action. In our opinion there is no force in this suggestion since his mortgage never existed.

No authorities have been quoted to us which would support his claim to any cause of action at the time of his suit.

Mr. Keith for the respondent has, however, urged that sections 39 and 42 of the Specific Relief Act suffice to show that his client could maintain the suit. In our opinion those sections are, in the present circumstances, of no avail, and do not assist respondent at all. In any case, in view of the fact that he had a proper remedy, we consider that the declaration sought for should not have been made.

We are of opinion that the lower Courts went astray and decided the case wrongly on the law point involved in the question of the maintainability of the suit.

The appeal is allowed. The decrees of the lower Courts are set aside, and the suit is dismissed with costs in all Courts.

W. C. A. & N. H.

Appeal allowed.

KONDAL RAYAR *v.* RANGANAYAKI AMMAL.

MADRAS HIGH COURT.

CIVIL APPEAL No. 353 OF 1920.

March 2, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

KONDAL RAYAR REDDIAR —PLAINTIFF—APPELLANT

versus

RANGANAYAKI AMMAL *alias* AMIRTHAMMAL—DEFENDANT No. 1—RESPONDENT.

Hindu Law—Husband and wife—Suit for restitution of conjugal rights by husband—Defence of cruelty—Legal cruelty, what is.

Where a Hindu falsely charged his wife with having attempted to poison him, and treated her generally with loathing and disgust, threatened her with personal violence, and on one occasion pushed her out of the house by the neck, in a suit for restitution of conjugal rights by the husband:

Held, that under the Hindu Law the circumstances were sufficient to constitute "legal cruelty" so as to establish a good defence to the plaintiff's suit and disentitle him to a decree.

Cruelty in the legal sense need not necessarily be physical. Constructive cruelty may also be a ground of relief. [p. 171, col. 2.]

A course of conduct pursued by the husband which is calculated to break the spirit of the wife or by which force, physical or moral, is systematically exerted towards the wife to such a degree and during such a length of time as to injure or undermine her health is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights notwithstanding that there is no actual physical violence. [p. 171, col. 2.]

Russell v. *Russell*, (1897) A. C. 395; 66 L. J. P. 122; 75 L. T. 249; 61 J. P. 756, *Evans* v. *Evans*, (1790) 161 E. R. 466; 1 Hag. Con. 35, *Bethune* v. *Bethune*, (1891) P. 205; 60 L. J. P. 18; 63 L. T. 259, *Patterson* v. *Patterson*, (1850) 3 H. L. C. 308 at p. 328; 88 R. R. 101; 10 E. R. 120, *Surjyamoni Dasi* v. *Kali Kanta Das*, 28 C. 37; 5 C. W. N. 195, *Thompson* v. *Thompson*, 15 Ind. Cas. 886; 39 C. 395, *Armour* v. *Armour*, 1 A. L. J. 318, considered.

Before passing a decree in favour of the husband for restitution of conjugal rights the Court should be satisfied that by giving its aid to him it does not thereby endanger the life, limb, liberty or the health of the wife. If there is danger to any of these the Court will be amply justified in refusing the husband any decree. [p. 170, col. 1.]

The Courts in India are Courts of Justice, equity and good conscience. In cases where no specific rules exist, they look to the English decisions for guidance. The Common Law of England furnishes precedents which are in conformity with equity, justice and good conscience. But the Ecclesiastical Law of England is not the Common Law of England and the former is applicable to a state of things which does not obtain in India and, therefore, great care should be exercised in importing wholesale into India the strict principles of the Ecclesiastical Law of England which are embodied in the decisions of English Courts. Where, therefore, the decisions of the English Courts rest not upon the principles of Common Law but on the peculiar principles of the Ecclesiastical Law, the Courts in India are not bound to follow them since the strict and peculiar principles of the English Ecclesiastical Law are inapplicable to India. [p. 169, col. 2.]

Appeal against a decree, dated the 31st March 1920, in O. S. No. 25 of 1919 on the file of the District Court, South Arcot.

Mr. *T. M. Krishnaswami Iyer*, for Messrs. *A. Krishnasami Ayyar* and *T. M. Ramaswami Aiyar*, for the Appellant.—The facts as established by the evidence do not amount to legal cruelty. The only acts complained against the husband in the course of 10 years of married life are (1) a charge that the wife attempted to poison the husband, which charge, even according to the defence evidence, was disproved immediately and nobody thought anything about it thereafter; (2) that when the misunderstandings between the husband and the wife were serious, the husband once necked her out of the house.

The other charges attemped to be proved were mere personal recriminations in respect of which no Court of law would give either consort any relief. My submission is these circumstances by themselves do not in law constitute legal cruelty which is necessary for refusing relief to the husband. [See Mayne's Hindu Law, 9th Edition, sections 96 and 456; *Surjyamoni Dasi* v. *Kali Kanta Das* (1), *Russell* v. *Russell* (2), *Evans* v. *Evans* (3).]

Any party to a marriage is *prima facie* entitled to a decree for restitution of conjugal rights unless circumstances are established which will endanger the health, liberty, or safety of the recalcitrant consort and it has been ruled [see *Surjyamoni Dasi* v. *Kali Kanta Das* (1)]; that it is only evidence of such cruelty as will support a decree for divorce in an English Ecclesiastical Court which would justify a refusal of conjugal rights in Courts in India.

(1) 28 C. 37; 5 C. W. N. 195.

(2) (1897) A. C. 395; 66 L. J. P. 122; 75 L. T. 249; 61 J. P. 756.

(3) (1790) 161 E. R. 466; 1 Hag. Con. 35.

Judged by the standard enunciated by the majority of the Judges in *Russell* v. *Russell* (2). I submit that, in the present case, no legal cruelty of any sort has been established. The principles applicable to this class of cases are not affected by the polygamy or monogamy that may be sanctioned by a particular system of jurisprudence.

If the law gives a man a right to marry more than one wife, he has certainly a right to the consortium of all his wives. In any event, even a decree now given could not be enforced by imprisonment under the new amended Civil Procedure Code and there is no reason why in appeal my client should be deprived of the moral sanction of this Court's decree to rehabilitate himself in the affections of his wife. In any case, the lower Court is wrong in giving a decree for maintenance in favour of the wife when no counter-claim was made. That part of the decree clearly cannot stand.

Dr. *S. Swaminathan* and Mr. *Desikachariar*, for the Respondent :—The decision in *Russell* v. *Russell* (2) does not apply to the facts of this case. It is well settled that, to constitute a proper defence, physical cruelty is not necessary. Reference was made to *Thompson* v. *Thompson* (4); *Armour* v. *Armour* (5) and the English cases cited in the Calcutta case.

The general principles of English Ecclesiastical Law are not by themselves applicable to India. Courts in India are Courts of Equity and need conform, when no rules exist in India, to the English Common Law which is different and less vigorous than the English Ecclesiastical Law. It would be enough if, as a result of the husband's conduct, the wife's health had suffered.

It is submitted on the facts of this case legal cruelty has been clearly made out.

JUDGMENT.—This is an appeal by the husband against the decree of the District Judge of South Arcot, dismissing his suit for restitution of conjugal rights against the first defendant, his wife, on the ground that he was guilty of legal cruelty. The plaintiff's case is that he married the first defendant about 18 years ago, that he lived with her as husband and wife till she left him, that he had to marry a second wife as the first defendant had no issue, that the first defendant left him about 19 months before he filed his plaint, at the instigation of the second defendant, her father, and the other defendants have induced her to stay away from the husband and that he was entitled to restitution of conjugal rights against the first defendant. The first defendant pleaded that the husband was guilty of cruelty, that she was ill-treated by him, that he falsely charged her with an attempt to poison him, and that when she went to the husband's house at the request of her father, he pushed her out by the neck and threatened to slipper her if she ever crossed his threshold. The learned District Judge has believed the evidence of the defendants and their witnesses and refused the plaintiff any relief.

Mr. T. M. Krishnaswami Aiyar who appears for the appellant contests the findings of fact and argues that, on the facts found, no legal cruelty has been established. The admitted facts are, that the first defendant was married to the plaintiff when she was quite young that she lived with him as man and wife for about 10 years, that, as she had no issue, the plaintiff married a second wife, about 1913, that the first defendant continued in her husband's house for about five years after the second marriage and has left the husband's protection. She filed a petition for maintenance on 14th November 1918 before the Sub-Divisional Magistrate of Tindivanam and he passed an order in her favour on 22nd February 1919 and the revision petition by the plaintiff against that order was dismissed by the High Court on 28th July 1919. He filed this suit on 7th April 1919.

The plaintiff, as his first witness, swears that he lived with the first defendant as man and wife till she left him without any ostensible reason. His suggestion for her leaving him is that the father applied to him for a loan of Rs. 1,000 for the purpose of prosecuting a case against one Kamalatchi Ammal and he refused to lend him money whereupon the father

(4) 15 Ind. Cas. 886; 39 C. 395.
(5) 1 A. L. J. 318.

KONDAL RAYAR v. RANGANAYAKI AMMAL.

took the daughter away and refused to send her back. He denies the allegation that he suspected his wife of an attempt to poison him and denies the acts of cruelty. The plaintiff is a man in well-to-do circumstances and seems to be very influential in his own village. His evidence is supported by P. W. No. 3, his peternal aunt, a widow living in his family. The other witnesses on his side do not throw any light on the matters in dispute. On the other hand, the first defendant has been examined as D. W. No. 1 and she says that there were no marital relations between her and the plaintiff after he married his second wife, that he would not even speak to her, that he took away her jewels on some pretext, that she was made to do household work like a servant, that he abused her when she took some butter-milk to him to be taken with his food, that he did not drink the butter-milk but got up from his unfinishd meal and said that he would not drink from her hand even in his next birth, that he would not allow her to touch the child of the second wife though the child was attached to her, that when he suffered from a slight ailment, he charged her with having put poison in his coffee, that he used very violent language to her, that he and his mother gave directions that she should not enter the kitchen which was the only room she had entered up to that time after the second marriage and that she, unable to bear the cruel treatment, left the house and went to Korkady to live with her father and mother and that the father after sometime brought her to her husband's house and when she entered the house he came from inside and necked her out. Her evidence is supported by that of her father as regards her being pushed out by the neck when he took her to her husband's house. D. W. No. 4, the village Munsif of the place, against whom no serious motive has been alleged says that he was sent for on one occasion by the plaintiff, that when he went to his house, his mother and peternal aunt showed him a *Karundagam* (a small metallic box) and asked him to open it and he did so and it emitted a bad smell. He was told that the first defendant was keeping that medicine for poisoning her husband. He asked that the first defendant should be sent for and as she was unable to go to him she sent word that it was kept by her for stomach-ache and he was afterwards told that she proved the innocuousness of the medicine by taking it herself. The other witnesses support the evidence of the first defendant that the husband considered her to be a disgusting woman and said that he would have no relations with her.

The learned District Judge, after carefully examining all the evidence, has come to the conclusion that her version of the case is better entitled to weight than that of the plaintiff. I have no hesitation in agreeing with him inasmuch as no arguments have been put forward on the side of the plaintiff which could in any way induce me to consider that the learned Judge has not correctly appreciated the evidence in the case.

The next question pressed by the appellant is that the acts of cruelty found are not sufficient to establish a good defence to the plaintiff's suit for restitution of conjugal rights. It is now settled that Courts in India have jurisdiction to entertain suits for restitution for conjugal rights and to grant relief when the parties are Hindus or Muhammadans. *Vide Surjyamoni Dasi* v. *Kali Kanta Das* (1). But the difficult question is, under what circumstances would a Court be justified in refusing to grant the relief asked for in such a case. In this case the parties are Hindus. Mr. Mayne in his book on Hindu Law sums up the law thus: "When the marriage is once completed, if either party refuses to live with the other, the case is no longer one for specific performance of a contract, but for restitution of conjugal rights." (Section 96). "Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there, or such continued ill-usage as would be termed cruelty in any English Matrimonial Court." (Section 456). Mr. Krishnaswami Aiyar strongly pressed on our attention the case of *Russell* v. *Russell* (2) and contended that a mere allegation of the commission of an offence would not amount to cruelty and that his client, though hastily, thought that the first defendant was capable of poisoning him but he repented of it and that inasmuch

as he was anxious to live with her, he entertained no fear of her poisoning him and, therefore, she was not entitled to live away from him. He also contended that the only act of actual cruelty in the populer sense was her being shoved out when she went to his house after leaving him for a time. In this connection it must be remebered that the plaintiff does not admit of having made an unfounded charge but denies having made it. He does not plead that he has forgiven his wife or that he had misled her into thinking that she was capable of committing a heinous offence but totally denies having made any such charge. Therefore, there can be no repentance on his part and the way in which this case has been pressed shows that he is anxious to have a decree in his favour without any regard to the future welfare of his wife. In *Russell* v. *Russell* (2) the House of Lords held that a "false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world and persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation." The case was decided by a majority of five Lords against four. Before considering the English authorities, it is to be borne in mind that the Matrimonial Law of England is the Canon Law of the Church and matrimonial causes were heard and determined by Ecclesiastical Courts. The Roman Church even now does not recognise divorce. The Anglican Church though it allows divorce is still leaning towards strict monogamy. It was only under the Matrimonial Causes Act (20 and 21 Vict. Chap, 85) that the King's Courts were given jurisdiction to entertain matrimonial causes and by section 22 they were directed to determine them as far as possible on the principles of the Ecclesiastical Law. That jurisdiction is now exercised by the Probate Division of the High Court of Justice. The Legislature did not alter the Canon Law except in few matters and the Judges who administer the law are bound by the precedents which were established in the Ecclesiastical Courts. To import the Ecclesiastical Law of England wholesale into India is as injudicious as it is inequitable. In the Christian countries, monogamy is the rule. No man or woman can marry a second time when the first marriage is subsisting. In England, therefore, if a wife or a husband refuses to cohabit or to render to one another marital duties, the other party cannot have any relief except as is granted by the Courts and that is the reason why Courts were strict in enforcing the marital duties and were jealous of the rights of the parties to the marriage and would not allow any violation of the marital tie, and compelled the recalcitrant party to submit to the embraces of the other and forced them to live as man and wife. In India, the Hindu Law permits a man to have more than one wife at the same time, but among the higher castes, a woman can marry only once. When a man marries more than one wife and ill-treats one of his wives in such a way as to make it impossible for her to live with him not merely with any degree of comfort but without danger to her health, the question for consideration is, should the Court enforce the strict rule in English Ecclesiastical Law or should it consider whether the circumstances of each case would justify its using its power to compel the wife to live with her husband who hates and loathes her and when by such residence her health is likely to be seriously impaired. The Courts in India are enjoined to decide according to justice, equity and good conscience in cases where no specific rule exists and they naturally look to the English decisions for guidance. The Common Law of England furnishes precedents which are in conformity with equity, justice, and good conscience. But the Ecclesiastical Law of England is not the Common Law of England and the former is applicable to a state of things which does not obtain in India and, therefore, great care should be exercised in importing wholesale into India the strict principles of the Ecclesiastical Law of England which are embodied in the decisions of the English Courts. Even in England, the tendency of the latter cases is to relax the rules of the Ecclesiastical Law as regards the marital rights and duties in order to give relief where a Court of Equity would consider such relief to be proper.

With these preliminary remarks, I will examine the cases relied upon by the appellant. In *Russell* v. *Russell* (2) the wife brought a suit for restitution of conjugal rights and the husband resisted it on the ground of cruelty by the wife. The cruelty proved was, " that from that time after the trial, although she had heard the verdict in favour of her husband at the close of the trial, that she thenceforth wrote letters, made statements, pursued her husband, practically, insisted on the same charge... not by one single act or one single letter, but by a continuance and persistence in conduct of that sort." The charge was that he was guilty of an unnatural offence. The case was tried before Pollock, B., with a Jury. He pronounced a decree for a judicial seperation. The Court of Appeal held that the husband was not entitled to a decree for judicial separation. Two of the learned Lords Justices, Lopes and Lindley, define cruelty thus : " There must be danger to life, limb or health, bodily or mental, or reasonable apprehension of it." The leading judgment in that case was delivered by Lord Harschell who held that the wife's persistence in making a false charge against her husband knowing the charge to be false, however, culpable such conduct was, did not amount to legal cruelty. He followed the *dictum* of Lord Stowell in *Evans* v. *Evans* (3) and held that the plaintiff's act did not amount to legal cruelty. Lord Stowell in the course of the judgment in *Evans* v. *Evans* (3) observes: "I take it the rule cited by Dr. Bever from Clarke and the other books of practice, is a good general outline of the Canon Law, the law of this country upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court granted a divorce without proof given of a reasonable apprehension of bodily hurt." After an examination of a number of cases, Lord Herschell observes at page 455 " I think the law of restitution of conjugal rights as administered in the Courts did sometimes lead to results which I can only call barbarous. I need seek no better illustration of this than the case of *Holmes* v. *Holmes* (6) decided in 1755 which is relied on for the proposition that the Courts can only refuse restitution on grounds which would justify a divorce. Conduct of a most revolting character on the part of the husband was held to afford no answer to his claim for a restitution of conjugal rights. Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by insult and outrage driven his wife to leave him, should, without repentance for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court might well refuse to afford its assitance to one who acted thus. And, notwithstanding the decision to which I have referred, there are not wanting *dicta* of eminent Judges, and notably, of Lord Stowell, that 'something short of legal cruelty' might bar a suit for restitution. However that may be, the matter is of less importance than it formerly was, as the Legislature has interposed ; and even if the Court is still bound to make a decree for restitution, it is no longer bound to enforce it as before." Lord Davey who agreed with Lord Herschell was obliged to confess: "My only duty is to say whether the appellant's contention is conformable to the principles on which the Ecclesiastical Courts formerly acted and gave relief. I am constrained to say that in my opinion it is not."

Considering the rigour of the Ecclesiastical Law, the Legislature interposed and made it optional with the Court to enforce the decree for restitution of conjugal rights by imprisonment. Order XXI, r. 32, of the Civil Procedure Code, prescribes the mode in which a party could be compelled to obey a decree for restitution of conjugal rights ; but I

(6) (1755) 2 Lee 116; 161 E. R. 283.

am not aware that the Court could refuse the execution of a decree unless it be that the health of the party against whom the decree is sought to be executed would suffer by such restitution. The latitude given to the English Courts has only been recently given to the Indian Courts by O. XXI, r. 33, Civil Procedure Code, as regards the execution of decrees in such cases. Lord Halsbury, who differed from the majority, says at page 420: "In the view the Ecclesiastical Courts took of the sanctity and perpetual obligation of the rights between the spouses, it is intelligible enough that they should have sternly enforced the duty of continued cohabitation, except in such cases as, to use the phrase continually recurring, 'when the facts show an absolute impossibility that the duties of the married life can be discharged.'" With regard to the conduct of the plaintiff, he observes: "For my own part, I believe an accusation of this kind is an incurable injury to the person against whom it is directed." Lord Hobhouse who was also in the minority in considering what would be cruelty, observes as follows: "That violence and bodily danger are far the most common forms of cruelty accounts for the frequent repetition of the *formulæ* relating to such things. But we find not only judicial recognition that there may be other forms of cruelty, but judicial *dicta* and decisions taking a wider range, and quite irreconcilable with the rigid line by which it is now sought to confine the jurisdiction of the Court," and after an examination of the cases on the point, he says: "The conclusion I draw from the authorities is that there is no rigid rule to exclude from the consideration of Judge or Jury a case where acts, cruel in their nature, are so grave as to destroy the foundatins of conjugal life. I do not think that any rule can be laid down less wide than that of Lord Stowell 'that the causes must be grave and weighty, and such as to show an absolute impossibility" meaning of course, a moral impossibility 'that the duties of married life can be discharged.' The fact that violence and personal danger are far the most common ground alleged for separation, has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But they are only one class of the broader category indicated by Lord Stowell."

In *Bray* v. *Bray* (7) Sir John Nicholl observes with regard to the conduct of the husband who accused his wife of the most abominable intercourse that can possibly be conceived, no less than incest with one of her nearest relations: "It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by this husband against his wife."

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. In *Kelly* v. *Kelly* (8) it was held "If force, whether physical or moral, is systematically exerted, to compell the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty and entitles her to a judicial separation." In that case, the husband adopted a deliberate system of conduct towards his wife with the view of binding her to his authority. No physical violence was found against the husband but only a course of conduct which was a kind of tyranny to the wife. Channell, B., in the course of the judgment observes: "It would be difficult to frame a definition of legal cruelty which should be applicable to all the cases which may arise. The object of the Matrimonial Court in exercising its jurisdiction in decreeing for judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe, will be rendered, unsafe by ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are

(7) (1828) 1 Hag. Ecc. 163; 162 E. R. [illegible].
(8) (1870) 2 P. & D. 59; 39 L. J. [illegible]; [illegible] T. 308; 18 W. R. 767.

infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result the Court must supply the remedy by separating the parties." In *Bethune* v. *Bethune* (9). The President of the Probate Division Sir James Hannen gave a decree for divorce on the ground of adultery coupled with cruelty the cruelty consisting of a long course of systematic neglect and insult. The law is summed up in Halsbury's Laws of England, Vol. 16, section 976: "A course of conduct calculated to break the spirit of the sufferer (more usually the wife) continued till health breaks down or is likely to break down under the strain sometimes termed 'constructive cruelty' is also a ground for relief", and reliance is placed for the proposition upon a number of cases. In India there are cases in which it was held that it was not necessary to prove physical violence in order to deny the husband a decree for restitution of conjugal rights: *Vide Thompson* v. *Thompson* (4) and *Armour* v. *Armour* (5).

The facts proved in this case are sufficient, in my opinion, to deny the plaintiff the relief claimed by him. When a husband, who is guilty of a course of conduct which would be regarded as cruel to the wife, comes before a Court seeking its aid to compell his wife to submit to his embraces, it is the duty of the Court to see whether the health of the wife is likly to suffer by forcing her against her will to live with him. The observations of Lord Brougham in *Paterson* v. *Paterson* (10) seem to be peculiarly applicable to the present case: "If the husband, without any violence or threat of violence to the wife,—without any maltreatment endangering life or health or leading to an apprehension of danger to life or health,—were to exercise mere tyranny, to utter constant insults, vituperation, scornful language, charges of gross offences (utterly groundless), charges of this kind made before her family, her children, her relations, her friends, her servants, insulting her in the face of the world, and of her own domestics, calling upon them to join in those insults, and to treat her with contumely and with scorn,—if such a case, were to be made out, or even short of such a case, *viz.*, injurious treatment, which would make the married state impossible, to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro* to a case, such as I have put." This observation was made before the Matrimonial Causes Act gave a salutory relief in hard cases. The facts found in this case are:—

1. The husband charged the wife with the attempted murder of her husband by poison.

2. He insulted her on more than one occasion and called her by the most vile epithet.

3. He treated her with loathing and disgust and abused her when she took some butter-milk to him, and he expressed his disgust by getting up from his unfinished meal.

4. He sent word through a servant that if she went back to him she would be dragged out by a pariah and slipered.

5. He threatened her with violence by saying that he would hash her to pieces with a knife and allowed the second wife to abuse her and to say that she (meaning the first defendant) deserved to be made to stand in the road and be spat on by passers by, that it was enough that she had not wrung its (child's) neck and thrown it into the well and that if she touched the child again she would be beaten with a broom-stick.

6. He used personal violence by pushing her by the neck. The mother-in-law and the peternal aunt who treated her with kindness turned against her after the charge of an attempted murder was ventilated by the husband.

I think these circumstances are sufficient to make out cruelty under the English Law. But in India where the conditions are different it is not necessary to implicity follow the precedents of the Ecclesiastical Courts in considering what is equitable in the circumstances. The Indian Courts are

(9) (1891) P. 205; 60 L. J. P. 18; 63 L. T. 259.

(10) (1850) 3 H. L. C. 308 at p. 328 88 R. R. 101; 10 E. R. 120.

Courts of justice, equity, and good conscience and though a decision of the House of Lords is to be regarded with the utmost respect, yet it is not binding upon the Indian Courts and where the decision rests not upon the principles of the Common Law but upon the peculiar principles of the Ecclesiastical Law of England, the Courts in India are not bound to follow the decisions for the simple reason that the Ecclesiastical Law of England is not the law of this country and monogamy, so far as the husbad is concerned, is not the rule of Hindu Law. The Hindu Law does not recognise any divorce. It permits a husband to have as many wives as he likes. The husband in this case had no marital relations with his wife.—the first defendant—for a period of more than seven or eight years and it would be cruel now to force the wife to go back to the husband against her will.

Mr. Krishnaswami Aiyar argued that the plaintiff was anxious to have his wife back, that he had repented of his past conduct and that he is willing to treat her as a wife should be. He also urged that in country places personal violence towards the wife by the husband is excusable and that we should not apply to the parties the principles which would govern a case where the parties are educated and enlightened. I am not prepared to believe that domestic relations in the *moffusil* and in the country places are as described by Mr. Krishnaswami Aiyar. No doubt sometimes, the Hindu society overlooks personal violence to the wife by the husband, but when a Court's intervention is asked for, the Court should not be guided by the public opinion, in a country village, but by what is just and equitable in the circumstances. In this case the plaintiff is a man of influence in his own village. There is no public opinion at all in that place. Is there safety or security for the wife if the husband chooses to charge her again with an attempt to poison him and hands her over to the Police on his becoming slightly ill and for which illness he could not find any reason? There is no guarantee that the suspicion which he once entertained will not be revived again if he or his second wife or his second wife's child should fall ill. If he was really anxious to have his wife back, he could very well have gone to her and offered to treat her properly. When the maintenance proceedings were before the Sub-Divisional Magistrate, he suggested that the parties should settle the matter out of Court and the plaintiff, in order to make out that he was willing to settle the matter, sent his handyman to fetch his wife and she rightly refused to go with him as she thought that the plaintiff was attempting to dupe her. If he was in earnest, he could have sent his peternal aunt or any of his female relations to fetch her. I am not prepared to put any faith in the protestations of Mr. Krishnaswami Aiyar on behalf of his cleint. A Hindu wife looks upon her husband as her Lord and Master and she has no happiness outside her husband's house. Knowing the conditions in India as we do, I am not prepared to believe that a Hindu wife would stay away at the instance of her father or other relations when there was no sufficient reason for her conduct, for she considers her husband's home is her proper place and she would not leave it without the gravest reason, as she has nothing to look forward to here or hereafter. There is a civil suit pending in which the wife seeks to recover her jewels from the husband. I am satisfied that the plaintiff has brought this suit only to satisfy his vanity and to defeat the order made in favour of the wife for maintenance and this suit is not a *bona fide* attempt to get back his wife to continue the marital relations. I consider the facts established sufficient cruelty on the part of the husband which would justify the Court in refusing the plaintiff the relief he seeks. The case might perhaps be different if the Court is asked to dissolve the marriage, but in a case of restitution of conjugal rights, the Courts need not consider what would be sufficient to grant a divorce according to the Matrimonial Law of England. On the other hand, before passing a decree in favour of the husband the Court should be satisfied that by giving its aid to him it does not thereby endanger the life, limb, liberty or the health of the wife. If there is danger to any of these, the Court would

be amply justified in refusing to give a decree for restitution of conjugal rights.

The learned Judge has decreed separate residence to the wife. There is no counter-claim by the defendant to the plaintiff's suit and I do not see how the Court could grant a decree for separate residence when there is no proper claim for it. That portion of the decree of the lower Court should be expunged.

In the result, the appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
N. H.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 19 OF 1923.

June 12, 1923.

Pesent:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

BHAGWAT PRASHAD SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

DWARKA PRASAD SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), O. XXI, rr. 11 to 14—Application for execution, requirements of—Return of execution application for additional Court-fee—Court-fee not paid, effect of—Application, whether "in accordance with law"—Decree-holders, several—Verification of application by all, whether necessary.

The fact that an execution application returned for amendment is not amended and re-filed within the time allowed, does not necessarily make the application one not in accordance with law for the purposes of Art. 182 of Schedule I to the Limitation Act. [p. 176, col. 1.]

Gopal Sah v. Janki Koer, 23 C. 217; 12 Ind. Dec. (N. S.) 145, not followed.

Order XXI, rr. 11 to 14 gives the particulars which the law requires to be stated in an application for execution. If the application conforms with those rules and is presented on a properly stamped paper, it must be taken to have been properly presented in accordance with law, even though it is returned for some other reason. [p. 175, col. 1.]

An execution application was returned for supplying a copy of the Record of Rights concerning the property sought to be made liable in execution and for payment of Court-fee on the additional amount of interest claimed between the date of the plaint and the date of the application. The order was not complied with. Within three years another execution application was made and the question was whether the previous application operated to save limitation:

Held, that assuming these were matters which the Court might have required to be done, a failure to do them could not affect the validity of the application as such, and that under Art. 182 of Sch. I to the Limitation Act the later application filed within three years from it was within time. [p. 176, col. 1.]

Under O. XXI, r. 11 (2) of the Civil Procedure Code it is not necessary that an execution application should be verified by all the applicants where there are more than one. It may well be that some of them may not be acquainted with the facts of the case. It would be straining the language of the rule too far to say that where there are more applicants than one, the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more are acquainted with the facts, their verification is not sufficient. [p. 176, col 1]

Appeal from an order of the District Judge, Gaya, dated the 17th May 1922, confirming an order of the Additional Subordinate Judge, Gaya, dated the 17th May 1922.

Mr. S. *Dayal*, for the Appellant.
Mr. S. K *Mitter*, for the Respondent.

JUDGMENT.

Miller, C. J.—The question for determination in this appeal is, whether an application for execution of a decree filed on the 9th April 1922 is barred by limitation. The judgment-debtor, who is the appellant before us, contended before the Additional Subordinate Judge that the decree was time-barred on the ground that more than three years had passed since the last application for execution. The question depended upon whether a previous application for execution presented on the 24th April 1919 was duly made in accordance with law within the meaning of Art. 182 (*v*) of the First Schedule of the Indian Limitation Act. It is admitted that if the application of the 24th April 1919 was duly made in accordance with

law the present application is not time-barred.

The learned Subordinate Judge found that the previous application was duly made in accordance with law and dismissed the judgment-debtor's objection. His decision was affirmed on appeal to the District Judge. From that decision the judgment-debtor has preferred the present appeal to this Court.

The validity of the application of the 24th April 1919 is challenged on three grounds, (1) that a copy of the Record of Rights was not filed together with the application; (2) that no Court-fee was paid for the additional amount of interest claimed between the date of the plaint and the date of the application, and (3) that the application was not verified by all the decree-holders. When the previous petition for execution was presented it was endorsed by the *Sherishtadar* of the Court with a note that no Court-fee on the increased amount of interest was filed and that copy of the Record of Rights was not filed, but that a written translation of the verification which was in the *mahajani* character had been supplied. On the same day, the 24th April 1919, the Subordinate Judge passed the following order :—

"Return the execution petition for needful and to be re-filed in 10 days from this date."

That order apparently meant that the decree-holders were to pay the additional Court-fee and supply a copy of the Record of Rights within 10 days. The order was not complied with but the present petition was presented within three years. In my opinion, it was not necessary that the previous application should be returned for the purposes mentioned. Order XXI, rr. 11 to 14, of the Civil Procedure Code gives the particulars which the law requires to be stated in an application for execution. If the application conforms with those rules and is presented upon a properly stamped paper I think it must be taken to have been properly presented in accordance with law. Rule 17 of the same Order prescribes the course which the Court shall take when the application does not conform with the requirements of rr. 11 to 14 and provides that the Court shall ascertain whether such of the requirements of those rules as are applicable to the case have been complied with. If they have not been complied with, the Court is empowered either to reject the application or to allow the defect to be remedied within a time to be fixed by it. It further provides that where an application is amended under the provisions mentioned, it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented. It may, perhaps, be inferred from this that where the application is returned on the ground that the requirements of the rules have not been complied with and is not amended within the time fixed it cannot be regarded as having been presented in accordance with law. It is nowhere stated, however, that where the application conforms with the prescribed requirements and is returned for some other reason it shall not be deemed to have been presented in accordance with law. On referring to rr. 11 to 14 no provision is found for the payment of any Court-fee on the amount claimed in excess of that covered by the Court-fee paid together with the plaint, or for supplying a copy of the Record of Rights, and, assuming these were matters which the Court might require to be done, the failure to do them cannot, in my opinion, affect the validity of the application as such. It was contended, however, that the failure to supply the additional Court-fee was a fatal defect in the application. The application was presented with an 8-annas stamp, which is admittedly in accordance with the requirements of Schedule II of the Court-Fees Act, then in force, for applications of this nature. The authorities are not uniform on the question whether additional Court-fee is payable on interest which has accrued on the decretal amount since the date of the suit and for which no Court-fee has been paid with the plaint. But assuming, without deciding, that it was within the competency of the Court to require payment of the additional Court-fee before it would order execution to proceed in respect of the additional amount claimed, such a fee was in no sense a Court-fee payable on an application for execution. It was, if payable at all, a Court-

fee payable on the plaint in respect of a part of the subject-matter in dispute which could not be estimated at the time when the plaint was presented, and which it is not usual to exact at that time. The failure to pay this fee would, at the most, entitle the Court to hold its hand and refuse to allow execution to proceed or to dismiss the application if the fee should not be paid within the time ordered but its non-payment cannot invalidate an application for execution properly stamped in accordance with the requirements of the Court-Fees Act and containing the particulars required by the provisions of O. XXI, rr. 11 to 14. But it was further contended that once the application was returned for amendment it could not be regarded as an application in accordance with law within the meaning of Art. 182 of the Limitation Act unless the amendment was made within the time ordered and the application again presented. In support of this argumnt the case of *Gopal Sah* v. *Jankl Koer* (1) was relied on, but in that case the original application did not contain all the particulars required by section 235 of the Code of 1882 (now O. XXI, r. 11), and it was returned for amendment within a specified time. The order requiring amendment was not complied with and it cannot be said that the application was ever properly presented in accordance with law. In the present case the application was not returned on account of any defect in supplying proper particulrs. In the case relied on it is true a broad proposition was laid down that once the application is returned for amendment of any kind, even though the defects had not vitiated the application, it could not be regarded subsequently as made in accordance with law unless the defects had been cured within the time allowed. It was not necessary on the facts of that case to lay down any such broad proposition, and the judgment in that respect was criticised and not followed in the later case of *Mathura Prosad* v. *Anurago Koer* (2) decided by the same High Court in 1910. In my opinion the broad proposition there stated cannot be supported upon a proper interpretation of the rules of O. XXI or upon general principles and should not be followed.

The only other question which was raised was that the application was not verified by all the decree-holders. The application was signed by all the decree-holders and was verified by all except one. O. XXI, r. 11 (2), provides that save as otherwise provided by sub-rule (1) every application for the execution of a decree shall be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The verification in the present case was clearly signed by persons acquainted with the facts of the case and as they were themselves the decree-holders it may be presumed that the Court was satisfied that they were acquainted with the facts of the case. It does not appear to me that the application need be verified by all the applicants. It may well be that where there are a number of decree-holders, some of them are not acquainted with the facts of the case, and all the law requires is that the application should be verified by some person proved to the satisfaction of the Court to be acquainted with the facts of the case. I think it would be straining the language of the rule too far to say that where there are more applicants than one the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more are acquainted with the facts of the case their verification is not sufficient. In my opinion, this appeal fails and should be dismissed with costs.

Kulwant Sahay, J.—I agree.

N. H. *Appeal dismissed.*

---

(1) 23 C. 217 (12 Ind. Dec. (N. S.) 145.
(2) 5 Ind. Cas. 579; 14 C. W. N. 481.

HARDIAL v. ALAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 103 OF 1922.

May 14, 1923.

Present:—Mr. Justice Gokul Prasad.

HARDIAL,—PLAINTIFF—APPELLANT

versus

ALAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Lambardar, *powers of—Lease of* Zemindari *land.*

A *lambardar* has authority, with reference to a particular season, to grant a lease of *zemindari* land.

Second appeal against a decree of the Subordinate Judge, Jhansi, dated the 17th of September 1921.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Kumuda Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of certain crops, or, in the alternative, the value thereof. The plaintiff's allegation was that he had sown wheat, *lahi* and mustard in 4 *bighas* of alluvial land bearing No. 169, that the defendants Nos. 1 to 9, having colluded with the Patwari, the defendant No. 10, forcibly cut away the crops sown by the plaintiffs about the 20th of March 1921. The defendant No. 10 is the Patwari of the village and was to receive one-tenth of the crops to be appropriated by defendants Nos. 1 to 9. The plaintiff again sowed some wheat, etcetra, on another plot of 7 *bighas* but the defendants Nos. 1 to 9 in collusion with defendant No. 10 cut and removed the crops. The plaintiff, therefore, brings the suit for recovery of the grain removed by the defendants or Rs. 347 the value thereof.

The defence of the defendants Nos. 1 to 9 was that they had been ploughing and sowing the field in question as it emerged from the river every year and had always been reaping the crops, that in the year in dispute they ploughed and sowed it as usual under a lease of Bhadon Sambat 1977 given by Shah Qutubuddin, the *lambardar* and that the plaintiff had never sowed the field in question nor had he any right to the crops. They also contended that there was no collusion between them and the defendant No. 10.

Defendant No. 10 denied any collusion with the other defendants and alleged that the defendants themselves sowed the crops and reaped them.

The First Court came to the conclusion that Qutubuddin, the *lambardar*, had authority to grant the aforesaid lease and the defendants Nos. 1 to 9 did, as a matter of fact, cultivate the plot in dispute. It further found that the plaintiff had no right to institute the suit and that the Patwari was not in collusion with the defendants. It did not decide the question of the value of the crops alleged to have been removed and on these findings dismissed the suit.

The plaintiff went up in appeal. The learned Judge of the lower Appellate Court has rightly found that the *patta* given by Qutubuddin was not for a period of more than a year and that the rent reserved could not be said to have been more than Rs. 100 in value. The *patta*, therefore, did neither require stamp nor registration (see, in this connection, Schedule I, Art. 35, Exemption A, of the Stamp Act of 1899, also Government Order No. $\frac{1048}{VII-I-34-I}$, dated the 3rd of December 1885 published in the N.-W. P. Gazette of 1885, Part I, page 579). The *lambardar* has a right to give a lease of *zemindari* property having regard to the particular season [*vide* the case of *Muhammad Kazim* v. *Miyan Khan* (1)]. In this case having regard to the words of the *patta* and specially to the fact that the land gained by alluvion was to be measured later on, this *patta* could not refer to more than that particular year. There was no certainty that the same land or the same quantity of land would emerge from the river the succeeding year. This *patta* could not, there-

(1) 4 A. L. J. 538; A. W. N. (1907) 165; 29 A. 554.

fore, be said to be one for more than one year nor could it be said that the rent reserved was more than Rs. 100. This *patta* by the *lambardar* was, therefore, valid and the defendants were justified in cultivating the land. The lease was, therefore, admissible in evidence and required neither a stamp-duty nor registration. These were the only grounds pressed in the appeal. Under these circumstances, it is not necessary to consider the question whether a second appeal lies or not. The appeal, therefore, fails and is dismissed with costs.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 188 OF 1921.

February 14, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

BENOY BHUSAN ROY—DEFENDANT—APPELLANT

versus

DHIRENDRA NATH DE—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage-deed—Due execution—Attestation—Burden of proof—Presumption—Recitals, value of—Evidence Act (I of 1872), s. 70—Admission of execution—Admission by representative of executant, value of.

A mortgage-bond is not duly executed and operative as a mortgage unless it is in fact signed by the mortgagor in the presence of at least two witnesses who sign the document as attesting witnesses. [p. 179, col. 2.]

Shamu Patter v. *Abdul Kadir Rowthan*, 16 Ind. Cas. 250; 39 I. A. 218; 35 M. 607; 16 C. L. J. 596; 16 C.W.N. 1009; 23 M.L.J. 321; 12 M. L.T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034 (P. C.), *Ganga Pershad Singh* v. *Ishri Pershad Singh*, 45 Ind. Cas. 1; 27 C. L. J. 548; 4 P. L. W. 319; 16 A. L. J. 409; 34 M. L. J. 515; 22 C. W. N. 697; 20 Bom. L. R. 587; 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176; 45 C. 748; 45 I. A. 95 (P. C.), referred to.

It is incumbent on the party who relies on a mortgage instrument to establish that the document was attested as required by law. [p. 179, cols. 1 & 2.]

Arjun Chandra Bhadra v. *Kailas Chandra Das*, 70 Ind. Cas. 532; 36 C. L. J. 375; 27 C. W. N. [illegible] (1923) A. I. R. (C.) 149, referred to.

In the case of a mortgage-deed, one of the attesting witnesses deposed that he saw the execution and signed as an attesting witness while the other said that he affixed his signature as an attesting witness at the request of the mortgagor but was unable to recollect whether he actually saw the execution of the document. Further it appeared that when the document was presented for registration, the second witness identified the executant, who, in his presence, admitted execution before the registering officer:

Held, that, under the circumstance, an inference might fairly be drawn that the requirements of the law were fulfilled. [p. 180, col. 1.]

Jogendra Nath Mukhopadhya v. *Nitai Churn Bundopadhya*, 7 C. W. N. 384, *Ram Dei* v. *Munna Lal*, 38 Ind. Cas. 175; 39 A. 109; 14 A. L. J. 1041, *Uttam Singh* v. *Hukam Singh*, 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 167. *Shib Dayal* v. *Sheo Ghulam*, 38 Ind. Cas. 694; 39 A. 241; 15 A. L. J. 164, *Venkata Reddi* v. *Muthu Pambulu Naick*, 60 Ind. Cas. 554; 39 M. L. J. 463, referred to.

Where a mortgage-bond contains a recital that the consideration had been recieved by the executant, the burden lies upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained an untrue recital. [p. 181, col. 2; p. 182, col. 1.]

Fulli Bibi v. *Bassirudi Midha*, 4 B. L. R. (F. B.) 54; 12 W. R. (F. B.) 25, *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Singh*, 12 M. I. A. 286 at p. 307; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 429; 20 E. R. 347, *Ali Khan Bahadur* v. *Indar Pershad*, 23 I. A. 92; 23 C. 950; 7 Sar. P. C. J. 63; 12 Ind. Dec. (N. S.) 631 (P. C.), *Brajeshware Peshakar* v. *Budhanuddi*, 6 C. 268; 7 C. L. R. 6; 3 Ind. Dec. (N. S.) 175, *Bisheswar Dayal* v. *Harbans Sahay*, 6 C. L. J. 659; 3 M. L. T. 38 and *Rahimjan Bibi* v. *Imanjan Bibi*, 15 Ind. Cas. 698; 17 C. L. J. 173, referred to.

Under section 70 of the Evidence Act an admission by the representative of a party to an attested document of its execution by the party, cannot be treated as an admission by the party himself. [p. 179, col. 1.]

Appeal against the decree of the Subordinate Judge Second Court, Midnapore, dated the 12th of May 1921.

Babus *Mahendra Nath Roy* and *Manmathanath Roy*, for the Appellant.

Babus *Brojolal Chakravarti*, *Ramani Mohan Chatterjee* and *Ramaprasad Mookerjee*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit to enforce a mortgage security. The document was executed on the 27th March 1911 by the father of the defendant in favour of the father of the plaintiff to secure a loan of Rs. 35,00 which was to carry interest at the rate of 2 per cent. per month. The suit was instituted on the 9th February 1920 by the son of the mortgagee against the son of the mortgagor. The

plaintiff stated that as the original document had been lost, he produced a certified copy from the Registration Office. The defendant contested the claim on a two-fold ground; namely, first, that there was no valid mortgage-bond, executed and attested in conformity with the provisions of section 59 of the Transfer of Property Act; and, secondly, that no consideration had been paid on the basis of the mortgage transaction. The Subordinate Judge has overruled these contentions and has decreed the claim. On the present appeal, that decree has been assailed on each of the two grounds urged in the Trial Court.

As regards the first objection, the Subordinate Judge held that section 70 of the Indian Evidence Act rendered it unnecessary for the plaintiff to prove execution and attestation of the bond, inasmuch as the defendant, in his written statement, admitted execution of the bond by his father. This view cannot be supported. Section 70 provides that the admission of a party to an attested document of its execution by himself, shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. The Subordinate Judge interpreted this section to mean that the admission by the representative of a party to an attested document may be treated as sufficient proof of its execution. This view is unsustainable on the plain language of the section. The section speaks of an admission by a party to an attested document of its execution by himself, that is, of its execution by the party concerned. An admission by the representatives of a party to an attested document of its execution by the party cannot be treated as an admission of the party to an attested document of its execution by himself.

Apart from this, there is an additional difficulty in the way of acceptance of the view taken by the Subordinate Judge. In the present case, no doubt, the defendant admitted that the bond was executed by his father. At the same time, he specifically denied that the bond had been duly attested as required by law. In such circumstances, it is incumbent upon the party who relies upon the mortgage instrument to establish that the document was attested as required by law. The case is covered, not by *Nibaran Chandra Sen* v. *Nagendra Chandra Sen* (1); *Satish Chandra Mitra* v. *Jogendra Nath Mahalanobis* (2), but by *Arjun Chandra Bhadra* v. *Kailas Chandra Das* (3). It is consequently necessary for us to examine whether the document has been proved to have been duly attested.

It is not disputed that a mortgage-bond is not duly executed and cannot operate as a mortgage unless it is in fact signed by the mortgagor in the presence of at least two witnesses who sign the document as attesting witnesses; *Shamu Patter* v. *Abdul Kadir Rowthan* (4) and *Ganga Pershad Singh* v. *Ishri Pershad Singh* (5). We must accordingly examine whether this document was in fact signed by the mortgagor in the presence of at least two persons who affixed their signatures as attesting witnesses. The original has been lost and we have on the record only a certified copy obtained from the Registration Office. The document shows, on the face of it, that it was signed by the executant Rakhalraj Ray. This is, indeed, admitted by the defendant. At the foot of the document we have the signature of the scribe Soshi Bhushan Ray. Thereafter follow the names of two persons who are described as witnesses; these names are Haran Chandra Chatterjee and Bhushan Chandra Das. The document was executed on the 27th March 1911 and, as the endorsement made by the Registering Officer shows, was presented for registration on the same day by the mortgagor Rakhalraj Ray. He admitted execution and was identified by Bhushan Chandra Das whose name appears on the deed as that of an attesting witness. On

(1) 44 Ind. Cas. 984; 22 C. W. N. 444.

(2) 34 Ind. Cas. 862; 44 C. 345; 20 C. W. N. 1044; 24 C. L. J. 175.

(3) 70 Ind. Cas. 532; 36 C. L. J. 373; 27 C. W. N. 263; (1923) A. I. R. (C) 149.

(4) 16 Ind. Cas. 250; 39 I. A. 218; 35 M. 667; 16 C. L. J. 596; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034 (P. C.).

(5) 45 Ind. Cas. 1; 27 C. L. J. 548; 4 P. L. W. 549; 16 A. L. J. 409; 34 M. L. J. 545; 22 C. W. N. 607; 20 Bom. L. R. 587; 23 M. L. T. 388; (1919) M. W. N. 382; 8 L. W. 176; 45 C. 748; 45 I. A. 94 (P. C.).

the strength of this admission of execution, the registration was completed. In the Trial Court, the scribe Soshi Bhushan Roy, though summoned as a witness, did not appear to give evidence. Haran Chandra Chatterjee was examined on commission. Bhusan Chandra Das was duly summoned and was present in Court on the 18th March 1921; but when the trial actually commenced he was not found and accordingly was not examined. The examination of Bhusan Chandra Das might not have been insisted upon by reason of the erroneous view taken by the Subordinate Judge as to the scope of section 70 of the Indian Evidence Act: we consequently decided to give an opportunity to the parties to examine Soshi Bhushan Ray and Bhusan Chandra Das. It was further alleged in the course of the argument that Haran Chandra Chatterjee, on the ground of pretended illness, avoided the Court, and was examined on commission. We accordingly decided to summon Haran Chandra Chatterjee also for examination in this Court. These three persons have been examined here. Soshi Bhushan Ray admits that he acted as the scribe; but he states that he was not present when the document was actually executed.

Haran Chandra Chatterjee adheres to the statement he made in the Trial Court that he was present at the time of execution of the document, that he saw the executant affix his signature thereto and that he thereafter put down his own name as that of an attesting witness. Bhusan Chandra Das states that at the request of the mortgagor he became a witness to the document. He admits that he did affix his signature to the document but he has no recollection of any other circumstances in connection with the execution of the document. He admits, that, on the day of execution, he was later on present at the Registration Office and that he identified the mortgagor Rakhalraj Ray when the latter admitted execution before the registering officer. The question thus arises whether on the facts stated, the inference may legitimately be drawn that the requirements of section 59 of the Transfer of Property Act have been fulfilled; in other words, whether Rakhalraj Ray executed the document in the presence of two persons who saw him execute the document and became attesting witnesses. As regards Haran Chandra Chatterjee there can, in our opinion, be no doubt that he was present, that he did see the execution and that he affixed his signature as an attesting witness. As regards Bhushan Chandra Das, we accept his testimony that he was present and affixed his signature as an attesting witness at the request of the mortgagor. But he was unable to recollect whether he actually saw Rakhalraj Ray execute the document. The appellant contends that such evidence as this does not entitle the plaintiff to treat the document as a valid mortagage-deed. We are not prepared to accept this contention as well founded.

The principle applicable to cases of this character was considered by this Court in *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (6) by the Allahabad High Court in *Ram Dei* v. *Munna Lal* (7), *Uttam Singh* v. *Hukam Singh* (8) and *Shib Dayal* v. *Sheo Ghulam* (9) and by the Madras High Court in *Venkata Reddi* v. *Muthu Pambulu Naick* (10). In the first of these cases, *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (6), the mortgage-deed, on the face of it, showed that it was attested by two witnesses. One of them was the writer, but he denied execution of the deed by the mortgagor. This denial, however, was found to be false by the Court of Appeal below. The other witness stated that the mortgagor signed in his presence, but he was not able to remember whether the mortgagor signed also in the presence of the writer. It appeared, however, on the face of the document, that the signature of the writer preceded that of the other witness. It was ruled by this Court that it might be fairly presumed that both signed as attesting witnesses after the execution of the document by the mortgagor and that such presumption might be made on the principle enunciated in section 114 of the Indian Evidence Act. Reference was made

(6) 7 C. W. N. 384.
(7) 38 Ind. Cas. 175; 39 A. 109; 14 A. L. J. 1041.
(8) 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 164.
(9) 38 Ind. Cas. 694; 39 A. 241; 15 A. L. J. 167.
(10) 60 Ind. Cas. 554; 39 M. L. J. 463.

to the decision in *Burgoyne* v. *Showler* (11). In that case, upon the face of the Will, without a memorandum of attestation, there was a signature of the testator at the foot, as also the subscription of two witnesses. It was ruled by Dr. Lushington that, in the absence or death of witnesses, *prima facie*, the presumption is that the testator signed in the joint presence of the two persons and that they subscribed in his presence. This principle was applied by the Allahabad High Court in the three cases mentioned where reference was made to *Wright* v. *Sanderson* (12). These decisions were followed, as based on sound principle, by the Madras High Court in the case mentioned before. Reference may in this connection be made to the decision in *In the goods of Gunstan*, *Blake* v. *Blake* (13), *Harris* v. *Knight* (14) and *In the Goods of Frances Peverett* (15). In the case before us, we have the affirmative testimony of one attesting witness that he was present, saw the execution and became an attesting witness. We have the testimony of another witness that, at the request of the mortgagor, he became an attesting witness. We have the further fact that, on the same day when the document was later on presented for registration, this second witness identified the executant, who, in his presence, admitted execution before the registering officer. At that time the signatures of these witnesses appeared as those of attesting witnesses on the face of the document presented for registration. We may, in these circumstances, legitimately draw the inference that the requirements of the law were fulfilled. No doubt, as pointed out in *In the Estate of Strong, Strong* v. *Hadden* (16), the question is one of inference from the surrounding circumstances; and cases are conceivable where the Court may decline to draw the inference by reason of proof of facts which show that the requirements of the law were not in the contemplation of the parties. In the present case, no such considerations arise and we hold that the document in suit is a duly attested and registered mortgage-deed.

We may add that when the case was originally argued before us, advantage was taken by the appellant of the failure of the respondent to produce the mortgage-bond to build the argument that the mortgage-bond was never taken out of the Registration Office because the consideration was not in fact paid by the mortgagee to the mortgagor. At the request of the parties, we called for a report from the Registration Office as to whether the document was still in the custody of the officer concerned. The Registrar stated that the document was taken out of the Registration Office on the 31st March 1911, that is, four days after it had been executed and presented for registration. If the document was taken out by the mortgagor, it should in the normal course of events be in the custody of the appellant. If, on the other hand, it was taken out by or on behalf of the mortgagee, we have to consider whether the story of loss, as narrated by Haran Chandra Chatterjee, is probable. Bhushan Chandra Das has stated that he actually took it out of the Registration Office on behalf of the mortgagee and made it over to Haran Chandra Chatterjee, who states how it was lost while in his possession. This story is corroborated by the affidavit made by Haran Chandra Chatterjee before the Magistrate of Howrah on the 10th April 1910 when he notified the loss of the document. The failure of the plaintiff to produce the original mortgage-bond does not consequently lend colour to the theory that the mortgagor did not deliver the document to the mortgagee because no consideration was paid for the transaction.

As regards the second objection, the defendant is in no better position. The document was executed by his father, and contains a recital that the consideration had been received by the executant. The burden lies upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained

(11) (1844) 1 Rob. 5; 3 Notes of Cases 201; 8 Jur. 814; 163 E. R. 945.

(12) (1884) 9 P. D. 149; 53 L. J. P. 49; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180.

(13) (1882) 7 P. D. 102; 51 L. J. P. 36; 46 L. T. 641; 51 L. J. Ch. 377; 30 W. R. 505.

(14) (1890) 15 P. D. 170; 62 L. T. 507.

(15) (1902) P. 205; 71 L. J. P. 114; 87 L. T. 143.

(16) (1915) P. 211; 84 L. J. P. 188; 112 L. T. 997; 31 T. L. R. 256.

an untrue recital of this description; *Fulli Bibi* v. *Bassirudi Midha* (17), *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Singh* (18) and *Ali Khan Bahadur* v. *Indar Parshad* (19), *Brajeshware Peshakar* v. *Budhanuddi* (20), *Bisheswar Dayal* v. *Harbans Sahay* (21) *Rahimjan Bibi* v. *Imanjan Bibi* (22). This burden has not been discharged. On the other hand, there is affirmative evidence on the part of the plaintiff to show that consideration was in fact paid. We hold accordingly that the Subordinate Judge has correctly found that consideration passed as alleged and that the mortgage transaction was operative.

The result is that the decree of the Subordinate Judge is affirmed and this appeal is dismissed with costs.

S. C. M. & N. H. *Appeal dismissed.*

(17) 4 B. L. R. (F. B.) 54; 12 W. R. (F. B.) 25.
(18) 12 M. I. A. 286 at p. 307; 2 Suth. P. C. J. 225; 2 Sar. P.C J. 429; 20 E. R. 347.
(19) 23 I. A. 92; 23 C. 950; 7 Sar. P. C. J. 63; 12 Ind. Dec. (N.S.) 631 (P. C.).
(20) 6 C. 268; 7 C. L. R. 6; 3 Ind. Dec. (N.S.) 175.
(21) 6 C. L. J. 659; 3 M. L. T. 38.
(22) 15 Ind. Cas. 698; 17 C. L. J. 173.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 95 OF 1921.
April 19, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Coutts-Trotter.

THE ADMINISTRATOR-GENERAL, MADRAS—PETITIONER—APPELLANT

versus

V. V. RAMIAH AND ANOTHER—APPLICANTS—RESPONDENTS.

Administrator-General's Act (III of 1874), s. 52—Administrator-General's Act (III of 1913), s. 42—Rules framed by Madras Government, r. II (3) (c)—Administration commenced under Act of 1874—Fees payable to Administrator-General—Computation, method of—Interpretation of Statutes.

In the case of the administration of an estate which commenced before the 1st April 1914, the amount which the Administrator-General is to receive is a percentage on the value of the assets distributed, provided they have, before distribution, been collected by him; with the result that if there is a rise in the value of the estate since collection he gets a larger amount by way of commission, and if there is a fall in the value of the estate his commission decreases proportionately. [p. 184, col. 1.]

Per *Schwabe, C. J.*—The first principle of the interpretation of a Statute is to take the ordinary interpretation of the words, and it is only in cases in which there might be more than one ordinary interpretation of the words that the Court has to look to anything outside to arrive at the meaning. [p. 183, col. 1.]

Appeal from the judgment of Mr. Justice Phillips, dated the 23rd of September 1921, passed in the exercise of the Original Testamentary Jurisdiction of this High Court, in O. P. No. 13 of 1921.

Mr. *J. R. Atkinson*, for the Appellant.

Messrs. *V. V. Srinivasa Aiyangar* and *K. Krishnaswami Aiyangar*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The question is whether, for the purpose of arriving at the amount of commission payable to the Administrator-General in the administration of an intestate estate in cases where the administration commenced before April 1914, the value of the assets is to be taken at the date of their collection or at the date of their distribution.

By the Act of 1913, the fees, whether by percentage or otherwise, to be charged in respect of the duties of the Administrator-General are those that may be prescribed by the Government provided that in respect of estates the administration of which commenced before the Act, the fees prescribed are not to exceed the fees leviable in respect of such an estate under the Act of 1874, which had been in force down to that date, and which was by that Act repealed. The word "prescribed", in that section means "prescribed by rules issued by the Government." So far as Madras is concerned, rules have been issued by Government in 1916. Rule II (1) prescribes that the Administrator-General shall be entitled to receive a commission upon the amount or value of the assets which he collects at rates varying according to the total value of the estate. Sub-section 3 (*c*) of the same rule, referring to the commission payable in such cases

says that, "such commission shall be payable to and retained by him upon the collection of the assets." The rule goes on after a full stop. "In the case of any estate the administration of which has been committed to the Administrator-General before the 1st April 1914, the commission chargeable shall be at the rate of five per centum as prescribed by section 52 of the Administrator-General's Act, 1874, or at the rate of three per centum in the case of estates falling under section 53 of that Act." Though it is very difficult to construe that rule, I think that it means that the new rates prescribed are to prevail in respect of estates newly coming under the administration, but that in respect of old estates, the old law is to prevail. I think that the object of that was to avoid the difficulties which would otherwise arise owing to the proviso in section 42 of the Act of 1913, which would involve an examination in each case to ascertain whether or not the rate charged exceeded the rate chargeable under the old Act, and, in my judgment, the policy was to keep alive for the pre-1914 administrations the old Act of 1874.

We will, therefore, have to look at the Act of 1874 (section 52) to ascertain how the amount to be charged by the Administrator-General is to be arrived at. In construing section 52 of the Act of 1874, we must apply all that rules of construction which applied to that section, when in force, in order to throw light on the intention of the Legislature in enacting particular words in the section under interpretation, and, therefore, I think, in order to solve the question of the meaning of section 52, we are entitled, and indeed bound, to look to sections 53, 54 and 55.

The first principle of interpretation is to take the ordinary interpretation of the words, and it is only in cases in which there might be more than one ordinary interpretation of words, that one has to look to anything outside to arrive at the meaning. The words of section 52 are: "The Administrator-General of Bengal shall be entitled to receive (a commission) at the rate of three per centum, and the Administrators-General of Madras and Bombay, respectively, at the rate of five per centum, upon the amount or value of the assets which they respectively collect and distribute in due course of administration." The amount of the commission, whether it be three per centum or five per centum, is made payable upon the amount or value of the assets collected and distributed. The ordinary English meaning of these words is "on what is both collected and distributed;" or, to put it in other words, "on what, having been collected, is distributed." On that interpretation the value cannot be properly ascertained until distribution. It is said that, if one looks at section 54, it is clear that the meaning is not the ordinary English meaning, but the words must be read either to mean "on the amount or value of the assets when collected" or "on the amount or value of assets when distributed, whichever may be the lesser amount," and an argument was addressed to us based on section 54 which in fact provides that one-half of the commission is to be payable and retained by the Administrator General upon collection and the other half upon distribution, which is said to show that you must value at the time of collection in order to arrive at the commission payable. I confess that this provision of section 54 gives rise to very considerable difficulty, but, on the whole, I think it can be explained by saying that the object of section 54 was to provide for the payment on account to one Administrator-General, and the possible adjustment of accounts between him and a subsequent Administrator-General when one had collected and the other had distributed, and was not intended to, and did not, affect the amount that was to be paid by the estate, and I think the words, "the amount of the commission lawfully retained by the Administrator-General upon the distribution of the assets shall be deemed a distribution within the meaning of this Act" are a corroboration of this view, because, in my view, if the other interpretation were right, that clause might be read "the amount of the commission lawfully retained by the

Administrator-General upon the collection or the distribution of assets shall be deemed a distribution in the due course of administration within the meaning of this Act." In my view the true explanation is that that section had nothing whatever to do with the public, except in so far as it entitled the Administrator-General to retain some money in advance, and that the rights as between the public and the Administrator-General are governed by section 52; and I see no reason for departing from what, in my view, is the natural interpretation of the words of that section and there is no reason for not holding that the amount which the Administrator-General is to receive is a percentage on the value of the assets distributed provided, of course, they have, before distribution, been collected by him, with the result that if there is a rise in the value of the estate since collection, he gets a larger amount by way of commission, and if there is a fall in the value of the estate his commission decreases proportionately.

On these grounds, I think, this judgment must be reversed and the appeal must be allowed but, without costs as the matter is one of public importance and the Administrator-General quite properly does not press for his costs. The respondent will take his costs out of the estate.

Coutts-Trotter, J.—I think this is a very difficult case. The matter arises by reason of section 42 of Act III of 1913 which provides for fees for the Administrator-General by rules promulgated by Government. The Act took the place of an old Act, II of 1874, which provided fees for the Administrator-General on a totally different basis. In those days the taking of the fees was a personal remuneration for his services; under the present Act the fees go to Government and the Administrator-General is paid a fixed salary for the work of his office. By the rules certain rates are fixed. By rule II (3) (*a*), the Administrator-General is entitled to receive on the amount or value of the assets which he collects in the course of administration remuneration according to a certain scale varying with the value of the estate. Sub-rule (*c*) runs as follows:—"Such commission shall be payable to and retained by him upon the collection of the assets. In the case of any estate the administration of which has been committed to the Administrator-General before the 1st April 1914 (it is in regard to such an estate that this case has arisen) the commission chargeable shall be at the rate of five per centum as prescribed by section 52 of the Administrator-General's Act, 1874, or at the rate of three per centum in the case of estates falling under section 53 of that Act." The argument that has been put forward in this case is that the reference to section 52 of the Act of 1874 and section 53 of that Act did not incorporate anything of those sections beyond the rate of percentage, which is contained therein, five per centum in one case and three per centum in the other. That is a very attractive argument and would make a very short way to the decision of the case, but, in my opinion, it is an argument that cannot be accepted, though I have very great doubt about it. The words occur in a section which is not fixing a schedule or scale of charges which is sub-section (*a*), but in a section which appears to be defining and fixing the time at which the commission shall be payable to and taken over by the Administrator-General, which is upon the collection of the assets. I cannot think that even a careless draftsman would insert in such a section a topic which did not relate to the matter therein but related to what I may call the method of computation of the commission as distinct from what the amount of the commission is to be.

Having got over that initial difficulty I find myself in this position: that I am to look to section 52 of the Act of 1874 to find out how the perception of the commission is to be carried out, and the section runs thus: "The commission shall be received at the following rates, *viz.*, at the rate of five per centum upon the amount or value of the assets which they (that is, the respective Adminis-

trators-General) respectively collect and distribute in due course of administration." They are to be paid commission on the value of what they collect and distribute. If these words stood alone, I should have very little difficulty about it. It seems to me that they must mean as my Lord paraphrased it—the amount of assets which, having collected, they proceed to distribute in due course of administration. They cannot distribute before they have collected. It may be that the words are superfluous, but to my mind they bear the plain meaning that the commission is to be taken on what reaches the hands of the beneficiary through the hands of the Administrator-General. It seems to me that that produces the most reasonable result, that the beneficiary should pay commission only on what reaches him during the course of administration. I cannot overlook another aspect of the case, *viz.*, that the new Act unquestionably has put an end to that construction, so that to the mere argument that it was reasonable, I do not think that I ought to attach too much weight in construing the Act of 1874. Nevertheless, I think that this is the primarily reasonable meaning of the words apart from any question of policy or equity. But then it is said, in order to constr section 52, you have got to look to section 54 of that Act and if you find that that contemplates some other method of computation, then, although section 54 is no doubt dead, it is perfectly legitimate to use it as a means of ascertaining what must have been the necessary meaning of section 52. I accede to that argument and I think we are entitled and indeed bound to look at the other sections for the purpose of construing any one of them though only one is in fact re-enacted. Section 54 says that one half of the commission shall be paid to and retained by such Administrator-General upon the collection of the assets and the other half shall be payable to the Administrator-General who distributes any assets in due course of administration, and may be retained by him upon such distribution. If the object of that section is clearly to provide for the case where there is a change in the office of the Administrator-General during the course of the administration of any given estates and to provide a method by which the commission should be shared between the successive incumbents of the office, then, of course, the provision that one half of the commission would be paid to the Administrator-General who collects the assets will of course take effect, whether there is going to be a change or not, because no one knows whether the Administrator-General will survive to distribute or whether he will not. The argument based on these words is that 'one-half of such commission' involves this position, that the exact amount of the commission must be known at the time of the collection of the assets, because you cannot allot one-half of a quantity which is not once and for all fixed. The answer appears to me to be that you can make an approximate estimate of the likelihood of the total amount of the assets and on such an estimate the one-half commission has to be based. If the estate, as is the case in regard to the estate that has given rise to the present discussion, increases in value between the collection and distribution, it is obvious that there has got to be a collection of the other half of the commission upon the estate which has increased in value. Some suggestions have been made in the helpful arguments of Mr. V. V. Srinivasa Aiyangar as to how that is going to be worked out. Where there are two halves you must have obviously a second valuation of some sort if you are to carry out section 52 and bring in the value of the estate and distribution at all. This is no doubt a rough and ready rule and to carry it out literally may effect the result: that the subsequent Administrator-General would get a large commission, while his predecessor who had worked for the collection would get a comparatively small amount. That may be the effect of that section. Another method is to suggest that what the section contem-

plates—for it says not a word about it—must be some sort of real adjustment as between the Administrator-General in office at the time of collection and the Administrator-General in office at the time of distribution so as to make their sharers equal. But I think, it is unnecessary for me to go into the various suggestions as to the true construction of section 54 because, as I have already said, section 54, to my mind, is only legitimately considered as a guide to construe section 52. I have come to the conclusion in agreement with my Lord, that section 54, whatever it means and whatever be its true construction, is an important guide. There are two possible results, first, that the Administrator-General should have a little cash in hand to proceed with his work of collecting the assets and administering the estate and, secondly, that the foundation should be laid for an adjustment of some sort as between successive Administrators-General. But section 54 does not control the fixing of the commission as between the Administrator-General—whether he be the same person throughout or not—on the one hand and the beneficiary who is to pay the commission on the other, and, in my opinion, the commission fixed by section 52 can only be the commission upon the value of the assets as they are ultimately distributed and placed in the hands of the beneficiary or beneficiaries.

I, therefore, agree that this appeal must be allowed.

V. N. V.
Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 38 OF 1923.

June 13, 1923.

Present:—Mr. Justice Kanhaiya Lal.

GOPAL DAS AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Babu GAURI SHANKER PRASAD AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 151—Order for payment of costs of commission; nature of—Enforcement of such order—Inherent power—Proceedings to enforce order, nature of—Appeal.

An order passed by a Court for the payment of the costs connected with the execution of a commission which are recoverable from the parties to the suit, is virtually an order in favour of an officer of the Court, and may be enforced under the inherent powers conferred on the Court by section 151 of the Civil Procedure Code, and any proceeding taken to enforce such order is not a proceeding between the parties to the suit within the meaning of section 47 of the Code, and the order is not open to appeal. [p. 187, col. 2.]

Execution second appeal against a decree of the District Judge, Benares, dated the 5th of October 1922.

Mr. *K. Verma*, for the Appellants.
Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—In a suit for partition a preliminary decree was passed appointing a Commissioner to make a partition and to ascertain the debts and outstanding amounts and the capital and stock-in-trade of a certain shop and to take them in account in framing his proposals. That decree was the subject-matter of an appeal to this Court. While that appeal was pending, the Commissioner proceeded with his work and found that a sum of Rs. 100, settled as payable to him for executing the commission, was insufficient in consideration of his labour. He, therefore, when submitting his accounts and the list of the properties proposed to be partitioned, moved the Court to award him Rs. 800 as his fees for the work he had done. The Court thereupon ordered that Rs. 600 should be paid to him by the plaintiffs and Rs. 200 by the defendant, and that if the appeal from the preliminary decree was successful, the defendant would be entitled to recover the latter sum from the plaintiffs. It further ordered that a decree for the amount should be prepared in favour of the Commisssioner against the parties to the suit. This order was passed on the 22nd of March 1919; but no decree was actually prepared in pursuance of the above order in favour of the Commissioner. The plaintiffs made default in the payment except of a small portion of the money.

RAM CHAND v. BANK OF UPPER INDIA, L. D., DELHI.

The appeal from the preliminary decree eventually succeeded and the entire claim was ultimately dismissed by the Court of first instance on the 15th of April 1920. In the closing or final decree then prepared the direction of the 22nd of March 1919 regarding the payment of remuneration due to the Commissioner by the plaintiffs was not embodied. Meanwhile, the plaintiffs obtained an order adjudicating them insolvents, on the 24th of March 1920. They subsequently obtained an order of discharge on the 26th of January 1921. During the insolvency proceedings no mention is said to have been made by them of the amount which they were liable to pay to the Commissioner and in the schedule of proved debts prepared the amount due to the Commissioner is not stated to have been shown.

An application has since been made by the Commissioner for the execution of the order of the 22nd March 1919 by the arrest of the plaintiffs. The plaintiffs opposed this application on the ground among others that, having been declared insolvents and discharged they were not liable to arrest in lieu of a debt proveable in the insolvency proceeding within the meaning of sections 34 and 44 of the Provincial Insolvency Act (V of 1920). When this objection came up for hearing the plaintiffs-judgment-debtors stated, that they were not in a position to pay any money at that time but would be able to do so after they start some business and earn some money. The Commissioner agreed to allow them time for the payment of the money due to him. The learned Subordinate Judge acceded to the request of the judgment-debtors for time and allowed them two years to pay the money, but at the same time he disallowed their objection. The judgment-debtors appealed to the District Judge who dismissed their appeal holding that no appeal was entertainable under section 47 of the Code of Civil Procedure. The preliminary question for consideration here is, whether section 47 has any application to the case. As has already been pointed out, there was no decree prepared in the case; in fact the person who was seeking redress was not even a party to the suit in which the order sought to be executed was passed. The order in question was virtually an order passed by the Court in favour of one of its officers for the payment of costs connected with the execution of a commission which were recoverable from the parties to the suit. An order of that character may be enforced by the Court under the inherent powers conferred upon it by section 151 of the Code of Civil Procedure in such manner as may be thought proper. Any proceeding taken in enforcement of such an order is not a proceeding between the parties to a suit for the execution of a decree within the meaning of section 47 of the Code of Civil Procedure and the learned District Judge was right in holding that no appeal lay to the Court below and no appeal would similarly lie here. The appeal is, therefore, dismissed with costs.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 459 OF 1917.
December 13, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

RAM CHAND — DEFENDANT—APPELLANT
versus
BANK OF UPPER INDIA, LIMITED, DELHI—PLAINTIFF—AND THE DIAMOND JUBILEE FLOUR MILLS COMPANY, LIMITED, DELHI—DEFENDANT—RESPONDENTS.

Company in liquidation—Secured creditor, rights of—Winding up order, effect of—Appeal—Objection to document admitted by First Court, whether entertainable.

The rules relating to insolvency proceedings are, as far as possible, applicable to liquidation matters. [p. 192, col. 1.]

When a Company goes into liquidation, a secured creditor may realise his security and recover therefrom the whole of his principal as well as the interest up to the date of his realisation, and

not merely the amount due on the date of the winding-up order. But if he realises his security and has to prove for a balance, the remaining assets of the Company would only be liable for such principal and interest as was due on the date of the winding-up order. The hypothecated property is liable for the whole claim and it is only the liability of the remaining of assets that is affected by the winding-up order. [p. 192, cols. 1 & 2.]

A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. He may, if he choose, disregard the liquidation proceedings and proceed against his security. [p. 192, col. 1.]

Case-law discussed.

It is too late in appeal to object to the admissibility in evidence of documents, for instance, answers to interrogatories, which have been admitted without objection in the First Court. [p. 190, col. 1.]

Shahzadi Begam v. *Secretary of State*, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.), followed.

First appeal from a decree of the District Judge, Delhi, dated the 31st October 1916.

Messrs. *Moti Sagar* and *Mul Chand*, for the Appellant.

Mr. *C. Bevan-Petman*, for the Respondents.

JUDGMENT.

Broadway, J.—This appeal has arisen out of a suit brought by the Bank of Upper India, Limited, Delhi, against the Diamond Jubilee Flour Mills Company, Limited, Delhi, and one Ram Chand for the recovery of Rs. 1,60,914-2-7 due on account of advances made to the said Flour Mills and secured by a deed referred to as a "cash credit loan bond," dated the 24th September 1901 and executed in favour of the Bank by the said Flour Mills and Ram Chand jointly. The said Flour Mills were in liquidation when the suit was instituted and the Official Liquidator contested the suit alleging that it was premature owing to the fact that it had been brought before the expiry of six months' notice agreed upon in the deed. It was also contended that the Bank was not entitled to any interest accruing after the 24th of June 1913 on which date the Bank went into compulsory liquidation.

Ram Chand filed separate pleas supporting the Official Liquidator in his allegation that the suit was premature, and pleading further that the suit was time barred, and that he was not personally liable. Further, he contended that his land was not chargeable with this claim inasmuch as his liability had been discharged owing to the variation of the original contract in which he was only a *surety*. The Bank in reply traversed these pleas and, as against Ram Chand, claimed that he was the principal debtor and not a surety and was also personally liable. The Trial Court framed the following issues:—

"1. Can plaintiff demand the amount due without six months' notice in the event of any of the contingencies mentioned in paragraph 2 *f* (*b*) of the plaint?

"2. Have any of these contingencies occurred?

"3. If not, is not the suit liable to dismissal as premature being brought before the expiry of the six months from notice?

"4. Was the plaintiff able to secure his rights by intervening in an application for liquidation, and does this disentitle him to costs?

"5. Is Lala Ram Chand liable only as a surety after plaintiff has exhausted his remedy as against defendant No. 1?

"6. Is the suit against Lala Ram Chand time barred under Art. 132, Limitation Act?

"7. Do the agreements mentioned in paragraph 4 of the plaint discharge Lala Ram Chand from liability?

"8. Does Lala Ram Chand incur any personal liability beyond that attaching to the land hypothecated?

"9. Is plaintiff debarred from bringing Lala Ram Chand's land to sale by suit?

"10. Is the mortgage in contravention of the provisions of section 69, Transfer of Property Act, and therefore void, and can no suit be brought on it?"

It was ultimately held that Ram Chand was a principal and not merely a surety, and that he was not personally liable, his liability extending only to the land hypothecated by him; and the Bank's suit was decreed against both the Mills and Ram Chand to the extent of the amount claimed together with future interest as agreed in the

RAM CHAND *v.* BANK OF UPPER INDIA, LD., DELHI.

bond. It was, however, declared that the only amount realizable by sale from the property charged was that due under the bond on the 24th of June 1913, *i.e.*, the sum of Rs. 1,52,000 and proportionate costs, the Bank being directed to prove for the balance in insolvency proceedings, presumably liquidation proceedings being meant. The Mills were rendered liable for the Bank's costs, but Ram Chand was allowed half his costs against the Bank. Against this decree two appeals have been preferred, one, Civil Appeal No. 291 of 1917 by the Bank through Mr. C. Bevan-Petman, and the other, Civil Appeal No. 459 of 1917, by Ram Chand through Mr. Moti Sagar. In the appeal by the Bank the decision of the Trial Court that the property hypothecated was only liable to the extent of Rs. 1,52,000 was attacked. In the appeal by Ram Chand all the findings against the appellant were contested. At the hearing, however, only two points were argued; first, that on the proper construction of the deed Ram Chand was only a surety, and, secondly, that the suit was barred by limitation. The remaining points were specifically dropped by Mr. Moti Sagar. The appeals being against the same decree they will both be disposed of by this judgment and I will first take up Civil Appeal No. 459 of 1917, namely, that by Ram Chand.

It appears that the site on which the buildings belonging to the Diamond Jubilee Flour Mills were constructed belonged to Ram Chand, appellant. Ram Chand was a member of a firm called Ram Chand and Company, which firm were the Managing Agents of the Flour Mills on the date when this cash credit bond was executed. It was alleged that the contract between the executing parties was to advance to the Mills alone a sum not exceeding two lakhs, and that a proper construction of this document showed that Ram Chand only signed it as a surety, he being the owner of the land on which the Mills' premises were situated. The preamble of the deed is to the following effect:—

"An agreement made at Delhi this twenty-fourth day of September 1901 between the Diamond Jubilee Flour Mills Company, Limited, and Lala Ram Chand, the owner of the land on which its premises are built, *hereafter collectively referred to as the said Company of the one part* and the Bank of Upper India, Limited, Delhi Branch. * * * of the other part."

In paragraph II, it was agreed that—

"The advance shall bear compound interest at eight (8) per centum per annum calculated half-yearly, such advances to be re-paid by the 'said Company' by such recoupments as the 'said Company' may make from time to time, provided that the 'said Company' shall not borrow any sum from any other person or Banker whatsoever for the purpose of making such recoupments except on the expiry of the six months' notice hereinafter mentioned. The said Bank shall be entitled to the re-payment of all principal and interest due to it on account of such advances on giving six months' written notice of its desire to close the account, provided that such account may be closed without such notice at any time if the said Company goes into liquidation, stops its Mill's working, works at a loss or commits breach of any of the terms of this agreement * * *"

In paragraph III, it is stated that—

"As security for the said advances and interest or any balance thereof that may be due from time to time the said Diamond Jubilee Flour Mills Company, Limited, hereby grants unto the said Bank a first lien on certain property specified including buildings plant, machinery, tools, furniture, stock in trade, raw materials, etc."

It then proceeds to recite as follows:—

"And the said Lala Ram Chand hereby grants unto the said Bank a first lien free from all encumbrances and charges on the land on which the said Company's premises are situated."

Then follow the boundaries.

It was contended that the expression "the said Company" which was declared in the preamble to refer to the Flour Mills and Ram Chand collectively, has

not been strictly employed in that sense throughout the various clauses of the deed, and that, therefore, it was open to Ram Chand to prove by oral evidence that he was acting merely as a surety when he signed the deed. In this connection attention was drawn to the evidence of Mr. G. H. Webb at page 71 of the paper-book. This gentleman had been in the employ of the Bank when this contract was entered into. He was examined in 1916 or something like 15 years after the execution of the deed. He was examined on interrogatories and a copy of the deed was shown to him. His evidence is to the effect that Ram Chand was only a surety to the extent of the land hypothecated by him. Objection was taken to the admissibility of this evidence by Mr. Petman. Mr. Moti Sagar contended that this evidence having been admitted without objection could not now be objected to in appeal and in support of his contention he cited *Shahzadi Begam* v. *Secretary of State* (1), in which it was held that it was too late in appeal to object to the admissibility in evidence of a document which had been admitted without objection in the First Court. It seems to me that this authority is in point, and that the evidence of Mr. Webb must be regarded as admissible at this stage. Mr. Webb's testimony, however, is the only evidence supporting Ram Chand's claim that he was a mere surety. Mr. Petman contended that Mr. Webb's evidence was really worthless. He was a dismissed employee of the Bank (which appears to be correct) and was speaking from memory. After a perusal of this gentleman's evidence, it seems to me impossible to accept it as conclusively proving that Ram Chand was merely a surety and not a principal when he executed the cash credit bond in question. The land of which he was the owner, and on which the premises belonging to the Flour Mills stood, had been leased to the Flour Mills by Ram Chand on a 99 years' lease. He was a member of the firm who were the Managing Agents of the Mills and from the correspondence on the record, printed at pages 5, 6, 7, 8, 9 and 10 of the printed paper-book, there can be no doubt that Ram Chand was well aware of the real nature of the transaction. He was aware that the Bank was agreeing to advance monies to the Flour Mills on the security of the property belonging to the Mills as well as on the security of the land, of which he was the owner. He himself went into the witness-box at the end of the case and has stated that he signed this deed as a surety. He admits, however, that the land belongs to him and not to Ram Chand and Co., and that the Mills used to send a balance-sheet to the Bank every year. He admits having signed the document, and that his signature refers to his land only. He, however, states that he did not read the deed and further that he only read it after the suit had been filed. I find it impossible to believe this evidence. The document itself appears to me to be perfectly clear, and under it Ram Chand hypothecated his land to the Bank not as a surety but as a principal, and I would hold accordingly. In this view of the case, Ram Chand being a principal and not a surety the question whether any act or acts on the part of the Bank discharged him does not arise, and it is, therefore, not necessarry to discuss Mr. Moti Sagar's arguments on this point.

The second point taken by the learned Advocate for the appellant was that the suit was barred by limitation. It was contended that a breach of the conditions entered in the deed took place before April 1902 and that as the suit was not brought till the 30th April 1914 it was barred under Art. 132. In support of this the balance-sheet for the year ending 30th April 1902, printed at pages 50 and 51 of the paper-book, was referred to. There, on the debtor's side, is entered an item of Rs. 16,248-14-6 as "other loans as drafts not enumerated above." Next, an entry dated the 27th of January 1902, printed at page 3 of the paper-

(1) 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.).

book was referred to as showing that the Flour Mills had, to the knowledge of the Bank, incurred a loan of Rs. 5,000 from another source which had been paid into the Bank. Reliance was placed on *Sham Sundar* v. *Abiul Ahad* (2) and *Sitab Chand* v. *Hyder Malla* (3) as authorities for the proposition that time commences to run from the date of the first default. With these authorities I am in accord. The question is, however, whether the item of Rs. 5,000 referred to has been shown to have been a loan. The entry at page 3 shows that a *hundi* was discounted by the Bank for Rs. 5,000 the *hundi* being drawn on Radha Kishen-Hazari Lal, Meerut. As pointed out by the learned District Judge it has not been shown that this amounted to a borrowing from the Meerut firm. The Mills may have been due this amount from Radha Kishen-Hazari Lal at Meerut for goods supplied, and this transaction may have been nothing more than the ordinary trade method of adjusting mutual accounts and purchases. In my opinion it has not been proved that the Flour Mills borrowed this or any other sums, for payment to the Bank, and that, therefore, no breach of the covenant not to borrow from any other person has taken place, and I, therefore, am of opinion that the suit is not barred by time.

The other points raised in the grounds of appeal having been dropped by Mr. Moti Sagar, in my view of the questions referred to above, Ram Chand's appeal fails and should be dismissed with costs.

I now turn to the appeal by the Bank, Civil Appeal No. 291 of 1917. Mr. Moti Sagar raised a preliminary objection to the effect that the appeal was bad, in that it had been filed by the Bank of Upper India, which Bank had gone into liquidation, and that, therefore, it was only the Official Liquidator who could appeal. This contention was not supported by any affidavit or other proof, and Mr. Petman informed the Court that, prior to the institution of the appeal, he had corresponded with the Agent of the Bank. In these circumstances, this objection must be overruled.

The point for determination in this appeal is, whether the District Judge is right in declaring that the Bank can only recover Rs. 1,52,000 and proportionate costs by sale of the properties hypothecated, and must prove for the remainder in the liquidation proceedings. Mr. Petman contended that the Bank being a secured creditor was not bound to prove for any portion of its claim in the liquidation proceedings. He contended that the rules relating to insolvency proceedings were applicable to liquidations and in support referred to Lindley on Companies; *In re Joint Stock Discount Co., Warrant Finance Company's case* (4), in which it was held that a secured creditor cannot be deprived of his security until he has been paid in full the principal, interest, and costs due thereon, *In re David Lloyd & Co., Lloyd* v. *David Lloyd & Co.* (5), where it was held by Jessel, M. R., that as a rule a mortgagee has a right to relalize his security; and in *Humber Ironworks and Ship-building Company, Warrant Finance Company's case* (6), where Sir G. M. Gifford, L. J., held that the creditor proves in the winding-up as in bankruptcy, for whatever the amount of the principal and interest up to a particular date may be; but that is for the purpose of convenience in the administration of the winding-up, and does not and is not intended to affect any other rights which the creditor may have, and does not amount to an appropriation in any shape or form.

Mr. Petman then referred to section 16 (5) of the Provincial Insolvency Act and pointed out that the power of any secured creditor to realize or

(2) 31 Ind. Cas. 808; 71 P. R. 1915; 153 P. W. R. 1915.

(3) 24 C. 281; 1 C. W. N. 229; 12 Ind. Dec. (N. S.) 854.

(4) (1870) 10 Eq. 11; 39 L. J. Ch. 417; 18 W. R. 961.

(5) (1877) 6 Ch. D. 339 at p. 343; 57 L. T. 83; 25 W. R. 872.

(6) (1869) 5 Ch. App. 88 at p. 92; 39 L. J. Ch. 185; 21 L. T. 626; 18 W. R. 54[illegible]

otherwise deal with his security is specially reserved under the Bankruptcy Laws, and in further support of his contention he referred to—

Shridharnarayan v. *Atmaram Govind* (7), *Shridhar Narayan* v. *Krishnaji* (8), *Gopi Nath* v. *Gur Prasad* (9), *In re Wyse, Ex parte Chowksey,* (10) and *Lang* v. *Heptullabhai* (11).

It is not necessary to discuss these authorities as, in my opinion, the position is perfectly clear. As far as possible, the rules of bankruptcy have been held applicable to liquidation matters. When a Company goes into liquidation a secured creditor may realize his security and prove for any balance there may be outstanding. If he realizes his security and has to prove for a balance the remaining assets of the Company would only be liable for such principal and interest as was due on the date of the winding-up order. A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. He may, if he chooses disregard the liquidation proceedings and proceed against his security and that is the position taken up by the Bank in the present case.

Mr. Moti Sagar referred to *Ram Saran Das* v, *Basheshar Nath* (12), where it was held that the—

"Liability created by a mortgage can be and is affected by the winding-up of the mortgagor Company so far at least that interest subsequent to the order of winding-up does not continue to be a charge on the assets. For interest subsequent to the winding-up order until payment, the general rule is that they only receive interest after all debts have been paid in full."

The correctness of this proposition was strenuously attacked by Mr. Petman, and it certainly seems to me open to doubt as I am of opinion that a secured creditor can, if he chooses, realise his security and recover therefrom the whole of his principal as well as the interest up to the date of the realization. The property hypothecated would thus be liable for the whole claim and it is only the liability of the remaining assets that could be affected by the winding-up order. The present case is only concerned with the liability of the hypothecated or mortgaged properties and it seems to me that these properties are liable to be sold in satisfaction of the entire claim and not merely for the amount due on the date of the winding up order. It was also contended that interest was not claimable after the winding-up order as the property of a Company in liquidation vested in the Official Liquidator, and that, therefore, in the present case the equity of redemption vested in the Official Liquidator of the Flour Mills on the date of the winding-up order. Doubtless, the property did so vest—but the Official Liquidator is in no better position than the Flour Mills. He can redeem the property by paying up all the monies secured by the deed in question. He cannot force the secured creditor to take less than the amount due at the date of redemption. The property is charged with the monies due according to the terms of the hypothec and continues to be so charged until such monies have been paid up in full according to those terms.

In any event, it is perfectly clear that the portion of the hypothecated property belonging to Ram Chand, *i.e.*, the land, was not, and could not be, affected by the fact that the Flour Mills went into liquidation. In my opinion, therefore, this appeal must be accepted with costs and the Bank must be given a decree for the whole amount of the claim together with future interest as agreed till realization, recoverable from the entire property hypothecated under the deed, and I would order accordingly.

Martineau, J.—I concur.

Ram Chand's Appeal dismissed.

Z. K. *Bank's appeal accepted.*

(7) 7 B. 455; 4 Ind. Dec. (N. S.) 306.
(8) 12 B. 272; 6 Ind. Dec. (N. S.) 667.
(9) 15 Ind. Cas. 860.
(10) 17 Ind. Cas. 31; 6 S. L. R. 97.
(11) 21 Ind. Cas. 714; 38 B. 359; 15 Bom. L. R. 939.
(12) 55 P. W. R. 1907.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2075 OF 1920.

January 30, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

BHAIRABENDRA NARAIN ROY AND ANOTHER—PLANTIFFS—APPELLANTS

versus

RAJENDRA NARAIN ROY—DEFENDANT—RESPONDENT.

Adverse possession—Co-owners—Ouster—Limitation, commencement of—Acquisition of limited interest.

Where possession can be referred to a lawful title it cannot be said that it is illegal and that it is adverse to a co-owner. In order to have the Statute of Limitation run against a co-owner there must be actual ouster or some act equivalent to ouster. [p. 193, col. 2.]

Defendant, a co-sharer landlord of the plaintiffs, obtained a decree for his share of the rent in respect of a non-transferable occupancy holding in the possession of a tenant and in execution of the decree purchased the land himself and entered into possession. More than twelve years after the plaintiffs sued for joint possession with the defendant:

Held, (1) that the purchase by the defendant did not confer any title on him and when he went into possession such possession was illegal against his co-sharers and was equivalent to an ouster of the plaintiffs and limitation commenced to run against them as regards the right to possession of the land from the date when the defendant took actual possession and that the suit was, therefore, barred by limitation; [p. 194, col. 1.]

(2) that although the defendant did not deny the plaintiffs' right to receive rent according to their shares he acquired by adverse possession the limited interest of a tenant. [p. 194, col. 1.]

Probhabati Dasi v. *Taibaturinessa Chaudhurani*, 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62 and *Panchkari Chattopadhya* v. *Maharaj Bahadur Singh*, 28 Ind. Cas. 708; 19 C.W.N. 136, referred to.

Appeal against a decree of the Additional Subordinate Judge, Malda, in Rajshahye, dated the 30th of April 1920, reversing that of the Munsif, First Court, at Malda, dated the 22nd of August 1919.

Babus *Sarat Chandra Roy Chowdhury* and *Krishna Kamal Mitra*, for the Appellants.

Babus *Mohendra Nath Roy* and *Jatindra Nath Sen*, for the Respondent.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit instituted by the plaintiffs for joint possession with the defendant of some lands. The facts lie within a narrow compass. The lands are said to have comprised an occupancy holding in the possession of a tenant, the landlords being both the plaintiffs and the defendant who are co-owners. The defendant brought a suit for his share of the rent against the tenant in occupation, obtained a decree and, in execution of that decree, purchased the land himself and entered into possession in August 1901. The effect of the decree was merely that of a money-decree and the defendant purchased only the right, title and interest of the tenant. The present suit was commenced on the 23rd of June 1917. It is found that the holding was a non-transferable occupancy holding which was purchased by the defendant. It is conceded that the defendant did not acquire any interest under section 22, sub-section (2), of the Bengal Tenancy Act so as to entitle him to resist the claim of the plaintiffs to joint possession, if there is no bar of limitation. The Court of first instance gave a decree for joint possession with regard to one plot only in favour of the plaintiffs. On appeal, the Subordinate Judge has reversed that decree and has dismissed the suit entirely on the ground of limitation.

It is contended on behalf of the plaintiffs, who are the appellants in this Court, that the decision of the learned Subordinate Judge is erroneous. It is argued that the plaintiffs and the defendant being co-sharers, there could be no limitation running against the plaintiffs by the occupation of the land by the defendant unless there was an actual ouster; and it is contended that, because the defendant says that the plaitinffs are entitled to their share of the rent of the land as proprietors of the *mahal*, there has been no ouster and hence the suit is not barred by the Statute of Limitation. The sole question, therefore, is whether, under the circumstances of this case, the defendant has succeeded in establishing the plea of limitation. There is no doubt that where possession can be referred to a lawful title, it cannot be said that it was illegal and that it was adverse to a co-owner. In order to have the Statute of Limitation run against a co-owner, there must be actual ouster or some act equivalent to ouster. It has to be seen, therefore,

whether the taking of possession by the defendant was under a lawful title. The plaintiffs and the defendant as co-sharers were no doubt entitled to receive rent from the tenant in occupation of the land according to their shares. No one of the co-sharers had a right to take actual possession of the land. When the defendant purchased the non-transferable occupancy right, such purchase did not confer any title on him, and when he went into possession, such possession was illegal against his co-sharers. According to the authorities of this Court, the plaintiffs were entitled to seek for possession according to their shares in the land from the date when the defendant took possession of the property. It cannot be said that, when the defendant took possession by virtue of the purchase which he sets up, he took possession in the exercise of his right as a co-sharer in the *mahal* and that there was no ouster of the plaintiffs with regard to the right to possession of the land. As a matter of fact, the taking of possession of the land by the defendant gave rise to the plaintiffs' right to joint possession and so the defendant's possession, of the entire land was equivalent to an ouster of the plaintiffs. Limitation, therefore, commenced to run against the plaintiffs as regards the right to possession of the land from the date when the defendant took actual possession. It is urged that, because the defendant did not deny the proprietary right of the plaintiffs, there could not have been an ouster of the plaintiffs. Defendant, however, does not dispute the plaintiffs' right to receive rent according to their shares. But he claims a tenant's interest by virtue of his purchase of the right of the tenant and he has been in possession adversely of this limited interest for more than twelve years; and it seems to me that the defendant can acquire such limited interest by adverse possession. It makes no difference that he is a co-sharer of the plaintiffs as landlords. There is no difference in principle, in my opinion, between the present case and the cases of *Probhabati Dasi* v. *Taibatunnessa Chaudhurani* (1) and *Panchkari Chattopadhya* v. *Maharaj Bahadur Singh* (2) as regards the acquisition of a limited interest by the purchaser of a non-transferable occupancy holding.

The appeal, therefore, fails and is dismissed with costs.

Walmsley, J.—I agree.

S. C. M. *Appeal dismissed.*

(1) 22 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

(2) 28 Ind. Cas. 708; 19 C. W. N. 136.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1060 OF 1919.

June 17, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

SAIN DITTA, MAJOR, AND JAWALA DAS, MINOR, UNDER THE GUARDIANSHIP OF SIAN DITTA—DECREE-HOLDERS—APPELLANTS

versus

NUR AHMAD AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Land belonging to member of agricultural tribe, whether can be alienated.

A Civil Court can order the temporary alienation of land belonging to a member of an agricultural tribe in satisfaction of a money-decree.

Datar Kaur v. *Ram Rattan*, 58 Ind. Cas. 603; 1 L. 292; 2 L. L. J. 333 (F. B.), followed.

Salih Mohammad v. *Mehar Singh*, 51 Ind. Cas. 399; 1 P. R. 1919 Rev., approved of.

Ahmad Khan v. *Parmanand*, 43 Ind. Cas. 356; 8 P. R. 1917 Rev.; 7 P. W. R. 1917 Rev., dissented from.

Miscellaneous second appeal from an order of the District Judge, Jhang, at Sargodha, dated the 20th February 1919, affirming that of the Senior Subordinate Judge, First Class, Jhang, dated the 7th January 1919.

Lala *Fakir Chand*, for the Appellants.

Hon'ble Khan Bahadur Mian *Fazl-i-Husain*, for the Respondents.

JUDGMENT.—In the present case the holder of a money-decree applied during execution proceedings that his money might be realised by a farm of the land of the judgment-debtor, and the question was referred to the Collector who reported on 19th November 1917, that a farm for nine years would satisfy the decree.

Meanwhile, the Financial Commissioner's decision *Ahmad Khan* v. *Parmanand* (1)

(1) 43 Ind. Cas. 356; 8 P. R. 1917 Rev. 7 P. W. R. 1917 Rev.

KHALIL v. MOHAMMAD ISMAIL.

was published disallowing such a farm in the case of land belonging to a member of an agricultural tribe and the Collector applied to withdraw his suggestion and the Subordinate Judge rejected the decree-holders' application for execution by order of 7th January 1919, which order was confirmed by the District Judge on the ground that the Financial Commissioner's decision concluded the matter. The decree-holder appeals.

Since that time, however, the view taken in this judgment has been dissented from in *Salih Mohammad* v. *Mehar Singh* (2), and by a Full Bench of this Court in *Datar Kaur* v. *Ram Rattan* (3) in which it was held that a Civil Court can order the temporary alienation of the land of a member of an agricultural tribe in satisfaction of a money-decree, and although Mr. Fazl-i-Hussain for the judgment-debtor doubts whether this decision is sound we consider ourselves bound by it and we, therefore, accept the appeal and, setting aside the orders of both Courts, remand the case to the First Court with a direction to dispose of the application in the light of the High Court decision and *Salih Mohammad* v. *Mehar Singh* (2), again referring to the Collector if necessary.

We make no order as to costs as the appeal has not been necessitated by any act on of the judgment-debtor.

Z. K. *Appeal accepted*

(2) 51 Ind. Cas. 399; 1 P. R. 1919 Rev.
(3) 58 Ind. Cas. 603; 1 L. 292; 2 L. L. J. 333 (F. B.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 365 OF 1921.
July 26, 1922.

Present:—Mr. Simpson, A. J. C.

KHALIL, AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MAHOMED ISMAIL, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Question not finally decided*—*Limitation Act (IX of 1908), Sch. I, Art. 120*—*Declaration, suit for*—*Cause of action*—*Assertion of title*—*Limitation, commencement of.*

A *taluqdar* brought a suit for resumption of certain *muafi* plots against the plaintiff. In that suit defendant put in an application claiming to be a partner with plaintiff in the under-proprietary right. The suit was decreed as against the plaintiff only, and the question whether the defendant was a partner with the plaintiff was pronounced to be one for a Civil Court and he was discharged from the suit. More than six years after the date of the defendant's application in the resumption suit, plaintiff brought a suit for a declaration that the defendant had no superior or inferior right or co-partnership with plaintiff in the plots which were the subject-matter of the resumption suit:

Held, (1) that the question of the status of the defendant as regards the plaintiff not having been decided in the previous suit by the Revenue Court, it was not *res judicata*;

(2) that the defendant's plea in the resumption suit that he was a partner with the plaintiff furnished the latter with a cause of action and limitation began to run from the date of defendant's application and that the suit was, therefore, barred by time under Art. 120 of Schedule I to the Limitation Act.

Second appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated the 3rd September 1921, upholding that of the Munsif, Fyzabad, dated the 30th May 1921.

Messrs. *Haider Husain* and *J. K. Banerji*, for the Appellants.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.—This is a second appeal by two plaintiffs whose suit has been dismissed by both the Courts below.

The suit was one for a declaratory decree in favour of the plaintiffs and the defendants Nos. 2 and 3 against the defendant No. 1 to the effect that defendant No. 1 has no superior or inferior right or co-partnership jointly with the plaintiffs and defendants Nos. 2 and 3 in the four plots Nos. 772, 768, 667 and 770.

There was a suit brought by the *taluqdars* for resumption of *muafi* which was decided on 29th November 1915. By that decree the plaintiffs and the defendants Nos. 2 and 3 were declared to be under-proprietors of plots Nos. 772 and 768 and tenants of plots Nos. 667 and 770. Plaintiffs and defendants Nos. 2 and 3 on the strength of this decree issued a notice of ejectment against defendant No. 1 as their sub-tenant. But defendant No. 1 claimed

a suit to contest the notice alleging himself to be a co-sharer with the plaintiffs and defendants Nos. 2 and 3. This contention was upheld and the notice was cancelled on 19th March 1918. Hence the present suit.

The question to be decided between the parties is whether Abid Ali, defendant No. 1, (who is now dead and represented by his seven sons) possesses the same rights as the plaintiffs and defendants Nos. 2 and 3 being a co-sharer with them as under-proprietor of Nos. 768 and 772 and a partner in their tenancy of Nos. 667 and 770 as he alleged, or whether, as plaintiffs say, he is a sub-tenant of plaintiffs and defendants Nos. 2 and 3. But it has to be decided whether this issue can be tried. The bars alleged are *res judicata* and limitation. Lastly, there is a question whether the relief sought, which is a declaration and, therefore, in the discretion of the Court, ought to be granted.

The way the question of *res judicata* arises is this. When the *talugdars* brought their suit for resumption of *muafi* they made plaintiffs and defendants Nos. 2 and 3 parties to it. Defendant No. 1, however, put in an application claiming, as he claims now, to be a partner with plaintiffs and defendants Nos. 2 and 3. He was made a party but ultimately the decree was given only against plaintiffs and defendants Nos. 2 and 3. As regards the defendant No. 1 it was said that his name was not entered in the papers where he was recorded as a sub-tenant only. The question whether he was a partner was pronounced to be one for a Civil Court and he was discharged from the suit. There is no *res judicata* here. Apart from all technical objections, such as the array of parties in the Revenue Court as co-defendants, I find that the present question was not decided in that case. What was decided by the Revenue Court was that the plaintiffs *talugdars* were entitled to get the relief they sought from the parties whom they themselves had named, and who are the only ones entered in the revenue papers. I think there was a decision that Abid Ali had no independent rights in these plots, but that the Court refused to decide whether or not he had any partnership right.

The question of limitation arises in this way. Art. 120 applies. The suit must be brought within six years from the time when the right to sue accrued. Now, in the resumption case when Abid Ali pleaded that he was a partner it is quite clear that that plea gave a cause of action for the present suit. The present suit, therefore, ought to have been brought within six years of that time. Now Abid Ali's application (Exhibit II) is dated 25th May 1914. The present suit was instituted on 16th December 1920 six months beyond time. Therefore, without deciding the main issue, I dismiss the appeal with costs on the ground that the suit was barred by limitation.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 189 OF 1921.

January 29, 1923.

Present :— Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

PATEL AMBARAM KUBERDAS—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,—DEFENDANT—RESPONDENT.

Bombay Revenue Jurisdiction Act (X of 1876), s. 11—Bombay Land Revenue Code (Act V of 1879), s. 203—Application for sanad, *refusal of—Appeal, failure to prefer—Declaration, suit for, maintainability of.*

Plaintiff, who was the purchaser of certain property, having failed to get possession of it, applied to the Collector for a *sanad*. The application was refused on the ground that plaintiff's vendor had not proved his title at the time of the Suburban Survey enquiry and the property had become Government property. Plaintiff, thereupon, brought a suit for declaration of his title and the grant of a *sanad*:

Held, that the plaintiff having failed to appeal under section 203 of the Bombay Land Revenue Code from the refusal of the Collector to grant a *sanad*, his suit was barred by the provisions of section 11 of the Bombay Revenue Jurisdiction Act.

MUNESHAR TEWARI *v.* MAHESHA KUERI.

Appeal against the decision of the District Judge, Ahmedabad, in Suit No. 19 of 1916.

Mr. *H. V. Divatia*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—We think the District Judge was right in holding that the suit was barred under section 11 of the Bombay Revenue Jurisdiction Act, X of 1876. The plaintiff having purchased certain property from one Kasam Punja made an application to the Collector, which must have been due to the fact that he could not get possession of the property which he thought he had purcased. The Collector replied that as Kasam Punja, the plaintiff's vendor, had not proved his ownership at the time of the Suburban Survey inquiry, it was held to be Government land. Therefore, the application had held a right to the said land and asked for a *sanad* in respect of the same could not hold good because the land was Government land. That refusal to grant a *sanad* was the cause of action on which the plaintiff relies when he filed this suit.

It is also clear from the notice he gave to the Secretary of State under section 80 of the Civil Procedure Code, that the notice was given because his application to the Collector had been rejected. The plaintiff could have appealed under section 203 of the Land Revenue Code but he omitted to do so. Section 11 of the Revenue Jurisdiction Act clearly prevents us from entertaining any suit on account of the Collector's refusal to grant the plaintiff a *sanad*, as the plaintiff had to prove that, previously to filing this suit, he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit, it was possible to present. He presented no such appeals. This appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 78 OF 1922.

April 24, 1923.

Present:—Mr. Justice Daniels.

MUNESHAR TEWARI—PLAINTIFF—APPELLANT

versus

Musammat MAHESHA KUERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 4 (5), 58, 63, 194 (3)—Co-sharer entitled to collect rent—Ejectment suit by him, if maintainable.

A co-sharer who is entitled to collect the entire rent of a tenant is, for the purposes of the Agra Tenancy Act, a land-holder and is entitled to eject the tenant. [p. 198, col. 1.]

Jhamman v. *Farrukhabad*, Sel. Dec. No. 2 of 1910, followed.

Section 194, sub-section (3), applies only to cases where one of two or more co-sharers is not entitled to sue alone. [p. 198, col. 1.]

Second appeal from the decree of the District Judge of Ghazipur, dated the 29th September 1921.

Mr. *Haribans Sahai*, for the Appellant.

Dr. *M.L. Agarwala*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for ejectment under section 63 of the Tenancy Act. The plaintiff is alone entitled to collect the entire rent from the tenants. This has been clearly found by the learned District Judge. The learned District Judge, however, was of opinion that though the plaintiff was entitled to the entire rent he was not entitled to eject the defendant without the concurrence of the entire body of co-sharers. It is hardly necessary to point out that this view, if correct, would be productive of great inconvenience, especially in the eastern districts where co-sharers are often very numerous. The learned District Judge gives two reasons in support of his decision. The first is that section 194 only makes an exception in the case of money-suits, and the other that the word landholder does not occur in section 58 of the Tenancy Act. The reference to section 194 is doubtless to sub-section (3). This sub-section, however, only applies where one of two or more co-sharers is not entitled to sue alone which is the whole point in dispute in this case. It is quite true, as the learned District Judge says, that section 58 does not contain the word

landholder. There is no reason why it should, as it only specifies the grounds of ejectment. The operative section under which the tenant is ejected is section 62, and the very opening words of this section are "when a landholder desires to eject a tenant." Landholder is defined in section 4(5) as the person to whom rent is payable, and it is, in my opinion, clear law that the co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him. He is the landholder for the purposes of the Act. This view was also taken by the Board of Revenue in *Jhamman* v. *Farrukhabad* (1) a decision which has been followed in many subsequent cases. I am told by Mr. Agarwala that this decision has recently been dissented from by the present junior member in a ruling which has not yet been reported. However that may be, it is in my opinion good law. It was finally urged by Mr. Agarwala for the respondents that the District Judge's decision does not cover all the pleas which were urged before him. I have accordingly been through the grounds of appeal with the Counsel and it is found that the only plea that can be said to be not covered by the judgment is that contained in paragraph 6 of the memorandum of appeal. In that the defendant urged that he had acquired occupancy rights. This point is not covered either directly or by implication in the judgment of the Court below and the learned Judge does not say that it was not urged before him. I accordingly remit an issue under O. XLI, r. 25, to the lower Appellate Court:— Has *Musammat* Murta Kuer, the defendant, acquired occupancy right in the land in suit?

On receipt of the finding, which should be submitted by 30th June, ten days will be allowed for objections. The finding will be decided on the evidence already on the record.

M. A. A. *Issue remitted.*

(1) Sel. Dec. No. 2 of 1910.

MADRAS HIGH COURT.

FULL BENCH.

CIVIL REVISION PETITION No. 288 OF 1922.

April 10, 1923.

Present.—Sir Walter Schwabe, KT., Chief Justice, Justice Sir Francis Oldfield, KT., and Mr. Justice Ramesam.

RAJAGOPALA NAIDU—PLAINTIFF No. 2—PETITIONER

versus

RAMASUBRAMANIA AYYAR AND ANOTHER—DEFENDANTS Nos. 1 AND 2—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7 (v) (e) and Sch. II, Art. 17 (vi)—Temple, if has market value.

A temple which is inalienable and absolutely devoted in perpetuity to religious purposes has no market-value at all as such within the meaning of section 7 (*v*) (*e*) of the Court-Fees Act and must be dealt with for the purposes of the Act as a matter "not otherwise provided for" under Schedule II, Art. 17 (*vi*) of the Act. [p. 201, col. 1.]

Manmatha Nath Mitter v. *Secretary of State for India in Council*, 25 C. 194; 24 I. A. 177; 1 C. W. N. 698; 7 Sar P. C. J. 226; 13 Ind Dec. (N. S.) 131 (P. C.), referred to.

Quære.—Whether a temple is a "house" within the meaning of section 7 (*v*) (*e*) of the Court-Fees Act.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise an order, dated the 20th February 1922, of the Court of the Additional Subordinate Judge, East Tanjore, at Mayavaram, in Original Suit No. 7 of 1921.

This petition came on for hearing on the 8th of January 1923, upon perusing the petition and an order of the lower Court and the record in the case, and upon hearing the arguments of Mr. *K. S. Sankara Ayyar*, for Mr. *T. R. Venkatarama Sastri*, for the Petitioner, and of Messrs. *T. V. Muthukrishna Ayyar* and *K. S. Venkataramani*, for the Respondents, and the case having been posted to be spoken to on 10th of January 1923, upon hearing Mr. *K. S. Sankara Ayyar* for Mr. *T. R. Venakarama Sastri*, for the Petitioner, and Mr. *K. S. Venkataramani*, for the Respondents, and the case having stood over for consideration till the 23rd of January 1923 the Court (Spencer and Venkatasubba Rao, JJ.) made the following

RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR.

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.—The plaintiffs in this representative suit claim to have an exclusive right to manage certain Devastanams mentioned in the plaint and to appoint and remove a Dharmakartha for those temples whenever occasion arises. They pray for a declaration accordingly and ask for delivery of possession by defendants Nos. 1 and 2 of all the properties of the suit temples and for payment of certain amounts that may be found due on examination of accounts of the income and expenditure.

The question in this civil revision petition is how such a suit should be valued. The Subordinate Judge has valued it according to the estimate made by a Commissioner of the value of the temples and all the properties attached to them which amounts to more than Rs. 2,00,000. The first plaintiff as petitioner contends that he is not liable to pay Court-fees upon the valuation of the temple properties according to their market value. He maintains that he can value the relief under section 7, clause 4 (*c*) of the Court Fees Act as he pleases, as the only right in issue in the suit is the right pertaining to trustees of managing the suit properties. In Civil Revision Petition No. 862 of 1917 a similar question came before a Bench consisting of Mr. Justice Sadasiva Aiyar and myself, the question then being whether a plaintiff who sued for joint possession along with other trustees was bound to pay Court-fees *ad valorem* as in a suit for possession falling under section 7, clause 5, upon the market-value of the temple and its properties. We made a reference to a Full Bench upon the point. When the reference came before the Full Bench the civil revision petition was withdrawn. The question which was a very important one, upon which Sadasiva Aiyar, J., and I differed, thus remained undecided. Most of the authorities were collected in the reference made by my learned brother and myslf, and after full consideration I expressed an opinion that the plaintiff's valuation was conclusive and should be accepted under section 7, clause 4 (*c*) and (*d*) and Art. 17, clause (*vi*) of Schedule II of the Court-Fees Act. I pointed out in that case that the plaintiff was only asking for such possession as he was entitled to on the footing of a trustee without having any personal interest in the trust property and for such possession as the holder of the office was capable of, the ownership of the temple properties being vested in the idol. If a plaintiff sets up any proprietary right over temple properties I was willing to concede that he must pay Court-fees valuing his relief of possession upon the value of the temple properties. I then held that the cases in *Sonachala* v. *Manika* (1) and Appeal No. 10 of 1911 were distinguishable and I quoted *Mohendra Sundar Thakur* v. *Dinbandhu Thakur* (2) and certain other authorities for the proposition that if a plaintiff claims no higher right than that of administering endowed properties he should not be made to pay Court-fees on the same footing as a plaintiff who sues for possession claiming rights as proprietor. The question is an important one, and I am not satisfied that Appeal No. 10 of 1911 and Second Appeal No. 1410 of 1917 in which it was held that the temple and its properties must be valued were corectly decided. It is advisable also that in a matter where no party is more concerned than Government who are interested in the payment of the full Court-fees, the Advocate-General should have notice and should be heard in the matter.

I, therefore, refer to a Full Bench the question what are the Court-fees legally payable on the plaint in this suit, Original Suit No. 28 of 1920, in the Court of the Subordinate Judge of Mayavaram?

Venkatasubba Rao, J.—I am also of the opinion that question should be referred to the Full Bench. The matter was fully discussed and the authorities in support of the rival cotentions were set forth in the referring judgments of my learned brother and Sadasiva Ayyar, J., in Civil Revision Petition No. 862 of 1917, and I, therefore, refrain from covering the same ground again. But there is one point to which I, would like to advert. It has been stated that, in the present case, the fee was paid on the value of the subject-

(1) 8 M. 516; 3 Ind. [illegible]
(2) 21 Ind. Cas. 771; 19 C. [illegible]

matter so far as it consists of "lands" under section 7 (c) (v) of the Court-Fees Act. The plaintiff, however, has not paid the fee payable on the market-value of the temple in question. The Commissioner appointed valued the temple at Rs. 2,22,000 odd. The estimate was based, *inter alia*, upon the costs of the materials used, on the ground that by that process the "market-value" of the structure could be ascertained.

Whatever may be held to be the correct view in regard to the more general question discussed in the judgment in Civil Revision Petition No. 862 of 1917, it seems to me that there is considerable force in the argument of the learned Vakil for the appellant, that the structures constituting a temple, which are the abodes of the idols, are not "houses" under section 7 (c) (v) or which "a market-value" can be placed under sub-clause (c). A "house," according to Murray's Dictionary, no doubt, includes a "a place of worship, a temple, or a church". I do not think we shall be justified in turning to English decisions for interpreting the word "house" as they deal with particular Statutes where the word occurs. As Stroud, in his Judicial Dictionary, points out a church consecrated according to the rites of the Established Church was held not to be a "house" under section 105, Metrop. Man. Act, 1885, whereas a Dissenting Chapel was held to be such a "house". Again, a consecrated church, though held not to be a "house" within the section just cited, was nevertheless held to be a "house" *qua* a building line which a local authority has a right to prescribe. I do not think we can derive much assistance from the definitions or interpretations given above in construing the word "house" in the section of the Court Fees Act.

I am of the opinion that under the Court-Fees Act a temple which is mainly the abode of the deity cannot be said to be "house", the "market-value" of which is capable of being ascertained. A temple being *extra commercium* is *ex hypothesi* incapable of having a market-value. It is well-known that, to construct structures similar to numerous temples in India, sums amounting to lakhs or tens of lakhs of rupees would be required, and I do not think that the Legislature intended that a Court-fee should be levied on what is described before us as the "market-value" of the temples. I am therefore, inclined to hold that it is not possible to estimate at a money value, a temple and the idols in it, and that, in any event, so far as the subject-matter comprises the aforesaid, the case falls within 17 (v) of Schedule II of the Court-Fees Act, V of 1922.

This petition came on for hearing in pursuance of an Order of Reference to a Full Bench, dated the 23rd January 1923.

OPINION.

Schwabe, C. J.—This is a reference to a Full Bench on the question of the Court-fee payable on a suit by the plaintiff claiming to be a trustee of a temple against the defendant who is in possession of the temple, also claiming to be a trustee. The property in question has been valued by the plaintiff for purposes of Court-fee at a certain amount, but the Comissioner has reported that the amount is too small solely on the ground that the temple buildings ought to be valued at their cost of construction *less*, presumably, something for depreciation. It is contended by the plaintiff that the temple buildings as such are not assessable at all for purposes of Court-fee. The section of the Court-Fees Act alleged to be applicable is section 7 (v) (c) which provides that, where the subject-matter is a house or garden, it has to be valued "according to the market-value of the house or garden." It is first argued, and with considerable force, that the temple is not a house at all. I do not think it necessary to go into the question of what is and what is not "a house" or whether any part of this temple could be properly included within the proper definition of the word "house." I think it better to leave that question over until it arises definitely for decision, for we have not in this case the full facts as to the exact nature of the buildings in qustion and the use to which they are or can be put. But, it is further argued that this temple, even if it can be considered as a house, has no market

value. "Market value" has been defined in England as meaning what it would fetch in the market under the state of things existing at the time, and that definition is to be found repeated with great clearness in *Manmatha Nath Mitter* v. *Secretary of State for India in Council* (3). That was a case under the Land Acquisition Act and what was acquired was a road and compensation was claimed in respect of that road based on the value of the land on which the road stood when it ceased to be a road, for agricultural or building purposes or the like: and their Lordships of the Privy Council made it quite clear that, apart from the fact that the Land Acquisition Act itself in terms prohibited such considerations, the principle of compensation based on the "market value" which is the wording in that Act as well as in the Court Fees Act, is that things have to be taken as they stand at the time.

Now, this temple is an ancient temple and its history dates at least thousand years back, and there seems to be no doubt, that the temple is devoted absolutely and in perpetuity to religious purposes. On those facts we have to enquire whether there is a market for such a thing. In my judgment, such enquiry results in the conclusion there is no market and that it can have no market-value at all. The principle applied by the Commissioner, when he has taken as the market-value, what may be called the hypothetical construction value, is, in my judgment, entirely wrong. He has got to find the market-value of the thing as a temple at the time. It is not suggested before us, on behalf of the respondent or on behalf of the Crown, who attended as *amicus curiæ*, that in fact there is any market for such things. I think also that it would be conclusive against such a contention, that the property is inalienable and was devoted in perpetuity to religious purposes.

On these grounds, I come to the conclusion, that there is no market value at all for this temple as such. That being so, it does not come under that section of the Act, and has to be dealt with as a matter "not otherwise provided for"—under Schedule II (17),—except that, apparently, there is in this case some market-value for some part of the property claimed, and in respect of that the plaintiff has put on a valuation. There is no appeal in respect of that valuation by him, and, therefore, that valuation stands and must be taken as correct.

Taking this view of the case, it is unnecessary to consider the question specifically referred to us by the Referring Bench, namely, whether, on a claim by a trustee for possession of trust properties for the purpose of proper administration of that trust, he will have to pay Court-fee on the value of the trust property, or whether in that case he is only bound to pay the nominal amount of Rs. 10 or Rs. 15. This question had been referred on a former occasion to a Full Bench of this Court, but it was not decided then, and, owing to the facts of this case, it shares the same fate now.

The answer to the question referred to the Court is, the Court-fee legally payable are the fees already paid.

Oldfield, J.—I entirely agree.

Ramesam, J.—I agree.

V. N. V. *Order accordingly.*

(3) 25 C. 194; 24 I. A. 177; 1 C. W. N. 698; 7 Sar. P. C. J. 226; 13 Ind. Dec. (N. S.) 131 (P. C.).

BALDEO SINGH *v.* MEGHU SINGH.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 51 OF 1918.
June 19, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

BALDEO SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MEGHU SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Execution of decree—Sale of equity of redemption—Symbolical possession, delivery of, whether necessary—Redemption, suit for, without setting aside auction-sale, whether competent—Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Notice to judgment-debtor, when necessary.

Where the equity of redemption in respect of property which is in the possession of mortgagees is purchased at an auction-sale, it is not necessary that symbolical possession of the intangible right purchased should be given to the auction-purchaser in order to complete his title, if in fact he does exercise rights of ownership over the property which he has purchased. [p. 205, col. 1.]

Plaintiff sued to redeem a mortgage and alleged in the plaint that a certain sale of the equity of redemption in execution of a decree was fraudulent, collusive and illegal:

Held, (1) that the allegation with regard to the auction-sale did not amount to an allegation that the sale was a nullity but that the sale was such as might upon proper proceedings being taken possibly be set aside; [p. 203, col 2.]

(2) that no proceedings having been taken to set aside the auction-sale the suit for redemption was not competent. [p. 203, col. 2.]

The notice mentioned in O. XXI, r. 22 of the Civil Procedure Code is only required to be issued where the application for execution is more than one year after the date of the decree. [p. 204, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Mullick, in Second Appeal No. 722 of 1917, dated the 22nd March 1918, affirming a decision of the Subordinate Judge, Shahabad, dated the 22nd May 1917, reversing that of the Munsif, Arrah, dated the 20th December 1916.

Messrs. *K. Hasnain* and *A. K. Roy*, for the Appellants.

Messrs. *Bunwari Lal* and *G. D. Singh*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal under clause 10 of the Letters Patent from a judgment of a Single Judge of this Court, dated the 22nd March 1918, dismissing an appeal from the Subordinate Judge by whose decision the plaintiff's suit which had been dismissed by the Munsif was remanded to the Munsif for a fresh trial.

The facts of the case, so far as they are material to the present appeal, are these: In February 1886 the plaintiffs' ancestors mortgaged 12 *bighas* of land over which they had occupancy rights to the ancestors of the defendants under a usufructuary mortgage and put the defendants' predecessors in possession, and out of the proceeds of the land they were to satisfy themselves under the terms of the mortgage in lieu of receiving interest on the money advanced. In the same year, about six months later, in August, a fractional proprietor of the property by name Kailas Chandra, who had in the previous year obtained a rent-decree against the mortgagors, took out execution proceedings and the property, the subject of the mortgage, as well as other property belonging to the mortgagors, was sold in execution of that decree. The sale took place on the 7th June 1886, the property having been attached in the previous March and the sale was confirmed on the 27th August 1886. The suit by the proprietor being one by a fractional proprietor only entitled him to a money-decree and not a rent-decree under the Bengal Tenancy Act. Therefore, what he purchased at the sale was merely the mortgagors' equity of redemption subject to encumbrances, that is to say, he purchased the right, title and interest which the mortgagors had and the interest so transferred to him was subject to the mortgage of the defendants which was still subsisting, but it seems to me that from that moment the plaintiffs lost all right, title and interest they had in the property and that that interest was transferred to Kailas Chandra. No steps were taken by the mortgagors to set aside that sale and in the year 1892 Kailas Chandra sold the equity of redemption which he had purchased at the auction-sale in execution of his decree to the mortgagees themselves and, therefore, the situation was that the mortgagees' interest as such merged in their greater interest as proprietors of the occupancy right. So matters went on, and in the year 1910 there were Survey operations in which a portion of the land was recorded as in the possession of the plaintiffs and

another portion was recorded as in the possession of the defendants. Then, in the year 1915, the plaintiffs who represent the original mortgagors brought this suit claiming to redeem the property and they tendered to the defendants the sum of Rs. 240 which was the amount of the loan and, on the defendants refusing to accept it, paid the money into Court and claimed to be entitled to redeem the property and get possession. In their plaint the plaintiffs allege that the purchase at auction in the year 1886 made by Babu Kailas Chandra and the subsequent sale by him of the equity of redemption to the mortgagees, who are now represented by the defendants, was fraudulent, collusive and illegal, and they say that no process of execution of the decree was served nor was delivery of possession at all made in the locality or at the house or on the person of the plaintiffs, and that neither Kailas Chandra nor the defendants ever came into possession of the said land in the capacity of purchaser at auction-sale or purchaser under the sale-deed and that the defendants have all along been in possession in the capacity of mortgagees, that the entire proceeds of the execution of the decree, sale and delivery of possession have been surreptitiously and fraudulently taken and that the purchase at sale and under the sale-deed, which are quite fraudulent and illegal, cannot be a bar to the plaintiffs' redemption.

When the matter came before the Munsif he pointed out very properly that, on the plaint as it stood, it was not contended that the purchase at auction by Kailas Chandra was a nullity, and he pointd out that, if the sale was a valid and subsisting sale until it had been set aside, and could not be treated as a nullity which in fact the plaintiffs did not claim to do, it was a bar to any claim to redemption until it was set aside by a Court of competent jurisdiction. It was not very clear from the plaint whether the sale to Kailas Babu included all the lands in suit and, therefore, the learned Munsif ascertained for himself from the record whether this was so or not and found that in fact the purchase by Kailas Chandra did include all the lands in suit as well as some others. The result was, according to the Munsif, that Kailas Babu purchased the equity of redemption, which was all that was left to the plaintiffs at that time, and that this he sold to the defendants who were at that time the mortgagees or *rehandars* under the usufructuary mortgage-deed of the plaintiffs. It appeared to him, therefore, that it was unnecessary in this case to go into any evidence at all because no suit had been brought to set aside the sale and, as it was not claimed that the sale was void and could be left out of consideration altogether, the plaintiffs were clearly not entitled to redeem.

On appeal to the Subordinate Judge, he remanded the suit back to the Munsif for a fresh trial by allowing the parties to adduce evidence in support of their respective cases and the ground upon which he did that was that the lower Court did not allow the plaintiffs to prove that the decree obtained by Kailas Chandra was fraudulent and invalid or that the defendants were mortgagees in possession. Now, it is obvious from this that the Subordinate Judge made a mistake in supposing that the plaintiffs had ever questioned the validity of the decree under which the execution sale took place in 1886. If it had been contended that the decree itself was a nullity then, no doubt, that would have been a matter for evidence. But no such allegation was made in the plaint at all. The only contention in the plaint was that the auction-purchase by Kailas Chandra was fraudulent and collusive and illegal and not that it was a sale under a decree which in itself was not operative nor was it indeed alleged in the plaint that the sale itself was void. All that was alleged was that the sale was fraudulent and collusive and, therefore, such as might upon proper proceedings being taken possibly be set aside. But as no proceedings had been taken to set it aside and as the period for taking such proceedings, which in the case of fraud would be three years, had passed from the time when the sale took place or when the plaintiffs knew of the fraud it was clear that there was nothing more that could be done to assist the plaintiffs to get rid of the sale.

An appeal was brought from the decision of the Subordinate Judge to a Judge

of this Court and he also seems to have been under the impression, no doubt misled by the judgment of the Subordinate Judge, that what was in question in the case was the validity not of the sale but of the decree under which Kailas Babu's auction-purchase took place. The main attack upon the validity of the purchase was that there had been no service of notice to the judgment-debtors under O. XXI, r. 22 of the Civil Procedure Code and that in the absence of any such notice to the defendants the Executing Court had no authority to sell the property and was acting without jurisdiction so that the sale was a nulity. I have already said that it was not specifically raised in the pleadings that the sale was a nullity but the question appears to have been treated in the lower Courts as if such a plea had been put forward. When the learned Judge of this Court came to deal with the case he said: "If the decree (I call attention to the word decree) of 1886 obtained by Kailas Babu was obtained without issue of summons in the suit and if the sale was held without issue of notice then there was no representation at all of the parties interested and the Court's jurisdiction to proceed with the trial was ousted" and he says that evidence must be taken in order to ascertain whether the decree was obtained without issue of summons and notice upon the defendants. He concludes: "If the plaintiffs succeed in proving this then they are entitled to regard the decree and the sale as nullities and to proceed to establish their claim to redemption. If they fail, then the question will arise whether the defendants having purchased the equity of redemption, if they did purchase it, are entitled to resist redemption on the principle of *Pancham Lal* v. *Kishun Pershad* (1)." He points out that this is a debatable point but one which, so far as this Court is concerned, has been settled by the decision in *Sheo Narain Ojha* v. *Ram Jatan Ojha* (2).

(1) 6 Ind. Cas. 47; 14 C. W. N. 579; 12 C. L. J. 574.
(2) 41 Ind. Cas. 532; 2 P. L. J. 587; 1 P. L. W. 729; (1917) Pat. 373.

So far as the decision of the learned Judge is concerned, I do not think there could be anything to complain about it if in fact it were based upon a true apprehension and appreciation of the facts of this case. And if, in fact, it were alleged and proved that there had been no issue of summons in the suit upon the parties, then clearly the plaintiffs would be entitled to treat the decree and all subsequent proceedings arising therefrom as a nullity, but that never was the case from start to finish and the only question, so far as the validity of any part of the proceedings is concerned, was the question whether the sale not the decree was a nullity or merely voidable.

A considerable argument was addressed to this Court on both sides as to whether the omission to issue notice under O. XXI, r. 22 of the Civil Procedure Code was such a defect as would render the subsequent sale proceedings absolutely null and void or whether it was merely an irregularity which, whilst entitling the plaintiffs to have the sale set aside on proper proceedings being brought, did not have the larger effect of rendering the sale absolutely void. That might be a question of some nicety but it is unnecessary in this case for the Court to decide that point because, under the provisions of O. XXI, r. 22, it appears that the Court executing the decree is only required to issue the notice there mentioned in cases where the application for execution is made more than one year after the date of the decree, and from the documentary exhibits put in in this case it appears that the date of the decree in favour of Kailas Chandra was the 4th September 1885 and that the application for execution was the 20th February 1886 so that no question at all could arise as to whether the sale was void or merely voidable owing to the absence of the notice under O. XXI, r. 22, because in the particular circumstances of this case that rule has no application. It seems to me, therefore, that the defendants' appeal in this case must succeed and that the decree of the Munsif must be restored because the question about which so much argument has been put before the Court turns out not to be a question which really arises. The result

is that the validity of the sale, so far as any fault in procedure is concerned, is unimpeachable and not only is it not void but it could not even be set aside as voidable upon the grounds which have been alleged by the respondents.

A further point, however, arose during the argument to this effect that it is pleaded that Kailas Chandra never in fact got possession of the property which he purchased. Now, what he purchased at the auction-sale was the interest of the mortgagors which was the equity of redemption. The mortgagees were still in possession and entitled to remain in possession and could not be turned out either by the mortgagors themselves or by a purchaser of the mortgagors' equity of redemption because he purchased subject to all encumbrances. Therefore, there was no physical possession which the purchaser could take and it was only symbolical possession that could have been effected in his favour in the particular circumstances of the case. It is not, in my opinion, necesssary in a case like the present that symbolical possession of an intangible right should be given to the purchaser in order to complete his title if in fact he does exercise rights of ownership over the property which he has purchased. What happened in the present case was, that having purchased the equity of redemption in the year 1886 he did in fact transfer it by sale to the defendants the mortgagees and, therefore, he exercised in a most effective way the rights of ownership and rights of possession, so far as he could be said to have possession in the property which he purchased, by that subsequent sale in 1892. It must be taken, therefore, that as against the plaintiffs, the mortgagors, his rights were complete and final even if transfer of possession were necessary at all events from the year 1892. There is no other point which has been discussed before us in the case. In my opinion the appeal must be allowed with costs here and in all the lower Courts and the decree of the learned Munsif must be restored dismissing the claim.

Adami, J.—I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 174 OF 1922.

January 23, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

LAXMICHAND JAVERMAL,—PLAINTIFF—APPLICANT

versus

THE MUNICIPAL COMMITTEE OF NANDURBAR—DEFENDANT—OPPONENT.

Construction of document—Municipal Octroi Schedule, prescribing value of goods—Octroi, whether can be charged on actual value.

Where the Octroi Schedule of a Municipality provided for the charging of Octroi on certain articles at a certain rate per cent. per cart-load and the value of a cart-load of each article was prescribed in the Schedule:

Held, that it was not open to the Municipality to charge Octroi at an *ad valorem* rate on the actual value of the articles. [p. 206, col. 2.]

Application praying for reversal of the decree passed by the Second Class Sub-Judge at Nandurbar, in Small Cause Suit No. 142 of 1921.

Mr. *R. J. Thakor*, for the Applicant.

Mr. *P. V. Kane*, for the Opponent.

JUDGMENT.

Macleod, C. J.—The plaintiff filed this suit against the defendant, Municipality claiming Rs. 60-4-6, being the amount charged by the Municipality, by way of Octroi duty on cloth over and above what it was under the law entitled to levy. It is admitted that section 167 of the District Municipal Act applied, and, therefore, the first five items sued for are beyond time. Shortly put, the Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an *ad valorem* rate on the value of the goods according to the present value and not according to the value appearing in the schedule of rates. The Octroi Schedule is divided into 3 columns in the first column are the names of various articles; in the second column is the rate per cart load; and in the third column is the weight in maunds or price. The cart-load is to be reckoned at 16 maunds of 40 *pakka* seers. 'Cloth' comes under class VII as cloth of all sorts and articles made of cotton, silk and wool; the rate per cart-load is 12 annas per every Rs. 100 or part of it. In the third column the price

is to be taken at Rs. 500 per cart-load of 16 maunds.

It seems to me clear that Rs. 500 was the limit value of a full cart-load of cloth of all sorts and articles made of cotton, silk, etc., upon which the rate of 12 annas per cent. was to be levied. Otherwise, the amount Rs. 500 in the third column had no meaning. But if no amount was mentioned, as the rate was 12 annas per cent., it would be necessary to have some method for appraising the value of such goods by means of an appraiser at the Octroi Station. But to obviate all difficulties of that kind, the framers of the schedule fixed the price per cart-load on which the *ad valorem* duty was to be paid.

If we turn to class VIII which includes iron and articles of iron, the rate per cart-load is 12 annas, the price of a cart-load of 16 maunds being taken at Rs. 150.

Again, copper, brass, tin, lead, zinc and articles made therefrom are all charged at 8 annas per cart-load the value of a cart-load of 16 maunds being taken at Rs. 400.

In those cases, as there was no rate per cent., it really was not necessary to place any value on the cart-load, for according as the cart appears to the clerk to have a less or a greater load than the average load he would be entitled to charge more or less than 12 annas.

That appears to me to be the obvious construction which the Court should put on this schedule. Unfortunately, in 1919, the Examiner of Local Fund Accounts found fault with the method upon which the Octroi duty had been charged.

He said: "As it appears to be the intention to charge those articles, against which value is stated *ad valorem* the present practice should either be stopped, and cloth, iron and other metals, etc., against which value is stated, should be charged *ad valorem* after seeing the original invoices showing the purchase-prices received by the importers from the exporting merchants, or the schedule amended with the sanction of the Commissioner C. D. so as to legalise the present practice. It appears advisable in the interest of the Municipality to charge cloth and iron, etc., or articles made thereof *ad valorem* as is done by most Municipalities."

It seems to me that the proper procedure was exactly the opposite. If it was considered desirable in the interest of the Municipality that cloth and iron, etc., or articles made thereof should be charged on their actual value *ad valorem*, it would certainly be necessary to add to the schedule rules prescribing how the real value of those goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. It seems to me probable that when the schedule was framed, it was considered advisable that there should be as little delay as possible at the Octroi Station, and that the methods of arriving at the Octroi duty to be charged should be of the simplest possible description. If it was intended that the contents of cart-loads of goods such as these of various descriptions and quality had to be valued at the Octroi Station, and if the rate was to be charged on such value, then it was necessary to have expert appraisers to estimate that value. Moreover, it would not be possible in many cases to obtain without much delay the invoices showing purchase-prices received by the importers from the exporting merchants. However, if the Municipality wish to charge Octroi duty *ad valorem* on the value of the goods imported within their limits, then they must set up a proper machinery for that purpose. The Rule will be made absolute and there will be a decree for the plaintiff for Rs. 8-4-0. No order as to costs.

Crump, J. - I agree.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONR'S COURT.

SECOND CIVIL APPEAL No. 69 OF 1922.
August 23, 1922.

Present:—Mr. Simpson, A. J. C.

SHEO DUTT BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

BISHUNNATH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Exercise of right, mode of—

SHEO DUTT *v.* BISHUNNATH SINGH.

Conveyance by vendee in favour of pre-emptor, effect of—Arbitration, reference to, whether defeats rival pre-emptor—Civil Procedure Code (Act V of 1908), Sch. II, para. 20.

A pre-emptor who purchases the property sold, privately from the vendee not only asserts his pre-emptive right but asserts it in so efficacious a form as to be entitled to have the bargain secured to him against every one not having a superior right of pre-emption. [p. 208, col. 1.]

Mahtabuddin v. *Karam Ellahi*, 73 P. R. 1898, referred to.

But in order to put himself in this position a pre-emptor must do one of two things within limitation, either he must institute a suit for pre-emption or he must obtain a conveyance from the vendee. If he does neither of these things, the mere fact that he has stated that he possesses the right, that he has approached the vendee, or that they have referred their matter to arbitration will not prevent his being barred by limitation. [p. 208, col. 2.]

A pre-emptor who refers his claim to arbitration out of Court and then makes an application under paragraph 20 of Schedule II to the Civil Procedure Code for filing the award made by the arbitrator, must be deemed to be enforcing his claim by suit, and unless the application under paragraph 20 is made within the limitation provided for a suit for limitation, it will be no answer to a claim for pre-emption by a rival pre-emptor. [p. 208, col. 2.]

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 29th November 1921, reversing the order of the Munsif, Sultanpur, dated 31st May 1921.

Mr. *A. P. Sen*, for the Appellant.

Mr. *Haider Hussain*, for Respondent No. 3.

JUDGMENT.—This is a pre-emption suit. The dispute is between two rival pre-emptors. It is a second appeal where the facts have all been decided. The sale-deed was executed on 8th January 1920 and registered on 13th January 1920. The plaintiff-appellant instituted a suit on the last day of limitation, 12th January 1921, making the vendor and the vendee defendants. On 11th February 1921 the vendee put in a written statement in which he said that Gokul Prasad ought to be a party. Accordingly, Gokul Prasad was made defendant No. 3 and he and the vendee set up a common defence. They said that on 24th December 1920 Gokul Prasad and the vendee had entered into an agreement to refer to arbitration Gokul Prasad's claim to pre-empt, that the arbitrators made their award on 4th February 1921 and that Gokul Prasad had applied under paragraph 20 of Schedule II, Civil Procedure Code, on 5th February 1921 to have the award filed in Court.

This was the state of things when the written statement was put in. I may add, to make the statement complete, that on 16th March 1921 judgment and decree were given for Gokul Prasad in accordance with the award.

The learned Munsif framed five issues. The first was: Has the plaintiff got a preferential right to pre-empt as against the defendants Nos. 1 and 3? He found that the plaintiff had bought certain plots from the same vendor, defendant No. 2, prior to the execution of the sale-deed and that this made the plaintiff a co-sharer of the Sub-Division with a preferential right against the defendant No. 1, the vendee who appears to have been only a co-sharer in the village. He found, however, that the defendant No. 3, in addition to being a co-sharer of the Sub-Division, was also a blood relation of the vendor. Consequently, defendant No. 3 has a preferential right against the plaintiff.

There were two issues about the price, but on this point no evidence was given and the price of Rs. 300 entered in the sale-deed stood.

The last issue was in two parts:—

(*a*) What is the effect of the arbitration proceedings? and (*b*) Were those proceedings fraudulent and collusive?

The learned Munsif found that the proceedings were fraudulent and collusive that in fact the agreement to arbitrate was executed after the institution of the present suit, and, therefore, after Gokul Prasad, defendant No. 3, the original pre-emptor had become barred by limitation. Accordingly, he gave the plaintiff a decree. Gokul Prasad, defendant No. 3, appealed.

The learned Subordinate Judge came to a finding of fact that the reference to arbitration did take place on 24th December 1920. Accordingly, he dismissed the plaintiff's suit.

The plaintiff comes into this Court on second appeal. He cannot, of course, dispute the findings of fact that the defendant No. 3 is a blood relation and that the reference to arbitration took place before the institution of the suit. The appellants,

SHEO DUTT v. BISHUNNATH SINGH.

argument is based upon the Statute, sections 6 to 15 of the Oudh Laws Act. His main contention is that the right of pre-emption must be exercised only in the ways expressly mentioned in the Statute.

I cannot accede to this contention. The right of pre-emption is defined in section 6 of the Oudh Laws Act as being a right "to acquire immoveable property on preference to all other persons." Section 11 lays down the procedure where the sale-deed has not been executed yet. The pre-emptor must tender the price to the vendor. The section does not say so, but it is clear from the Transfer of Property Act that the vendor must then execute a sale-deed in favour of the pre-emptor which will have to be registered. If the sale-deed has been executed in favour of the vendee it is clear that the pre-emptor must obtain his conveyance from the vendee. But if he does so he has exercised his right of pre-emption. I see no reason for holding that he is confined to the remedy of a suit in Court. There is direct authority to the contrary: *Mahtab-ud Din* v. *Karam Illahi* (1). That was a case in which, before the institution of a suit by one pre-emptor, another pre-emptor had obtained a deed of sale from the vendee. It was held that the pre-emptor who had purchased it privately from the vendee had not only asserted his pre-emptive title but asserted it in so efficacious a form as to be entitled to have the bargain secured to him against every one not having a superior right. But this consideration will not dispose of the present appeal because the respondent, Gokul Prasad, defendant No. 3, did not obtain a conveyance from the vendee. He used a different procedure. The problem can best be solved by approaching it from the point of view of the plaintiff and considering the paintiff's rights at two stages of the proceedings, namely, at the time of institution, and at the time when the Munsif granted him a decree. At the time of the institution of the rival pre-emptor, who had a superior right, had entered into an agreement to refer his claim to arbitration. This was no bar to the institution of the plaintiff's suit, nor, in my opinion, would it be any answer to the plaintiff's suit. It is idle for a pre-emptor to negotiate with the vendee. He must do one of two things within limitation, either he must institute a suit for pre-emption, or he must obtain a conveyance from the vendee. If he has done neither of these things, the mere fact that he has stated that he possesses the right, that he has approached the vendee, or that they have referred their matter to arbitration, will not prevent his being barred by limitation.

The second point of time is 31st May 1921 when the Munsif gave the plaintiff a decree. By that time the rival pre-emptor had himself obtained a decree but he had not completed his title by depositing the money. His decree was not valid against the plaintiff. Paragraph 20 of Schdule II, Civil Procedure Code, provides that where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to the Court to have the award filed. It provides, in the second clause of the same paragraph, that the application shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. I hold, therefore, that a pre-emptor who refers his matter to arbitration out of Court and then makes an application under paragraph 20 is proceeding by suit and not by private conveyance and that his suit must be within time. Now this suit was beyond time. It does not follow that the Court committed any error in granting a decree. The Court is bound to grant a decree in accordance with an award and it is very questionable whether the decree could be refused on the ground of limitation. Probably a decree passed under paragraph 21 will hold good even if the application was beyond time. But it holds good only between parties. It is still open to the plaintiff, who was no party to that decree, to show that the suit was barred by limitation. I conceive the position then to be the same as if Gokul Prasad, respondent-defendant No. 3, had instituted a suit by filing a plaint on 5th February 1921. It is plain, therefore, that these proceedings being beyond time were not a sufficient reason for refusing to give

(1) 73 P. R. 1898.

the plaintiff a decree. It is to be noted that the second reason did not exist. There had been no complete conveyance of any kind in favour of Gokul Prasad.

There is an unreported case of this Court, which was followed by the lower Appellate Court, *Maula Bakhsh* v. *Becahen Khan* (F. A. No. 60 of 1914), decided by a Single Judge. But there is a very important distinction between that case and this one, namely, that at the time when the plaintiff was asking for a decree there had been complete conveyance to the rival pre-emptor. On the other points the facts were very much the same. The sale-deed was dated 20th September 1911 and was registered on 13th December 1911. The agreement to refer to arbitration was entered into on 12th July 1912. I am unable to discover from the record when the suit was instituted but it was some months later than the agreement to refer to arbitration and it was earlier than the award. The award was dated 30th January 1913 and the decree which followed on the award was dated 27th February 1913. A deposit was made in pursuance of that decree on 25th July 1913, while it was not till 12th February 1914 that the suit was dismissed. In that case plaintiff never got a decree at all and, as I have said, the rival pre-emptor completed his title by paying the money. But in the present, case at the time the plaintiff got his decree, the rival pre-emptor had not done enough to prevent the plaintiff getting a decree. He had neither instituted a suit within time, nor had he obtained a complete conveyance of the property. I find, therefore, that the Munsif was right in giving the plaintiff a decree in spite of the finding of fact by the lower Appellate Court that the agreement to refer was earlier than the institution of the suit.

For these reasons I accept the appeal, set aside the judgment and decree of the lower Appellate Court and restore the decree of the Munsif. The plaintiff will get his costs in all Courts from defendants Nos. 1 and 3.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 41 OF 1921.
August 23, 1922.

Present:—Sir Walter S. Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

VENKATANARAYANIAH AND OTHERS—PLAINTIFFS Nos. 1 TO 3—APPELLANTS

versus

V. SUBRAMANIA IYER AND OTHERS—DEFENDANTS Nos. 1 TO 4 AND 6 TO 14—RESPONDENTS.

Vendor and purchaser—Vendee undertaking to discharge mortgage on property—Contract of indemnity—Cause of action—Constructive trust—Pecuniary advantage gained by fiduciary—Restoration—Trusts Act (II of 1882), s. 88.

A had created two mortgages on a house and some land in favour of *B* and *C*. *D* a friend of *A* made a suggestion according to which the land was sold to *D* for Rs. 5,000 and the house mortgaged to him for Rs. 1,000 and the sums were left with him to pay off the mortgages in favour of *B* and *C* so that *A* would have his house unencumbered except for the newly created mortgage in favour of *D*. *D* paid off the mortgage in favour of *B* but started a dispute with *C* as to the amount due under his mortgage. *C* claimed Rs. 4,938 while *D* tendered a payment of Rs. 4,800, which amount was not accepted by *C*. *A* had no knowledge of, and did not concern himself with, the dispute, treating it a matter between *C* and *D*. Some years afterwards, *C*. brought a suit on his mortgage against *A* and *D*. *A* relying on *D* did not appear in the suit and the defence was managed by *D*. Eventually a decree for Rs. 10,000 was passed for the mortgage amount and interest. In due course *C* took proceedings to bring the mortgaged properties to sale. *D* now paid a sum of Rs. 4,000 and freed the land, of the equity of redemption of which he was the owner, but the house was sold for Rs. 5,500 and *A* ejected therefrom. *A* alleging that the house had been purchased *benami* by *D* sued him for various reliefs:

Held, (1) that *D* under the scheme propunded by him, undertook a liability to indemnify *A* against any claim by *C*; [p. 211, col. 2.]

Izzatunnissa Begam v. *Pertab Singh*, 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1143; 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203 (P. C.), relied on.

(2) that the cause of action under the contract of indemnity did not arise until *A* suffered loss by being ejected from the house under the Court sale; [p. 211, col. 2.]

(3) that if the allegation that the house had been purchased by *D benami* in the name of a third person was true, he was bound to restore its possession to *A*, as *D* was throughout in a fiduciary relationship to *A*, in the first place as his agent and, in the second place, as his accepted legal adviser. [p. 213, col. 1.]

Nugent v. *Nugent*, (1907) 2 Ch. 292; 76 L. J. Ch. 614; 97 L. T. 279; 23 T. L. R. 660, *Nugent*

v. *Nugent*, (1908) 1 Ch. 546 at p. 548; 77 L. J. Ch. 271; 98 L. T. 354; 24 T. L. R. 296, *Ramasamy Chetty* v. *Karuppan Chetty*, 31 Ind. Cas. 216; 29 M. L. J. 551 and *Deonandan Prasad* v. *Jaski Singh*, 39 Ind. Cas. 346; 44 C. 573; 15 A.L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 30 (P. C.), relied on

(4) that, ordinarily, *D* would have been entitled to a charge on the house for the Rs. 5,500 purchase-money, but on the facts of the case he was not so entitled as he had throughout in his possession money of *A* sufficient to redeem the house from the mortgage under which it was sold. [p. 213, cols. 1 & 2.]

(5) that *D* was entitled to his mortgage of Rs. 1,000 over the house, but the mortgage for the purpose of interest must date from the time when it became effective, that is, the date when *D* in fact advanced Rs. 1,000 towards paying off *C*, which date was the date of the Court sale; [p. 213, col. 2.]

(6) that, finally, *A* was entitled as damages to all costs to which he had been put in the proceedings taken by *C*. [p. 213, col. 2.]

Appeal against the judgment and decree of Mr. Justice Coutts-Trotter, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 553 of 1919.

Mr. *N. Sivarama Krishnier*, for the Appellant.

Messrs. *T. Ethiraja Mudaliar* and *V. V. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The first question to be determined in this case is, what was the contract between the parties. The first plaintiff and his father owned some property in Madras consisting of a house and some lands. The father in 1907 was an old man and the first plaintiff a young man about 21. Their affairs were somewhat involved and they had borrowed money on mortgage from two persons, Veerabadra Ayyar and Appadurai Nayakan. The mortgages covered both the house and the lands. The first defendant, a Barrister's clerk and an old pupil of the first plaintiff's father, offered to get their affairs into order and he propounded what seemed to be, and I think, was, an excellent scheme. Certain lands, the subject of these mortgages, were to be sold to the first defendant or, purchasers found by him for a fixed sum of Rs. 5,000 and by means of that money, and other moneys I shall refer to hereafter, the then existing mortgages were to be paid off. As far as the mortgage of Appadurai Nayakan was concerned, this was done and the mortgagee disappears from this case except that there is a matter which is the subject of issue VI about which there is still some dispute which I do not think has been disposed of. The facts seem to be, that the first defendant, got a judgment in the Small Cause Court in Suit No. 3938 of 1910 against the first plaintiff and his father. It seems to be clear from Exhibit S that this amount was not due. There was a promissory-note given mainly as security for the handing over of certain title-deeds to Appadurai Nayakan which were duly handed over. With full knowledge of this, the first defendant took an endorsement of the promissory-note and then sued on it and got a judgment. Whether this transaction is fraudulent, and how he came to get this judgment, has not been investigated. I gather the judgment has not been executed. The whole matter requires looking into. On the face of it, there seems to be something very suspicious about it and I propose to refer this matter for the consideration of the learned Judge. The rest of the scheme was, that the first defendant should retain the Rs. 5,000 purchase-money and should advance up to a further thousand rupees on a mortgage of the house, and that he should apply the total to pay off the existing mortgages, the first plaintiff and his father finding any samll balance that there might be. In February 1907 Veerabadra Iyer stated the sum due to him to be Rs. 4,862 and by March 1917 this had gone up to Rs. 4,939. Money was found by the first plaintiff and his father to make up this mortgage-amount and matters were left in the first defendant's hands, the essence of the scheme being that the Rs. 5,000, purchase-money, and Rs. 1,000, advanced by the first defendant on the mortgage of the house, and the small balance found by the first plaintiff and his father should be paid into or retained in the first defendant's hands and that he should use it for getting rid of Veerabadra Iyer altogether so that the plaintiff would have his house unencumbered except for the newly created mortgage of Rs. 1,000, in the first defendant's favour. The terms of this arrangement were reduced to writing by a document Exhibit A. The ori-

ginal has been lost or, at any rate, has not been produced and Exhibit A is a copy produced by the plaintiffs. It is quite clear that in that copy there is missing a sentence at the foot of the first page, after the words "must be." The words, no doubt, are to the effect that the balance not exceeding Rs. 1,000 must be advanced by the first defendant on a mortgage of the house and that the transfer of the property and the mortgage of the house should be completed within one month and also providing that any balance required above the Rs. 1,000 was to be provided by the first plaintiff and his father. The first defendant undertook to discharge Veerabadra Iyer's mortgage. It is stipulated that the failure on either side to finish the transaction in time is to make the party in default liable for any damages suffered. That the missing line or lines is, or are, to be supplied in the manner I suggest is strongly evidenced by the recitals in a subsequent mortgage of August 8th 1907, by the first plaintiff to Veerabadra Iyer, which is Exhibit F in Original Side Appeal No. 52 of 1916 and the terms of which, I have no doubt, were well known to the first defendant. The learned Judge has held, in the events that happened, that plaintiff's claim which would otherwise be a good one, is barred by limitation. He interprets, the agreement to mean that the first defendant undertook to discharge Veebadra's mortgage in a month from February 7th, 1907, and holds that his failure to do so was a breach of that contract and that the time under the Statute began to run from March 9th, 1907. I do not agree with this interpretation, because, in the first place, I can find no time limited for the payment of the mortgage-money and indeed it is pretty clear from what happened afterwards that neither party contemplated payment in a month unless Veerabadra Iyer agreed to diminish his claim within that period. I think that no time was fixed and I do not think there was any breach by the first defendant, until he had communicated to the first plaintiff, or till he had done some act showing to the first plaintiff, that he was not going to carry out his contract. What he did I shall refer to later. Further, if the non-payment within a month to Veerabadra Iyer was a breach of the contract by the first defendant it was not a breach which was accepted by the first plaintiff as a breach of the contract and, indeed, the contract between the parties was treated by both parties as being open and remaining open until the events which culminated in the sale in 1919. Further, in my view, the first defendant undertook a liability to indemnify the first plaintiff against any claim by Veerabadra Iyer and the cause of action under that contract of indemnity did not arise until the plaintiffs suffered a loss by being ejected from the property. The first defendant was a purchaser of certain lands for Rs. 5,000 part of which he re-sold to others. I do not propose to consider whether they were *benami* to him or not as it is wholly immaterial, and these lands were subject to Veerabadra Iyer's mortgage, and as a purchaser he impliedly undertook to indemnify the first plaintiff against any claim by the mortgagee or any loss incurred through the action of the mortgagee: See the judgment of the Privy Council in *Izzatunnisa Begam* v. *Perlab Singh* (1). It is true that in this case the house was also subject to the same mortgage and, in the absence of an agreement, there would probably have to be *pro rata* apportionment for this purpose of the mortgage, between the house and the lands, but here, by the agreement of February 7th, all difficulty of this kind is removed because the plaintiff agreed to provide the first defendant with the money necessary to pay off this mortgage so that both the house and the lands might be unencumbered, and in fact the plaintiffs supplied all the necessary money. In my judgment, there is a necessary implication in the sale of the land to the first defendant, coupled with the agreement of February 7th, that the first defendant will indemnify the first plaintiff and his father from all claims, or loss in respect of Veerabadra's mortgage. Without such an implication the whole scheme would be nugatory, for it would be open to the first defendant not to settle with Veerabadra and to leave the house charged with the mortgage, while

(1) 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1145; 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203 (P. C.).

the scheme was intended primarily to free that house from the mortgage.

What happened afterwards may be stated shortly. The first defendant chose to try and fight Veerabadra as to the amount due. He had a contention that a small part of the money, something like Rs. 140, owing by the plaintiff, while purporting to be charged on the land, was not properly so charged as it was otherwise secured and that the adding of it to the mortgage-money was clogging the equity of redemption as it prevented the property being redeemed by payment by sums only which were originally advanced on the mortgage security. At least, I think, that that was his point, and it was an interesting point. It was a purely academical one because the plaintiffs undoubtedly owned the money. Whether charged on the land or not and they had provided moneys to the first defendant, which were enough to pay not only the sums originally charged on the property but also this Rs. 140. The total amount due to Veerabadra in March 1907 was Rs. 4,938-8-0. The first defendant chose to tender a payment and paid into Court Rs. 4,300, which was subsequently increased to Rs. 4,800 and odd. Veerabadra Iyer would not accept this amount. Thereupon the first defendant took the money out of Court and did nothing. Tthis is the money of the plaintiffs but the first defendant was entitled to retain it for the purpose of paying off Veerabadra and for other prupose. He says he distributed amongst the purchasers—I confess I do not believe it—and even though he did, he had no sort of right to do anything of the kind as he had no right to it at all. He was, as I have stated, entitled to do one thing only and that is to pay to Veerabadra and discharge his mortgage. Time went on and compound interest on the mortgage piled up. The first plaintiff was living in the mortgaged house and I am convinced he had no knowledge of and did not concern himself with what was happening as to the mortgage, treating it, as indeed it was, as a matter between the first defendant and Veerabadra Iyer with which he was not concerned. That this is the fact is borne out by Exhibits R, S and T which show that after the money had been obtained back by the first defendant both he and the plaintiff were treating the contract of February 1907 as still alive and were assuming that the first defendant had carried out, or was willing to carry out his part of the bargain, for the first defendant was claiming to enforce the mortgage for Rs. 1,000 on the mortgage of the house, and that Rs. 100 was only to be advanced by the first defendant to be used in paying off Veerabadra Iyer and in fact has not been advanced at all. The inference I draw from these documents is, that the first defendant was deliberately concealing from the first plaintiff that he had not paid oft Veerabadra Iyer and had in fact misappropriated the Rs. 5,000 the purchase-money of the lands. Further, in 1910, the first defendant purports to sell the house under the mortgage for Rs. 1,000 again showing that he was treating the contract of 1907 either as being still alive or as having been performed by him.

The first defendant, no doubt, still relying on his point as to clogging the equity did nothing till 1915 when Veerabadra Iyer brought a suit against the first plaintiff and the first defendant. The defence was managed by the first defendant. He set up that he had tendered in March 1917, and had always been ready and willing to pay the right amount, thus showing that as between himself and the plaintiffs he had carried out the bargain of February 1907 and kept them indemnified and that he still had the money which he had received under that contract, had always been and was still ready and willing to complete his duties by paying the proper amount to Veerabadra Iyer. The Judge who tried the case found that the first defendant was wrong and he gave a decree for Rs. 6,896. Veerabadra was not satisfied and went to the Court of Appeal. The first plaintiff still relying on the first defendant and treating it as a matter not concerning him, did not trouble to appear in appeal. The first defendant agreed to the decree being increased to something over Rs. 10,000 and in his absence, the decree against the plaintiff was, by order of the Court, similarly increased. In due course, Veerabardra took proceedings to execute his decree by bringing the mortgaged property to sale by Court-auction. Then the

first defendat took a course which, to my mind, was impertinent as it was dishonest. He paid Rs. 4,000 to Veerabadra to free the lands, he being the owner of the equity of redemption of the mortgage, and so prevent them being sold. Be it remembered that he had not in fact paid for those lands except perhaps the small amount that he had got from some sub-purchaser and that he had, throughout, nearly Rs. 5,000 of the plaintiff's money in his hands. He then misapplies the money which was to free the house and lands, to free the lands only and leaves the house to be sold for the balance of the mortgage-debt. In due course, this was done and on July 14, 1919, the house was sold for Rs. 5,500 and the first plantiff was ejected and they at once bring the suit. The house is said to have been worth about Rs. 8,000 or Rs. 9,000 at that time. The purchaser at the Court-sale was the 11th defendant, who is stated to be the concubine of the first defendant and is alleged to have been acting for him in this transaction.

If this be true, in my judgment, on the authority of *Nugent* v. *Nugent* (2) and *Nugent* v. *Nugent* (3) many other English cases and *Ramasamy Chetty* v. *Karuppan Chetty* (4) and *Deonandan Prasad* v. *Janki Singh* (5). Such a transaction cannot be allowed to stand, as the first defendant was, in my judgment, throughout in a fiduciary relationship to the first plaintiff, in the first place, as an agent and, in the second place, as his accepted legal adviser. Whether the 11th defendant was or was not ***benami*** for the first defendant is a question that, on the view the learned Judge took, did not arise and this case must go back to him to hear and determine that point. If the house is, by this ***benami*** transaction, in the first defendant's possession, he must restore it. The terms would ordinarily be that he would be entitled to a charge on it for the Rs. 5,500 purchase-money but on the facts of the case, he is not so entitled for he had, throughout, in his possession money of the plaintiffs sufficient to redeem the house from mortgage, some of which in fact he had applied for the purpose of redeeming his land, and the plaintiffs are entitled to have that house unencumbered except by a mortgage of Rs. 1,000 in favour of the first defendant, and that mortgage must date for the purpose of interest from the date when it became effective, that is, the date when the plaintiff in fact advanced Rs. 1,000 towards paying off Veerabadra. That date is the date of the Court-sale. From that date the mortgage will bear simple interest at the agreed rate of 10½ per cent. The plaintiffs, having been ejected at that date, will be entitled to mesne profits until re-conveyance. The Trial Judge will, of course, ascertain the amount of mesne profits on the house. If it is found that the sale was not ***benami***, then the the plaintiffs would only be able to get damages and they are entitled to be put by the damages in the same position as if the first defendant had carried out the contract, that is, they will get the actual value of the house they have lost as on the date of ejectment, being Rs. 1,000 and by way of further damages, interest on that amount at 9 per cent. per annum since the date of ejectment of that decree. One of the questions to be decided by the Trial Judge will, in this event, be the value of the house. The plaintiffs are also entitled, in any event, as damages to all costs to which they have been put in the proceedings by Veerabadra Iyer to which they were praties. Further, they are entitled to a declaration that they are entitled to be indemnified by the first defendant against all claims by purchasers of the lands in question in respect of liabilities which they have incurred by reason of Veerabadra Iyer's mortgage. We are told that two of the purchasers had had to pay Rs. 1,300 balance to Veerabadra Iyer. How the matter stands as between them and the first defendant we do not know, and we are expressing no opinion on it, but if plaintiffs have to pay any damage, in my judgment, they are entitled to claim them under their right of indemnity against the first defendant

(2) (1907) 2 Ch. 292; 76 L. J. Ch. 614; 97 L. T. 279; 23 T. L. R. 660.

(3) (1908) 1 Ch. 546 at p. 548; 77 L. J. Ch. 271; 98 L. T. 354; 24 T. L. R. 296.

(4) 31 Ind. Cas. 216; 29 M. L. J. 551.

(5) 39 Ind. Cas. 346; 44 C. 573; 15 A. L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 39 P. C.).

BHAGWATI PRASAD *v.* ACHHAIBAR SINGH.

There is the matter also of a later mortgage, as Exhibit E8 in Original Side Appeal No. 52 of 1916, in respect of which it is stated that the plaintiffs are liable and not the first defendant. It may be that the first defendant has discharged that mortgage, and whether he is entitled to any and what charge on the property in respect of any payment made in relation to that mortgage is one of the matters which will be open for discussion before the Trial Judge. The sixth issue will also then be heard and determined if plaintiffs so desire. The first defendant must pay to the plaintiffs their costs here and below. The liability as to costs as between the plaintiffs and the 11th defendant in the Court below will be decided on remand by the learned Judge. The 11th defendant will not in any event be entitled to any costs of this appeal because in this appeal plaintiffs have succeeded in getting a new trial as between them and the 11th defendant. Plaintiff will pay the costs of the 14th defendant which will be fixed at Rs. 150. In the Court below there will be one set of costs for the seventh defendant (sixth respondent) and the 13th and 14th defendants, and another set for defendants Nos. 2, 3, 8 and 10 payable by the plaintiffs.

Walace, J.—I entirely agree. I have really nothing to say which has not already been fully said by the learned Chief Justice and I have to add nothing to what he has said.

V. N. V. *Appeal allowed.*

N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL NO. 4 OF 1922.

August 21, 1922.

Present:—Mr. Ashworth, A. J. C. and Mr. Simpson, A. J. C.

BHAGWATI PRASAD AND OTHERS—DEFENDANTS—APPELLANTS—APPLICANTS

versus

ACHHAIBAR SINGH AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110, O. XLV, r. 2, O. XLVII, rr. 4, 8, scope of—Limitation Act (IX of 1908), s. 5—Leave to appeal to His Majesty in Council—Extension of time—Sufficient cause—Estoppel—Failure to object to value of suit, effect of.

The provisions contained in rules 4 and 8 of O. XLVII of the Civil Procedure Code make it clear that the granting of an application for review merely amounts to a decision to re-hear the case in which the decree or order in respect of which a review is claimed was passed. The Judge hearing the review is not entitled to do anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted, the Judge who has allowed the review becomes vested with jurisdiction to pass any order which the original Judge could have passed. It may be sufficient for him merely to alter the order of the original Judge, or it may be necessary for him to take some intermediate step such as an order in remand, or referring an issue. [p. 215, col. 2.]

Once an application for review is granted it cannot subsequently be dismissed. [p. 215, col. 2.]

The provisions of section 5 of the Limitation Act are applicable to an application for leave to appeal to His Majesty in Council. [p. 216, col. 1.]

A review application was granted by a Judge and an issue was referred to the lower Court. On receipt of the finding the Judge came to the conclusion that the judgment of which review had been granted was correct, but instead of passing an order in the same terms himself he dismissed the application for review. The unsuccessful party applied for leave to appeal to His Majesty in Council but meanwhile the time for making the application had elapsed:

Held, (1) that the original judgment of which review had been obtained had not been affected by anything which had subsequently taken place; [p. 215, col. 2.]

(2) that, therefore, the application for leave to appeal must be considered with reference to that order; [p. 216, col. 1.]

(3) that although the application was barred by time, yet having regard to the fact that this was due to the erroneous procedure adopted by the Judge granting the review who had wrongly dismissed the application for review after granting it, the applicant was entitled to the benefit of section 5 of the Limitation Act. [p. 216, col. 1.]

The value of property which is the subject-matter of a suit is a question of fact which may be concluded against a party by his admission. [p. 217, col 1.]

A party cannot by admitting a lower valuation of a suit suffer an appeal to be heard by a Single Judge of a supreme Court and then claim a higher valuation for the purpose of obtaining leave to appeal to His Majesty in Council. [p. 217, col. 1.]

Application for leave to appeal against an order of the First Additional Judicial Commissioner, dated the 10th April 1922, and of the Second Additional Judicial Commissioner, dated the 19th October 1921 and 19th April 1919, in First Civil Appeal No. 8 of 1921, reversing that of the Subordinate Judge, Fyzabad, dated the 21st May 1918 and the 14th January 1921, and upholding the finding of the Subordi-

BHAGWATI PRASAD v. ACHHAIBAR SINGH.

nate Judge, Fyzabad, on Issue No. 11 dated the 20th February 1922.

Mr. *Bisheshwar Nath Srivastava*, for the Applicants.

Mr. *A. P. Sen*, for the Opposite Party.

JUDGMENT.—This is an application under O. XLV, r. 2, of the Code of Civil Procedure for leave to appeal against an order to which three separate dates are assigned in the application for leave to appeal. These dates are 16th April 1919, 19th October 1921 and 10th April 1922. It appears that on 19th October 1921 Mr. Dalal, then Second Additional Judicial Commissioner, passed an order setting aside the decree of the lower Court in favour of the defendants and decreeing the plaintiffs' suit. An application for review of this judgment of Mr. Dalal was made and entertained by Mr. Lyle, First Additional Judicial Commissioner, after Mr. Dalal had left the Court. The application was entertained in view of the fact that Mr. Dalal had overlooked the allegation by the defendants of a certain ground for impugning the Will on which the plaintiffs based their claim, a ground on which an issue had been struck by the Court of first hearing but on which no decision had been passed by that Court in view of its dismissal of the claim on other grounds. On the 12th January 1922 Mr. Lyle passed the following order:—

"I allow this application in review and return the case to the Court of first instance with directions that it record a finding on Issue No. 11 and submit that finding to this Court within one month."

The Court of first hearing submitted its finding which was in favour of the plaintiffs. Mr. Lyle accordingly saw no reason to interfere with the order of Mr. Dalal allowing the plaintiffs' claim, but instead of himself passing an order to the same effect as the one that Mr. Dalal had passed he merely by an order dated the 10th April 1922 dismissed the application for review with costs.

The first question that has to be decided in this application for leave to appeal is whether the application is within time. That depends on whether the order appealed against should be regarded as Mr. Dalal's order of 19th October 1921 or Mr. Lyle's order of the 10th April 1922.

In discussing this question it appears desirable to quote the first part of rule 4 of O. XLVII (which is the Review Chapter) and the whole of rule 8 of that Order:

"4 (1). Where it appears to the Court that there is no sufficient ground for a review, it shall reject the application.

"(2) Where a Court is of opinion that the application for review should be granted, it shall grant the same:

"Provided that

"(*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for."

"8. When an application for review is granted a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

These provisions appear to us to make it quite clear that the granting of an application for review merely amounts to a decision to re-hear the case in which the decree or order (in respect of which a review is claimed) was passed. The Judge hearing the review is not entitled to do anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted the Judge who has allowed the review becomes vested with jurisdiction to pass any order which the original Judge could have passed. It may be sufficient for him merely to alter the order of the original Judge or it may be necessary for him to take some intermediate step such as an order in remand or referring an issue. In the persent case Mr. Lyle adopted the second step. When the case came back from the lower Court with a finding on the issue his proper course would have been to allow the appeal and decree the plaintiffs' claim. This is what he obviously intended to do. But instead of doing so he wrongly passed an order dismissing the application for review which he had already granted.

Adopting, then this view the present position is that no order justifying a decree in favour of the plaintiffs was passed by Mr. Lyle. Whether that passed by Mr. Dalal will stand good notwithstanding the

granting of the review will depend on whether Mr. Lyle was justified in dismissing the application for review after he had granted it and, secondly, supposing that he was not, whether this Bench has any power to ignore his second order. Both questions must be answered in the negative. The first we have in substance already decided and as to the second an appeal in this Court does not lie from a decision, however wrong and without jurisdiction, of a Single Judge.

The consequence is that Mr. Dalal's order of the 19th October 1921 remains unaffected by anything that happened subsequently. It is against this order that the applicants are appealing to the Privy Council as may be seen from their grounds of appeal. Such appeal is admittedly time-barred. The applicants cannot, moreover, apply for a review of Mr. Lyle's order of the 10th April 1922 as they are barred from doing so under O. XLVII, r. 9.

Although, however, the application is beyond time the applicants desire us to invoke section 5 of the Limitation Act and to admit the application after time. It is urged that the fact that Mr. Lyle merely dismissed the application before him for review instead of, as we hold that he should have done, passing himself an order in appeal dismising the appeal, is a sufficient cause for the application not being made within time. We have no doubt that under section 5 we are entitled to admit the application after time. If any authority is needed for this we would refer to *Jyotindra Nath Sarkar* v. *Lodna Colliery Co.* (1), where a Full Bench of the Patna High Court held that section 5 was applicable to an application for leave to appeal to His Majesty in Council. The only question is whether the cause for not filing it within time is sufficient. We have already expressed the opinion that the application for review was granted on the 12th January 1922 and that from this date Mr. Lyle had jurisdiction in the case as if the appeal had been heard by him *ab initio*. From this date, therefore, the applicants were not in a position to file an appeal from Mr. Dalal's order of the 19th October 1921. When on the 10th April 1922 Mr. Lyle passed the order dismissing the application for review this order revived the right of the applicants to appeal from Mr. Dalal's order but limitation had by then expired. It is obvious, therefore, that according to our view the applicants were prevented from lodging the appeal within time by a mistake of Mr. Lyle. We, therefore, admit the application for leave to appeal and proceed to deal with it on its merits.

The next question is whether the valuation of the property in suit amounts to Rs. 10,000. The property in suit is revenue-paying land, being a 1-anna 4-pies fraction of the whole *mahal*. Court-fee was paid at five times the land-revenue as required by section 7 (*v*) of the Indian Court-Fees Act. For purposes of jurisdiction the property was stated in the plaint to be worth Rs. 6,000 and in the written statement the applicants-defendants stated that they took no objection to this valuation. The Court of Trial dismissed the suit. In an appeal to this Court the property was again stated to be worth Rs. 6,000 for purposes of appeal. Had it been valued at Rs. 10,000 or over it would have been heard by a Bench of two Judges. As it was, it was heard by a Single Judge. The appeal was accepted and the plaintiffs obtained a decree.

The applicants-defendants base their right to appeal to the Privy Council first on the ground that the value of the subject-matter of the suit in the Court of first instance amounted to Rs. 10,000 and that the value of the subject-matter in dispute on appeal to His Majesty in Council is of the same sum and, alternatively, that even if the value of the subject-matter in dispute did not amount to Rs. 10,000 yet the decree in favour of the plaintiffs involved indirectly a claim or question respecting property of Rs. 10,000.

The first question for this Court to decide is whether the applicants are estopped from pleading that the value of the subject-matter of the suit is Rs. 10,000 by reason of their raising no objection to this valuation in the Court of first hearing or at the time when the plaintiffs appealed. It is to be noticed that in the Court of first hearing it made no difference what the valuation for the purpose of jurisdiction was stated to be as the Subordinate Judge had jurisdiction up to an unlimited amount. In

(1) 62 Ind. Cas. 649; 2 P. L. T. 361; (1921) 1 Al. 177; 6 P. L. J. 350 (F. B.).

the appeal, however, the same valuation for purposes of jurisdiction was placed on the suit by the plaintiffs without objection from the present applicants and the result of this was that the appeal was heard by a Single Judge instead of by two Judges as it would have been if the valuation had been held to be Rs. 10,000. So the failure of the applicants to object to the valuation for purposes of jurisdiction in the Appellate Court was not without effect. In the case *Jagannath Bakhsh* v. *Mendana* (2) it was held by a Bench of two Judges of this Court, in circumstances which we cannot distinguish from the present case, that defendants who had accepted the value of property for purposes of jurisdiction could not be heard to question that value subsequently. Several rulings have been quoted to us that the arbitrary valuation prescribed for the purposes of stamp-duty will not preclude a party maintaining a higher sum as the real value of the subject-matter in dispute, but these rulings have no bearing on this case where a different valuation was asserted for purposes of jurisdiction. The *ratio decidendi* adopted in the ruling quoted was that the value of the property is a question of fact and that that question had been settled by the defendants on their own admissions. It is clear that if the defendants had objected to the valuation for purposes of jurisdiction an issue would have been framed and the matter settled in an early stage of the litigation. We are, therefore, disposed to agree with this ruling that there is in substance a finding of fact of the two lower Courts that the valuation for purposes of jurisdiction is as stated in the plaint. The Privy Council will not without very strong reason allow a question of fact decided concurrently by two lower Courts to be re-opened. Apart from this, it appears to us that it is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a Single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. Accordingly, we see no reason to depart from the ruling of the Bench of this Court and decide that the value of the subject-matter of the suit is less than Rs. 10,000.

(2) 30 Ind. Cas. 204; 2 O. L. J. 208 at p. 211.

It is, however, pleaded in the alternative that the decree in favour of the plaintiffs involved indirectly a claim or question respecting property of Rs. 10,000 inasmuch as the sale-deed of 1833 on which the claim was based comprised double the amount of property now in suit. The question we have, therefore, to decide is whether the decree of this Court that the sale-deed relied on was a forgery would operate to the detriment of any party who might seek relief on the basis of the sale-deed in respect of the other half of the property thereby transferred. The present suit is concerned with half of the property. The original owner of the whole of the property was Fateh Singh. There is a sale-deed executed by Fateh Singh in favour of Gopal Singh and Sanoman Singh. It is dated 1833 but the finding of Mr. Dalal is that this document was really written in 1870 and that it was never intended to operate. If this sale-deed were held to be genuine and operative then Fateh Singh was divested of the whole of the property in 1833 and no subsequent disposition by him had any force. Fateh Singh executed two Wills. The first was in 1865 and it was in favour of his wife and of Chandrabali Singh in equal shares. Chandrabali Singh is the present defendant and it was on the basis of this Will that he subsequently obtained a decree giving him possession of the half of the property which he now holds. But he is also the son of Gopal Singh who was one of the vendees under the sale-deed of 1833. The second Will was executed in 1867 and was in favour of the wife with remainder to the daughter. Fateh Singh died in 1876. In 1878 Chandrabali Singh obtained his decree against the wife for half of the property, the second Will somehow being held inoperative against the first Will. In 1879 the wife and daughter together executed a deed of gift in favour of Chandika Singh. The plaintiffs brought their suit on foot of this deed of gift as the representatives-in-title of Chandika Singh. In 1880 Sanoman Singh, one of the two vendees under the sale-deed, died and in 1882 his son Jagat Bali obtained a decree on foot of the sale-deed of 1883 against both the vendors and the donee Chandika Singh for

cancellation of the deed of gift of 1879 and for possession of half of the property. In 1916 the wife died. In 1917 the plaintiffs brought the present suit. They could not ask for possession of Jagat Bali's moiety of the property because they were barred by *res judicata*, the donee under the deed of gift having been a party to Jagat Bali's decree of 1882. But they could and did claim possession of Chandrabali's half. Chandrabali's decree was good against the wife only. Up to the time of the wife's death this decree was also good against her donees; but when she died the gift by her daughter became operative and plaintiffs brought their suit. Chandrabali could not maintain the earlier Will against the later Will, but he set up the sale-deed. Obviously, if Fateh Singh had divested himself of the property in 1883 the Will of 1867 was invalid and the gift was equally invalid and the plaintiffs' suit must fail. By the decision of Mr. Dalal plaintiffs succeed. If Mr. Dalal's decision should be set aside, the decision would effect only one-half of the property. It will not effect Jagat Bali's half even indirectly. The plaintiffs cannot attack Jagat Bali because the decree of 1882 is *res judicata* against the plaintiffs. If any third party were to attack Jagat Bali the present decision would not be *res judicata* in the case. It is true that the reasoning in the present judgment might be held valid if this supposed claimant were to set up the sale-deed of 1883 but, where a judgment or order can have no effect on subsequent litigation apart from the reasons given for it, such judgment or order cannot be said even indirectly to involve a question respecting the subject-matter of the litigation. So we hold that the decree in question has not involved even indirectly a question respecting property of Rs. 10,000.

For the above reasons we hold that no appeal to the Privy Council lies and dismiss the application for leave to appeal with costs.

Z. K. & N. H. *Application dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 262 OF 1922

AND

CIVIL REVISION PETITION No. 541 OF 1922.

February 22, 1923.

Present:—Justice Sir Francis Oldfield, Kt., and Mr. Justice Venkatasubba Rao.

KARRI BAPANNA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUNKARI YERRAMMA AND OTHERS—DEFENDANTS Nos. 11 TO 13—RESPONDENTS.

Evidence Act (I of 1872), s. 44, scope of—Judgment, objection to—Gross negligence.

Section 44 of the Evidence Act is applicable not only where a previous judgment is attacked on the ground of fraud or collusion but also where it is alleged to have been obtained owing to the gross negligence of the gurdian of the person disputing it. [p. 219, col. 1.]

Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11; 3 C. W. N. 660; 14 Ind. Dec. (N. S.) 8, *Jogeshwar Narain Singh v. Roy Radha Raman*, 16 Ind. Cas. 543, followed.

Appeal against an order, dated the 21st February 1922, of the Court of the Additional Subordinate Judge, Vizagapatam, in Appeal Suit No. 361 of 1921, preferred against the decree of the Court of the District Munsif, Yellamanachalli, in Original Suit No. 384 of 1918.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Vizagapatam, dated the 21st February 1922, in Appeal Suit No. 361 of 1921.

Mr. *Y. Suryanarayana*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—The order appealed against is one of remand. The question was whether, as the eleventh defendant alleged, a previous decree was invalid, because it had been obtained owing to the negligence of her then guardian. The first objection to this order of remand is that the plea of negligence was untenable inasmuch as, if the eleventh defendant wished to plead that she was not bound by the previous judgment she should have brought a regular suit to have it set aside. That does not appear to be in accordance with section 44 of the Indian Evidence Act or the construction of that provision

in *Rajib Panda* v. *Lakhan Sendh Mahapatra* (1). It is urged that section 44 is not applicable when the previous judgment has been obtained owing to gross negligence; and it is true that only fraud or collusion and not gross negligence is mentioned in it. We do not, however, think that the principle involved is inapplicable to cases of gross negligence. It may be observed that such cases were referred to as on the same footing with cases of fraud in *Jogeshwar Narain Singh* v. *Roy Radha Raman* (2), and we can see no reason on principle why any distinction should be made between the one class of cases and the other.

On the merits, we think that the lower Appellate Court has stated its reasons very badly for conclusions which are correct. The first question was whether the District Munsif was right in not coming to a conclusion on the plea of gross negligence. There is no doubt that this plea was not taken by the eleventh defendant in any distinct language in her written statement. The written statements were exceedingly general, the injunction of the Code that allegations of fraud and the like should be made specific, if they are made at all, being entirely neglected. On these pleadings, however, two very general issues were framed, one of which, the fourth, was quite wide enough to cover the plea of gross negligence; and, a most important consideration, there is no doubt that the parties had in mind the plea of gross negligence at the trial and that the eleventh defendant was attempting to produce evidence in support of it, which was rejected not because the matter was not agitated in the suit, but because the District Munsif did not think that that evidence was of any value. In these circumstances, we hold that the case of gross negligence was open and that the Munsif should have found definitely on it. The lower Appellate Court's order, therefore, remanding the suit for re-trial on that point must be supported. It had already directed the Munsif to take an additional written statement from the eleventh defendant. We supplement that direction by saying that the negligence relied on should be described in as definite a manner as possible and that a definite issue as to the gross negligence should be framed before the re-trial begins.

The lower Appellate Court's order is next that in the re-trial certain documents shall be admitted in evidence and considered. It is not clear on what grounds exactly it founded that direction; for it has not gone into the question whether those documents were rejected on any legal ground by the Munsif. We have done so with the result that we are not able to find any objection valid under the Evidence Act to the admission of those documents established. They were apparently produced before the District Munsif, but he dismissed them with the remark that they were prior to the date of a certain compromise and that the father of the alleged adopted son, one Sanyasi Naidu, could not have known of them, and elsewhere commented on the absence of documents to show that Sanyasi recognised his alleged adopted son as his son. We are told that the District Munsif was inaccurate in this and that among the documents there are some which would support this part of the case. In any event, however, the documents, as the Munsif himself says, would show that Chellamal, the widow of Sanyasi, after his death recognised the alleged adopted son. That, in our opinion, would certainly be a relevant fact and it would, of course, be for the Trial Court to estimate its importance. The District Munsif throughout has not shown that there is any provision of the Evidence Act under which he was justified in excluding these documents. He was not justified in excluding them, because they would not prove a particular part of the case, when they were relevant to establish another part. This being so, this portion also of the lower Appellate Court's order was correct.

The appeal accordingly fails and is dismissed with costs of the eleventh defendant (the first respondent). The civil revision petition is dismissed. No order as to costs.

Appeal and petition dismissed.

V. N. V.

N. H.

(1) 27 C. 11; 3 C. W. N. 660; 14 Ind. Dec. (N. S.) 8.

(2) 16 Ind. Cas. 543.

KHAIRUDDIN *v.* SAHU GULAB DAS.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 243 OF 1922.

June 1, 1923.

Present:—Mr. Justice Ryves.

KHAIRUDDIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAHU GULAB DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 95 (a), 167—Suit for declaration of occupancy rights against Zemindar and co-tenant—Jurisdiction of Revenue Court.

Having regard to the provisions of section 167 of the Agra Tenancy Act, a suit by a tenant under section 95 (*a*) of that Act against the landlord and a co-tenant, for a declaration of occupancy rights is cognisable by a Revenue Court, and not by a Civil Court.

Second appeal against the decree of the Additional District Judge, Moradabad, dated the 16th of November 1921.

Mr. S. *Raza Ali*, for the Appellants.

Messrs. *Bhagwati Shankar* and *Durga Prasad*, for the Respondent.

JUDGMENT.—Shansi was the occupancy tenant of the land in dispute. He died leaving four sons, Sher Khan, Zainuddin, Baz Khan and Khairuddin. The plaintiffs are Khairuddin and the four sons of Zainuddin, who is dead, and the three sons of Baz Khan, who is also dead. These plaintiffs brought this suit in the Revenue Court at Moradabad against Sher Khan and the *zemindar*. The suit purported to be one under section 95 (*a*) of the Agra Tenancy Act. In their plaint, after reciting the above facts, they stated that on the death of Shansi his four sons jointly cultivated the land but the name of Sher Khan alone was entered in the revenue papers because he was the eldest son and was the head of the family. The plaintiffs assert that they are in possession of the land as heirs of Shansi but that, inasmuch as the *zemindar* does not admit that they are tenants the suit was brought for a declaration under section 95 (*a*) of the Agra Tenancy Act. The Assistant Collector before whom the case came held that the suit was triable by a Civil Court and dismissed it. On appeal the learned Additional District Judge of Moradabad has upheld this view. The plaintiffs come here in second appeal and the only point taken is, that the suit was one exclusively

BALAPPA GHENAPPA *v.* AKKUBAI.

triable by the Revenue Court, and my attention has been drawn to the cases of *Ram Charitar Rai* v. *Jiani* (1), *Baljit* v. *Mahipat* (2) and *Jagannath* v. *Balwant Singh* (3). It seems to me, from a perusal of the plaint itself, tha tthe real object of this suit was to have a declaration against both the *zemindar* and Sher Khan that the plaintiffs were the occupancy tenants of the holding. Such a suit, it seems to me, can only be brought in a Court of Revenue having regard to section 167 of the Agra Tenancy Act. I, therefore, allow this appeal, set aside the decree of the Court below and direct that the plaint be returned through the learned District Judge to the Trial Court to restore to its original number and to dispose of it according to law. Costs including in this Court fees on the higher scale will abide the result.

W. C. A. & N. H. *Appeal allowed.*

(1) 21 Ind. Cas. 859; 36 A. 48; 11 A. L. J. 1022.

(2) 49 Ind. Cas. 118; 41 A. 203; 17 A. L. J. 60.

(3) 68 Ind. Cas. 247; 44 A. 692; 20 A. L. J. 57; (1922) A. I. R. (A) 372; 4 U. P. L. R. (A.) 194.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 227 OF 1922.

March 14, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BALAPPA GHENAPPA GHONGADI—PLAINTIFF—APPELLANT

versus

AKKUBAI *Kom* RAYAGOUDA BIRADAR PATIL AND OTHERS—DEFENDANTS Nos. 2, 3 AND 6—RESPONDENTS.

Hindu Law—Mitakshara—Bombay School—Joint family—Adoption—Adoptive father reserving free power of management, effect of—Alienation by manager, validity of.

Plaintiff was adopted under a deed of adoption which contained the following clause:—

"You have acquired whatever rights and authorities a natural son should have acquired had I got any, and you have from to-day become the owner of the property moveable and immoveable. You should stay with us and take

care of us as long as we, *i. e.*, my wife and I, live. After our death you are the sole owner and should thereafter make *Vahiwat* as owner. In whatsoever manner the estate, moveable or immoveable is managed (*Vyavastha*), as long as I live it is to be taken that you approve of it. You have no authority to object to it. On this condition I have taken you in adoption of my free will on your and your father's consenting to it:"

Held, that the clause conferred on the adoptive father power of management of the family property free from any interference on the part of the adopted son, but it did not give him an unrestricted power of alienation. [p. 223, col. 1.]

A member of a joint family in Bombay can alienate his undivided share in the family property without the consent of his co-owners. [p. 223, col. 1.]

Therefore, an alienation of the whole interest in a portion of the family property by the manager is good at least to the extent of his own share in the property alienated. [p. 223, col. 1.]

Kasam v. *Jorawar Singh*, 68 Ind. Cas. 573; 49 I. A. 358; 31 M. L. T. 46; 16 L. W. 223; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.), followed.

Appeal against the decision of the Assistant Judge, Belgaum, in Appeal No. 172 of 1920.

Mr. *H. C. Coyajee*, with him Mr. *A. G. Desai*, for the Appellant.—The lower Courts have really misread and misunderstood the adoption deed, Exhibit 50, in this suit. The word used for management in the original is "*Vyavastha.*" The word, as interpreted by Molesworth and Wilson, means "settlement, arrangement, just disposition, establishment in suitable connection or order or separating, setting apart, settlement, arrangement." The word by itself has no distinct meaning. The word must be construed so as to be consistent with the context, especially with the sentence "you have acquired whatever rights and authorities a natural son should have acquired." The word does not override the natural legal rights of the adopted son. At the most, it confers upon the father the management of the family property as manager, free from the interference on the part of the son. It does not invest the father with unrestricted power of disposal. If it were so, in case the father and the son were to fall out, it would arm the father with a good weapon to deprive him of all the family property. Your Lordships will note that in this case the old father has recently married and has fallen out with his son. He has tried to deprive the son of his share by attempting to alienate almost all the exclusive property either by way of gift, sale or mortgage, without any necessity whatsoever. There are over a dozen suits of a similar nature pending in the lower Courts. If the deed be widely construed as empowering the father to alienate the property without any restrictions whatsoever, it would entail hardship by defeating the natural rights of the son.

No doubt, the major son can consent to his father's alienations without legal necessity, but he cannot be said to consent to all the future alienations which the father as a manager is not competent to do.

Mr. *R. A. Jahagirdar*, for the Respondents.—The word *Vyavastha* connotes unlimited power of alienation, and as such the alienation is binding on the son. The plaintiff was a major at the time the adoption deed was passed and there was nothing wrong in his voluntarily consenting to the condition in the deed The son is not to object to any sort of alienation by the father. The consent of the plaintiff was quite natural as he had a tempting bait of a very extensive fortune. Had he not consented, the father might not have adopted the plaintiff.

Secondly, it is a recognised principle of Hindu Law that the manager of the joint family can alienate the family property, though without any necessity, with the consent of the other co-parceners. The plaintiff had consented to his father getting unlimited power of disposal. It can be, therefore, said that he had consented to the alienation at issue. Your Lordships may not take into consideration other alienations, the learned Counsel has just referred to, as they are not before the Court.

If your Lordships then are against me on this point, my next point will be that the alienation is good to the extent of a moiety, the share of the father. Defendant No. 1 alienated the suit property for a valuable consideration which he is entitled to do under the law. I admit there is no legal necessity proved; but a co-parcener can under the Mitakshara prevailing in the Bombay Presidency alienate

his share in the family estate for a valuable consideration. The alienation then is good to the extent of the father's share. I rely upon remarks of their Lordships of the Privy Council in *Kasam* v. *Jorawar Singh* (1).

Mr. *Coyajee*, in reply.—It is so my Lords, we have an alternative prayer in the plaint for the recovery of the moiety on partition.

JUDGMENT.—The plaintiff sued for a declaration that the sale-deed passed by deceased defendant No. 1 who was the adoptive father of the plaintiff in favour of the defendant No. 2 was void, and to recover possession of the property in suit. In the alternative the plaintiff sued for possession of half the suit property on partition. The suit has been dismissed in both the Courts.

The plaintiff was adopted by Ghenappa, the first defendant, on the 30th November 1903, at which time the plaintiff was a major. Exhibit 50 is the adoption deed, and it is on the interpretation of a particular passage in that deed that the decision in this suit depends.

For the plaintiff it was contended that the material portion of the deed ran as follows :—

"You have acquired whatever rights and authorities a natural son should have acquired had I got any, and you have from to-day become the owner of the property moveable and immoveable. You should stay with us and take care of us as long as we, that is, I and my wife, live. After our death you are the sole owner and should thereafter make *Vahiwat* as owner. In whatsoever manner the estate, moveable or immoveable, is managed, as long as I live it is to be taken that you approve of it. You have no authority to object to it. On this condition I have taken you in adoption of my free will on your and your father's consenting to it."

The word used in the original is *Vyavastha* and the learned Appellate Judge at page 3 has quoted the various meanings assigned to that word in Molesworth's Marathi English Dictionery and Wilson's Glossary of Judicial and Legal terms. It would appear that the word itself has no distinct and separate meaning. It may either mean settlement, arrangement, just disposition ; establishment in suitable connection, or order or seperating, setting apart, settlement, arrangement.

The learned Subordinate Judge considered that the word "*Vyavastha*" in the context in which it was used could mean only settlement, disposition, and that the adoptive father had thus reserved to himself unlimited powers of disposal over the property both moveabe and immoveable.

The learned Appellate Judge held that the word "*Vyavastha*" connotes just disposition as manager of the family. There is further an ingenious argument raised that because a manager of a joint Hindu family can alienate the family estate with the consent of the other members of the family, the plaintiff consented, prior to his adoption, to his adoptive father's management, and, therefore, it must be taken that he consented to any alienation which might be made in future by the adoptive father as manager. There is, an obvious fallacy in that argument, because, ordinarily, a general consent given to a manager of a joint Hindu family would not include a consent to alienations for value which are not within his province as manager, so that, for other alienations express consent would be necessary. Therefore, the consent given to a manager by other members of the family does not necessarily inlcude consent to future alienations. It would only mean, as in this case, that the family would not interfere in any way with the ordinary management of the family property.

But it has been contended for the respondent that the word "*Vyavastha*" connotes unlimited powers of alienation. It seems to us that when we have to interpret a word of this indeterminate character, we must read it strictly with th context in the adoption deed, and although it would be very natural for a son if he is major to consent, and if he is a minor, then for those who are acting on his behalf to consent, to the adoptive father's acting as manager of the family property, yet it would be extremely unlikely that there

(1) 68 Ind. Cas. 573; 50 I. A. 338; 31 M. L. T. 40; 16 L. W. 223; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.).

should be a consent given to the adoptive father having unrestricted powers of alienation which might result, as it did in this case, in the father's dissipating the whole of the family property or the best part of it before the adopted son, could succeed. That being the case, in our opinion, we should interpret this adoption deed as conferring on the father powers of management free from any interference on the part of the adopted son, and as such a provision might naturally have been made in the deed although the adopted son at that time was a major, it is by no means necessary or even natural that we should interpret the clause as giving to the adoptive father an unrestricted power of alienation. We think, therefore, that the learned Appellate Judge was wrong in dismissing the paintiff's suit.

We think that the alienation in this suit was not competent with regard to the plaintiff's share. It is a question on which apparently there is some conflict of authorities whether an unauthorised alienation by the manager of a Hindu joint family is altogether void or whether it would be held good to the extent of the share of the person making the alienation. In *Kasam* v. *Jorawar Singh* (1) their Lordships of the Judicial Committee accepted the view that the Mitakshara is to be interpreted in Berar in the same manner as in Bombay, and that accordingly a member of a joint family in Berar could sell his undivided share without the consent of his co-owners. If, therefore, the plaintiff's father had power to alienate his own share without the consent of the plaintiff, it is difficult to say why in the case of an alienation for value as in this case of the whole interest of the family property it could not remain good with regard to the plaintiff's father's share.

We think, therefore, that the plaintiff is entitled to a declaration that he is the owner of half the suit property and that the suit should be ref rred to the Collector for partition of the suit property in equal moieties between the plaintiff and the second defendant.

There should be usual enquiry as to mesne profits from the date of suit. The plaintiff should pay Court-fees to the extent of mesne profits to which he has succeeded.

The plaintiff is entitled to half his costs throughout.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1 OF 1921,
AND
CIVIL REVISION PETITION No. 2 OF 1921.
March 15, 1923.

Present:—Sir Walter S. Schwabe, Kt., Chief Justice, and Mr. Justice Odgers.

THE PRESIDENT OF THE DISTRICT BOARD OF SOUTH CANARA—DEFENDANT—APPELLANT

versus

K. GOPALAKRISHNA BHATTA—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 1, 3, 19—Tolls (Army) Act (II of 1901), s. 6—Suit for damages caused by illegal order of President of District Board, nature of—Suit, whether cognizable by Small Cause Court—Suit wrongly brought against President—Interference in revision—Civil Procedure Code (Act V of 1908), s. 115.

Where the plaintiff, a toll-gate contractor, alleged in his plaint that the President of the District Board issued an order wrongfully forbidding him to collect tolls in respect of certain carts and claimed damages caused by reason of such illegal order:

Held, (1) that the suit was really not one for declaration so as to bring it under Art. 19 of Schedule II to the Provincial Small Cause Courts Act but was really one for damages and the Small Cause Court would, therefore, have jurisdiction to try the suit though in arriving at its decision, it would have to come to a conclusion as to whether the prohibition was rightly or wrongly imposed; [p. 224, col. 2.]

(2) that Arts. 1 and 3 of the Schedule were not applicable to the suit, since the President of the District Board was not an officer of the Government within the meaning of those Articles; [p. 224, col. 2.]

(3) that section 6 of the Tolls (Army) Act, did not bar the jurisdiction of the Court to entertain the suit; [p. 225, col. 1.]

(4) that the mere fact that the suit was wrongly brought against the President of the District Board instead of the District Board itself was not a matter going to the jurisdiction of the Court

PRESIDENT, DISTRICT BOARD, SOUTH CANARA *v.* GOPALAKRISHNA BHATTA.

as to warrant interference with the decree of the lower Court in revision by the High Court under section 115 of the Civil Procedure Code. [p. 225, col. 1.]

Second appeal against the decree of the District Court, South Kanara, in Appeal Suit No. 50 of 1920, preferred against the decree of the Court of the District Munsif, Kasargod, South Canara, in Original Suit No. 652 of 1918, and petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of South Canara, in Appeal Suit No. 50 of 1920, preferred against the decree of the Court of the District Munsif, Kasargod, in Original Suit No. 652 of 1918.

The Advocate-General, for the Appellant.

Messrs. *B. Sitaram Rao* and *R. Kesva Alyanger*, for the Respondents.

JUDGMENT.

SECOND APPEAL No. 1 OF 1921.

A preliminary point is taken in this second appeal under section 102 of the Civil Procedure Code on the ground that this was a suit which could be brought in the Provincial Small Cause Court being for an amount under Rs. 500. The suit was rather a curious one. It was an action by a person who had bought the right to collect tolls on certain roads from the District Board. He had to comply, according to his contract, with the orders given by the President of the District Board. A large quantity of fodder being required for Army purposes in this District, the Forest Officers hired carts and sent them along the road on which the Toll-bar in question was. The respondent tried to collect tolls on these carts and he received an order from the appellant, President of the District Board, forbidding him to collect tolls, he basing his prohibition on his interpretation of the Army Act under which he decided that no toll was payable in respect of carts carrying supplies for the Army. The respondent complied with the order which the appellant had issued, and in due course brought a suit for damages claiming that this order forbidding him to collect these tolls was illegal and alleging that he had suffered damages by reason of that order.

The District Munsif and on appeal the Subordinate Judge so found, and awarded him damages, for Rs. 214. No second appeal lies against that decision the amount being under Rs. 500 unless this is one of the suits set out in the Second Schedule to the Provincial Small Cause Courts Act, IX of 1887. The Article of the Schedule relied on is Art. 19 "a suit for a declaratory decree not being a suit instituted under section 283 of the Civil Procedure Code." I agree that if the case is really a case for a declaration, the Court would be entitled to hold that the Small Cause Court's jurisdiction was excluded. If the case was really a case for damages, as in our judgment this was, the Small Cause Court would have jurisdiction though in arriving at its decision, it would have to come to a conclusion, as to whether this prohibition was rightly or wrongly imposed. The other Articles relied upon are Arts. 1 and 3 which except from the cognizance of a Small Cause Court suits concerning acts and orders purporting to be done by the Governor General in Council or by a Local Government or by a Member of Council and suits concerning acts and orders purporting to be done by any other officer of the Government in his official capacity. If the President of the District Board is an officer of the Government within the meaning of these Articles, this suit would be excepted. But in our judgment he is not. Local Boards and Corporations are what may be called *quasi*-Government bodies but by the very scheme of the Acts under which they are created they are not servants of the Government. Their representatives in some cases are nominated but generally elected by the people and they have their official capacity as such and not as officials of the Government. It is true that they are under Government in the sense that under the Statute they have to account to the Government and are under certain disciplinary powers of the Government. The Government has a duty cast upon it to see that these ministerial bodies carry out their functions lawfully. But in our judgment none of the officials of these Municipalities and District Boards are officers of the Government coming within Arts. 1 and 3.

It follows that this preliminary point

succeeds and that this second appeal does not lie and must be dismissed with costs.

CIVIL REVISION PETITION No. 2 OF 1921.

Schwabe, C. J.—The Civil Revision Petition is on the same matter just disposed of—(Second Appeal No. 73 of 1921). It is suggested that the Court that had heard the case had no jurisdiction by reason of section 6 of the Tolls (Army) Act II of 1901. By that section provisions are made for compensation to certain persons who sustain loss by reason of the Act. It is argued that loss had been sustained by the present respondent by reason of that Act. It is not at all so. Even if it were so, that section does not, in my judgment, exclude the jurisdiction of the Small Cause Court to hear cases such as this.

It is further suggested that this action did not lie because it was against the President and not against the District Board itself. That is not a question, as I understand it, going to the jurisdiction and I see no ground for interfering in this case on revision.

This Civil Revision Petition will be dismissed. There will be no costs.

Odgers, J.—I agree.

V. N. V. *Appeal and Petition*
N. H. *dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 53 OF 1920,
September 18, 1922.

Present:—Mr. Ashworth, J. C., and Mr. Simpson, A. J. C.

Thakur RUDRA PRATAP NARAIN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Thakur NIRMAN PRASAD SINGH AND OTHERS—PLAINTIFFS *Thakur* SHER BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Usage and custom, distinction between—Proof of custom—Presumption arising from recent usage—Pleadings, construction of—Impartible estates—Hindu Law—Joint family—Partition—Exclusion from enjoyment, what amounts to—Limitation Act (IX of 1908), Sch. I, Art. 127—Suit by several co-parceners for partition of united fractional share—Claim of some plaintiffs barred, effect of—Guardian and ward—Possession by guardian of property of ward—Presumption—Evidence Act (I of 1872), s. 35—Statement in record of case reciting admission of party, admissibility of.

A custom on which a party relies must be sufficiently defined for its application to the facts of the case to be clear and undoubted, but the strict English rules of pleadings should not be applied to pleadings in India and a party should be allowed to prove a custom narrower than that alleged in its pleadings. [p. 228, col. 1.]

Abdul Hussein Khan v. *Bibi Sona Dero*, 43 Ind. Cas. 306; 45 C. 450; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 12 S. L. R. 104; 45 I. A. 10 (P. C.), followed.

An impartible estate in Hindu Law is not only consistent with but postulates that the family to which it belongs is joint. No presumption against indivisibility of possession or title can arise by reason of joint living. [p 244, col. 1.]

The rule of impartibility never attaches itself to small estates and cannot survive as a family custom independently of some particular estate. [p. 227, col. 2.]

A family custom of succession to an estate held merely in mortgage cannot exist. [p. 229, col. 2.]

Rama Kanta Das Mahapatra v. *Shamanand Das Mahapatra*, 1 Ind. Cas. 754; 36 C. 590; 6 A. L. J. 364; 13 C. W. N. 581; 9 C. L. J. 497; 11 Bom. L. R. 530; 19 M. L. J. 239; 36 I. A. 49; 6 M. L. T. 84 (P. C.), relied on.

A succession of judgments on a question of custom is valuable evidence as to the existence of the custom. [p. 231, col. 1.]

Mahomed Ibrahim Rowther v. *Shaikh Ibrahim Rowther*, 67 Ind. Cas. 115; 49 I. A. 119; 30 M. L. T. 85; 26 C. W. N. 793; 35 M. 308; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944 (P. C.), followed.

Gujju Lall v. *Fatteh Lall*, 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112 (F. B), distinguished.

A custom must be ancient. [p. 237, col. 1.]

It is of the essence of special usages modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. [p. 237, col. 1.]

(Case-Law discussed.)

Usage should never be used as a synonym for custom. It has two distinct legitimate meanings but neither of them should be confused with custom. It is used to denote what is done by people uniformly and consistently. Used in this sense usage has not the force of law. It would

RUDRA PRATAP NARAIN SINGH *v.* NIRMAN PRASAD SINGH.

only obtain the force of law when it is proved to be reasonable, invariable, ancient, etc., in which case it becomes what is known as custom. It is also used to denote what is done uniformly and consistently and has been so done in a certain locality or by a certain trade or profession, etc., for a period sufficient to make it probable that people in their contracts and in their contractual relationships adopt it as an implied term or condition. Where this is the case a Court which has to put a construction upon a contract imports into the terms of the contract the trade or local usage. Here, again, usage has not the force of law nor will it be sanctioned by the Courts if contrary to positive law. The parties could enter into a contract in contravention of the usage but if they enter into a contract which neither affirms nor denies the usage, the usage may be proved in order to ascertain what was in their minds when they wrote the contract. [p. 238, cols. 1 & 2.]

Then, again, there is the case where usage has some legal effect not *per se* but as *prima facie* evidence of a custom. Where a well-established recent usage is proved and the proof is carried back for a period which may be regarded as covering the period of living memory, a presumption is thereby raised that this usage is in reality the exercise of an ancient and valid custom. If there is no rebutting evidence a decision in favour of the custom may be based on this evidence alone. If the presumption raised by recent usage is rebutted by proof that an ancient custom could not have come into existence, then the usage fails to possess any legal effect. [p. 238, col. 2; p. 239, col 1.]

Where it was found that the usage of impartibility had been observed in a family for the last fifty years, but that evidence against the possibility of a custom of impartibility came down almost to the same date;

Held, that the necessary antiquity of the custom had not been proved. [p. 239, col. 2.]

Co-parceners in a Hindu joint family are entitled to claim partition of property even though they are excluded from possession. [p. 240, col. 2.]

Exclusion by a co-owner of other co-owners will not become adverse to the latter until they become aware of it, but nonetheless there may be exclusion in fact. It is, however, open to a co-owner to prove that exclusion of the other co-owners took place at one time and the bringing of the fact to their knowledge at another time. [p. 240, col. 2.]

In exclusion there is a mental as well as a physical element. Legal or juridical exclusion from an estate by one co-owner of his co-owners is consistent with their physical admission to it. For such mere physical admission to put an end to exclusion it must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. Such intention will be inferrred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such a presumption is, however, rebuttable. [p. 243, col. 2.]

A claim for partition is one of the modes of enforcing a right to share in joint family property within the meaning of Art. 127 of Sch. I to the Limitation Act. [p. 240, col. 2.]

Kali Kishore Roy v. *Dhununjoy Roy*, 3 C. 228; 1 Ind. Dec. (N. S.) 733, relied on.

A suit by several members of a joint family for partition of their united fractional share from the whole estate, and not merely for partition of their individual shares, must fail on proof that the claim of any of the plaintiffs is barred by time. [p. 244, col. 2.]

Where a guardian takes possession of property owned or partly owned by his ward a very strong presumption arises that possession is taken on behalf of the ward, but the presumption is not irrebuttable. [p. 241, col. 2.]

Vasudeo Atmaram Joshi v. *Eknath Balkrishna*, 8 Ind. Cas. 639; 35 B. 79; 12 Bom. L. R. 956, *Carea* v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836 and *Thomas* v. *Thomas*, (1855) 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701; 110 R. R. 107, referred to.

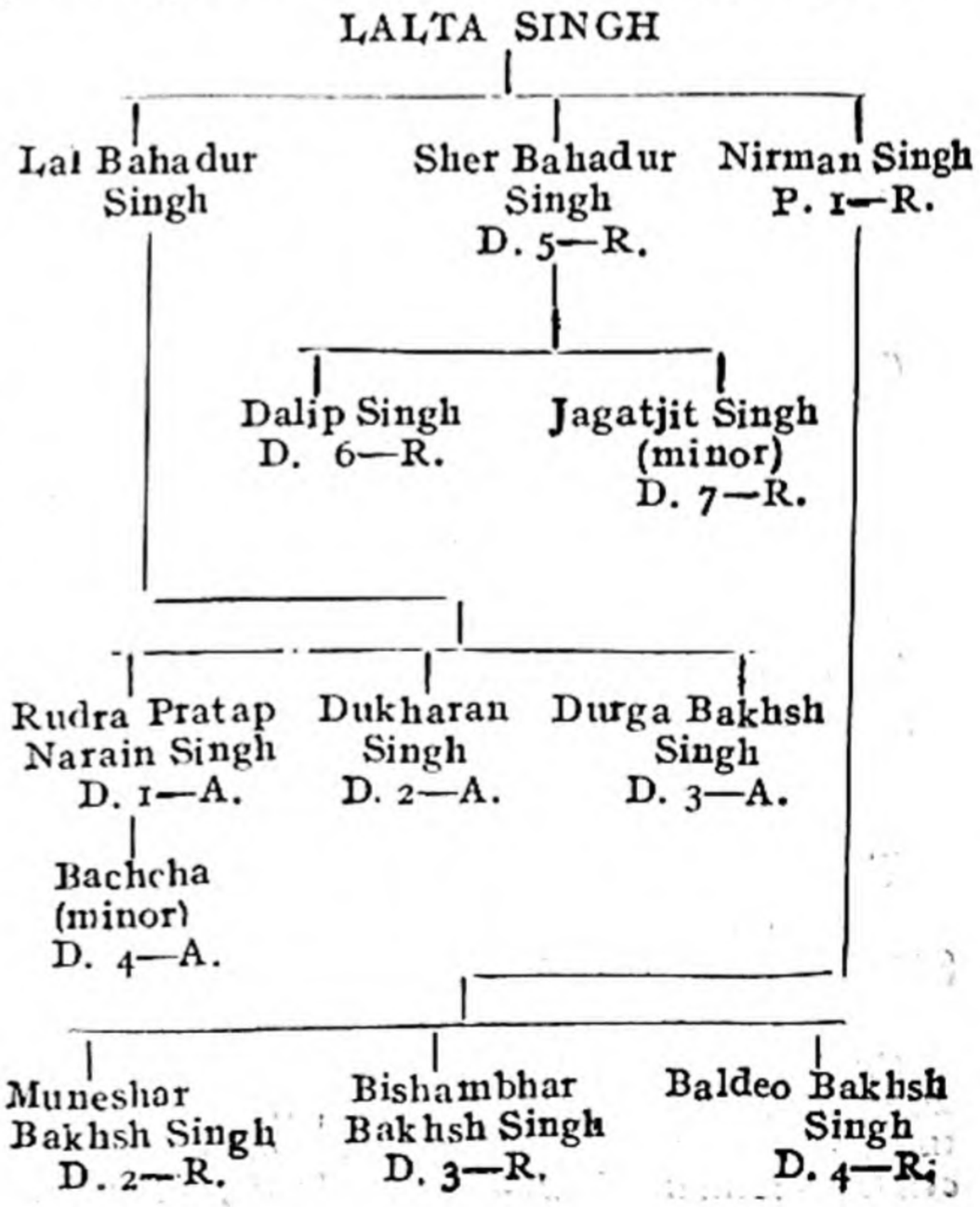
The statement of a Court that a person admitted the claim of another person in a case pending before it is relevant under section 35 of the Evidence Act inasmuch as the statement forms part of the record. [p. 242, col. 2.]

Appeal from a decree of the Subordinate Judge, Bahraich, dated the 6th July 1920.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—This is a defendants' appeal. The relationship of the parties will appear from the following pedigree:—



The appellants, therefore, are the descendants of Lal Bahadur Singh. The respondents are Lal Bahadur Singh's two brothers and their sons. The suit was one for partition of joint family property, plaintiffs alleging that the family was still joint and that they were still in joint possession of the joint family property.

Defendant No. 1 set up a family custom of impartibility and primogeniture and he was supported by the other appellants. The other defendants sided with the plaintiffs.

The learned Subordinate Judge decreed the suit on a finding that the custom alleged by the defendants Nos. 1 to 4 was not proved. Defendants Nos. 1 to 4 have appealed. The four plaintiffs and the remaining defendants are arrayed as respondents.

There are two main questions for decision in appeal. The first is, whether the custom is proved and the second is, whether, if it is found that the custom is not proved, the plaintiffs are nevertheless barred by limitation.

Our finding is that the custom is not proved, but that the plaintiffs are barred by limitation. The decision of the question of limitation, however, itself turns to no small extent on a finding that a recent usage, not amounting to an enforcible custom, does exist in this estate.

The first question for decision is whether the custom has been proved. We are disposed to allow a considerable amount of latitude to the appellants in the way of permitting them to prove a custom different from the custom they pleaded. All that it was necessary for them to plead or prove was the existence of a valid family custom whereby the Bahrampur estate is impartible and descends by primogeniture. Appellants were ill-advised in taking upon themselves a greater burden than this. They analysed, if we may so put it, this pleading into two pleadings neither of which they could possibly prove.

One of these was that there was a family custom of impartibility not relating to any particular estate; that is to say, that any member of the extensive clan of Raekwar Thakurs could walk about India acquiring land and impressing upon each estate as he acquired it his own custom of impartibility. We do not say that such a state of things was impossible, but we do say that we know of nothing similar. The rule of impartibility, so far as we know, never attaches itself to small estates; and it is difficult to imagine how it could survive as a family custom independently of some particular estate. It is not necessary to go into details as to the ancient history of the family. The learned Subordinate Judge has treated this part of the case elaborately and we agree with his reasoning and conclusions. It is sufficient to say here, briefly, that the parties belong to the clan of Raekwar Thakurs. There are other branches of this family who are in possession of *taluqas*, which are entered in list II of Act I of 1869. By section 10 this is conclusive that a family custom of impartibility governs them. But as regards the Bahrampur branch of the family, their ancestor was Kishan Das (see Exhibit 57, page 57 of Part III of the record) and there is no record of any custom of impartibility among any of his descendants with the possible exception of this estate of Bahrampur which we are considering. Partitions took place freely among the descendants of Kishan Das and in the direct line of descent of the parties. (See the judgment of the lower Court at pages 455 & 456 of Part I of the record). The idea, therefore, of an ancient family custom, which was already binding upon the parties before they acquired Bahrampur estate, is clearly disproved.

The second pleading was that impartibility actually runs with the land in the case of Bahrampur, that even if the Raekwars were to sell it to outsiders they would be obliged to take it as an impartible estate. Such a contention is equally improbable and has now been abandoned.

But in a recent decision of the Privy

Council, *Abdul Hussein Khan* v. *Bibi Sona Dero* (1), their Lordships said:—

"It is urged against the appellant that he alleged the custom on which his case depends in three different forms: first, in the plaint filed on the 12th July 1907 in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; secondly, in an affidavit sworn by him on the 10th July 1907, where he said that the custom was 'that a woman after her arriage loses all interest and right of inheritance in the property left by her relations (on the father's side)'; and, finally, in the plaint in the present proceedings, where the custom is asserted in these terms:—'But according to the custom regulating the inheritance by famales in the family of the parties and amongst the respectable Baluchis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations.'

"There certainly is a marked difference between these different customs but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals, and the question is, was such a custom proved?".

We infer from those remarks that the custom must be sufficiently defined for its application to the facts of the case to be clear and undoubted, but that the strict English rules of pleading are not to be applied. We are prepared, therefore, to allow the appellants to succeed provided they can prove the existence of a family custom relating to the Bahrampur estate and to treat their wider pleadings as surplusage.

This brings us to the question whether such a custom is proved. It is necessary to consider in some detail the actual formation of the Bahrampur estate. It is stated in the pleadings that the first member of the family to acquire lands in Bahrampur was Surat Singh (see pedigree in the written statement, page 29 of Part I). In the *wajib-ul-arz* of what may be called the parent village of Bahrampur (see Exhibit No. 31, page 18, and Exhibit A1 at page 50 of Part III of the record), there is a statement "Surat Singh took on this side of the river a portion of village Bahrampur and village Athaisa by mortgage about 50 years ago." But there is no other evidence that Surat Singh acquired any land in Bahrampur or in any part of the present estate, and there is little doubt that the statement in the *wajib-ul-arz* is incorrect. The date given of "50 years ago" is out of the question. The mortgage obtained by his sons is dated 1709 (Exhibit A5, page 162) and his own acquisition of certain ferry rights is dated as far back as 1663. This document is Exhibit A3 on page 160. By it Surat Singh acquired by purchase the toll on the ferry of Bahrampur. There is no evidence that he acquired anything else. The mortgage obtained by his son, Achal Singh, is dated 1709. It is of 1/5th of Bahrampur. At that time all mortgages were possessory. It adds "and the right of passage in the said village." The word translated "the right of passage" is "*guzar*" which is said to be the Persian for "ferry." Presumably, Achal Singh had inherited this from his father Surat Singh but thought it advisable to have it mentioned in his deed (Exhibit A5, page 162). Four years later, in 1713, he obtained a mortgage of 2/5ths share in the same village. Two years later, in 1715, he obtained a third mortgage (Exhibit A6, page 182) either on another 2/5ths share of the same village or as an additional charge on the same 2/5ths

(1) 43 Ind. Cas. 306; 45 C. 450; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 12 S. L. R. 104; 45 I. A. 10 (P. C.).

Putting the facts at their highest for the appellants, Achal Singh was now mortgagee in possession of the whole of the village of Bahrampur.

The *wajib-ul-arz* of Bahrampur (Exhibit A1 at page 50 of Part III) states that Surat Singh himself acquired a portion of village Bahrampur and village Athaisa by mortgage about 50 years ago. As we have said above, this is not correct. The *wajib-ul-arz* of Athaisa (Exhibit 82, page 47, Part III) states that it was Mahpal Singh who obtained the *lambardari* of the said village by means of mortgage. We do not possess the original document; but Mahpal Singh is the son of Achal Singh; so it is probable that Athaisa was acquired somewhat later.

It is stated in the *wajib-ul-arz* of Sabza (Exhibit 81, page 45) that there are two *pattis* in the village and that *patti* No. 1 was included in the *ilaqa* of Bahrampur in 1181 *Fasli*. This will correspond to 1762, so if it is correct Sabza would be either the second or the third village to be acquired.

The *wajib ul-arz* of Zumerpur is the plaintiffs' Exhibit 83, page 48, Part III. It is stated that the share No. 2 was mortgaged in 1817 to Mahpal Singh and Jang Bahadur Singh. They are described as ancestors of Lalta Singh, but as a matter of fact only Mahpal Singh was Lalta Singh's ancestor. Jang Bahadur is his brother, and the fact, if it be a fact, that the mortgage stood in both names, goes against the appellants' case that the estate was then impartible. Share No. 3 has also come to be included in the Bahrampur estate but the *wajib-ul-arz* says that it is not known how this came about. It is known to have been in other hands in 1829 and after that date there were at least two devolutions which presumably took some time. So the acquisition of this village must be fairly late. Admittedly, these 4 villages form the original estate.

It is admitted by the respondents that these four villages were included in the *kabuliyat* of Gur Prasad Singh, the fourth in descent of Surat Singh. It is difficult to see how any custom of impartibility could have existed earlier than Gur Prasad Singh. Wherever the origin of the title can be traced it is a mortgage. Now under the Muhammadan Law there was no period of limitation for the redemption of a mortgage. (See Tagore Law Lectures, 1882, Mitra on Limitation, Vol. I, page 16). This continued to be the law on annexation. Bengal Regulation No. II of 1805, section 3, clause 4, provides that "no length of time shall.....bar the congizance of a suit for recovery of a property in cases of mortgage." The Limitation Act of 1859 provided for the first time for a limitation (Mitra's Limitation Act, page 56.) The limitation was 60 years (section 1, clause 51.) Oudh was exempted from this provision for at least two years (section 24), but in 1860 a Circular No. 190/2917, dated 13th August 1860, applied the same period of 60 years to Oudh. Therefore, the family did not possess an absolute title to these lands until the year 1860. It was remarked by the Privy Council in *Rama Kanta Das Mahapatra* v. *Shamanand Das Mahapatra* (2).—"It is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed." The facts of that case were different. The estate was attached to a certain office which could be granted or withdrawn at the pleasure of Government. But we are of opinion that the principle applies to an estate held merely with the rights of a mortgagee. In this case, as in that, the title was defeasible at any moment and it is this which makes the difficulty of a custom attaching to the estate.

Looking at the pedigree on page 29 of Part I, it will be seen that Surat Singh never owned any part of this estate and that his son, Achal Singh, was acquiring portions by mortgage. Achal Singh had two sons, Mahpal Singh and Jang Bahadur Singh. We find some evidence that a mortgage was made in the names of both, but it must be admitted in favour of the appellants that there is no other record of Jang Bahadur or his descen-

(2) 1 Ind. Cas. 754; 36 C. 590; 6 A. L. J. 364; 13 C. W. N. 581; 9 C. L. J. 497; 11 Bom. L. R. 530; 19 M. L. J. 239; 36 I. A. 49; 6 M. L. T. 84 (P. C.).

dants owning any part of the property. This, however, is not conclusive because according to the same pedigree the line of Jang Bahadur Singh died out in the fourth generation corresponding in number of descents with Adhar Singh who died some 60 or 70 years before institution. So Jang Bahadur counts for very little one way or the other. There seems no reason to suppose that the estate was regarded as impartible in the time of Mahpal Singh.

Of Sardar Singh, son of Mahpal Singh, we know still less. We find some descendants of Meharban Singh, brother of Sardar Singh, raising a claim to the estate as late as in the time of Lalta Singh who did not die till 1882, but their claim was unsuccessful. Sardar Singh had 3 sons Gur Prasad, Sheo Ghulam and Dina Singh. If the estate was impartible Gur Prasad Singh was entitled to get it and it is strongly in the appellants' favour that the whole estate is now in the hands of his descendants. We know nothing of Sheo Ghulam Singh except that his son Bishun Singh was tenant of 19 *bighas* of land in Bahrampur at a rent of Rs. 25. This may have been the arrangement made for his maintenance and will point to the estate being impartible at that time; but of course it is far from being conclusive.

Dina Singh is an important person. We find a mortgage dated 1806 for a period of 10 years executed in favour of Dina Singh who is described in it as "*Zemindar* and proprietor of Bahrampur etc." And in the *wajib-ul-arz* of village Athaisa (Exhibit 82, page 47, of Part III), the successive holdings of the *kabuliyat* are given as follows:—

Fasli	A. D.	
1224 to 1228	1817 to 1821	Gur Prasad Singh.
1229 to 1247	1822 to 1840	Dina Singh.
1248	1841	Adhar Singh son of Gur Prasad Singh.
1249	1842	
1250	1843	Direct management.
1251	1844	
1252	1845	Dina Singh.
1253 to 1255	1846 to 1848	Direct management.
1256 to 1260	1849 to 1853	Baryar Singh, son of Dina Singh.
1261 1262	1854 1855	Lalta Singh, son of Adhar Singh.
1263	1856	Ganga Singh.
1264	1857	Settlement made with Lalta Singh.
1266	1859	do do do.

The *kabuliyat* was a document which was executed by a person who thereby undertook to be responsible to Government for the payment of the land revenue. He was not necessarily the proprietor, but naturally such engagements were as a rule entered into either by the proprietor himself or by some great *taluqdar* who made himself responsible for collecting and paying in the revenue of some smaller *Zemindar* who thereby became to some extent his vassal. The granting of the *kabuliyat* to Dina Singh, Ganga Singh and Baryar Singh is *pro tanto* evidence that the estate was not at that time impartible, otherwise the *kabuliyat* would only have been granted to the sole owner, not to any other member of the family. It is perhaps stronger evidence against primogeniture.

There is thus very little evidence that a custom existed at the time of the annexation. There is no doubt some. There had been, so far, no partition. But this fact is not such strong evidence as it would otherwise be owing to the state of affairs in Oudh before annexation. In Sleeman's Journey through Oudh at page 169 of the original edition it is said:—

"In Oudh the law of primogeniture prevails among all the *talukdars*, or principal landholders; and, to a certain extent, among the middle class of landholders, of the Rajput or any other military class. If one co-sharer of this has several sons, his eldest often inherits all the share he leaves, with all the obligations incident upon it, of maintaining the rest of the family."

"This rule of primogeniture is, however, often broken through during the lifetime of the father, who, having more of natural affection than family pride, divides the lands between his sons. After his death they submit to this division, and take their respective shares, to descend to their children, by the law of primogeniture, or to be again sub-divided as may seem to them best, or they fight it out among themselves, till the strongest gets all."

In this state of things the fact that strict Hindu Law was not always followed can be explained on other grounds than the existence of a custom valid by law. It is quite probable that the family was showing a tendency to adopt the prevalent fashion of primogeniture. It is quite impossible that a custom sufficiently ancient to merit recognition as law could have been in existence.

This brings us to the evidence of recent usage which is strong. The most important parts of it are certain proceedings in the Settlement Courts about the time of the First Regular Settlement.

On the general question of the evidential value of decisions by Courts on questions of custom, it is not necessary to say much in view of the recent judgment of the Privy Council in *Mahomed Ibrahim Rowther* v. *Shaikh Ibrahim Rowther* (3). In that case their Lordships considered a succession of judgments, treating the decisions as valuable evidence: for instance, in dealing with a decree of the Madras High Court in which Innes, J., decided in favour of the usage, it was said: "There was, however, an appeal from his decree which ended in a compromise — a circumstance which deprives his decision of much of its evidentiary value." In the well-known Full Bench case of the Calcutta High Court, *Gujju Lall* v. *Fatteh Lall* (4), where the reverse was held, the question was not one of a custom but merely of a right to immoveable property.

(3) 67 Ind. Cas. 115; 49 I. A. 119; 30 M. L. T. 85; 26 C. W. N. 793; 35 M. 308; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944 (P. C.).

(4) 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112 (F. B.).

In the present case there are several decisions which, taken together, show that a custom of impartibility was recognised by the Courts at the time of Settlement and continuously to the present day. The date of institution is 6th July 1917. Impartibility has been the usage of the estate at least since 29th May 1868 when the estate was settled with Lalta Singh alone but that is a period of 49 years only and a usage of such recent date cannot be regarded as a custom. On this point of the existence of a usage from the year 1868, we differ from the Court of Trial and it is necessary, therefore, to give our reasons in some detail.

We depend mainly on the proceedings in Court. But we also attach some weight to plaintiffs' oral evidence. We are unable to agree with the adverse criticisms passed on that evidence by the learned Subordinate Judge.

The earliest document is A17 on page 195 of Part III. It is a copy of certain questions and answers put to Sital Singh, the son of Dina Singh, who is mentioned above, together with a judgment. It states that Sital Singh claimed that he also had a *zemindari* in this estate and that his name be recorded amongst the proprietors or that the *khewat* be prepared in his name. It is stated in the judgment that during the Mutiny Sital Singh had dispossessed Lalta Singh but at the time of recent Settlement he did not put forward any claim, rather he never put in an appearance. The recent Settlement referred to is called the Settlement of, 64, that is 1264 *Fasli*, and means the Settlement of 1857 which followed the annexation and preceded the Mutiny. Sital Singh's claim was dismissed and it was said: "As Sital Singh's uncle is Lalta Singh and it is the custom of the *pargana*, so Lalta Singh be directed to give food and raiment to him."

Next, there is Exhibit A188, page 197, in which the Commissioner decides a claim by Sital Singh to receive Rs. 325 a year from Lalta Singh as allowance. The order says: "Lalta Singh now says that he is ready to pay the stipend promised from 69 *Fasli*. This arrangement can stand therefore, meantime, the whole question

being open to reconsideration at the Regular Settlement." The first part of this order might point to a withdrawal of his claim to the estate by Sital Singh, but the second part shows that nothing was settled at that time.

When the Regular Settlement came Sital Singh brought a suit. It is to be remembered that all actions relating to land were decided at that time by the Settlement Officers, the jurisdiction of the Civil Courts was barred. The judgment of the Settlement Officer is Exhibit A21 to be found at page 229. Sital Singh in this litigation admitted that the estate was impartible. What he set up was that it did not descend by primogeniture but to the eldest. I may add that in the present case respondent is prepared to admit primogeniture, if impartibility is proved. The reason of this is that the ordinary Hindu rule as applied to impartible estates would not give the estate to the plaintiff. In the present suit, therefore, we are concerned only with an allegation of impartibility plus primogeniture by the appellants and a denial of impartibility by the respondents. The Settlement Officer had to decide whether there was primogeniture. He decided that there was, and he dismissed the claim of Sital Singh and others. It is a little difficult to see how there came to be six plaintiffs, all claiming an impartible estate. But presumably the explanation is to be found in the fact that members of a joint family have a right to maintenance out of an impartible estate belonging to the joint family and have also a hope of succession thereto. In this judgment the learned Settlement Officer dealt with the *kabuliyats* held by Dina Singh and Baryar Singh. He says: "it is very clear that Adhar Singh, Sheo Bakhsh Singh and Lalta Singh were the actual proprietors." This Sheo Bakhsh will be seen in the pedigree at page 29 of Part I. He was the eldest son of Adhar Singh and it appears that he succeeded to the estate. He died childless and his brother, Lalta Singh, succeeded. There was a doubtful adoption by Sheo Bakhsh's widow to which I shall come later, but it is of little importance because the boy adopted was Lal Bahadur Singh, the son of Lalta Singh who ultimately succeeded to the property on the death of his father, and who never showed any disposition to push his claims, during his father's lifetime. Whether the learned Settlement Officer was right or not, there is perhaps scarcely sufficient evidence on the record to show. His order was appealed to the Commissioner whose judgment begins with Exhibit A 203 at page 243 of Part III. The Commissioner made the following remarks on page 244:—"The parties are all descended from one Sardar Singh. It seems satisfactorily proved that the custom of the family was that one person, *i.e.*, the eldest son, should be *kabuliyatdar* and that no partition ever took place. But it is not impossible that the reason of this was not so much that there was any well-defined usage barring partition as that the members of the family being on good terms, partition was not desired. It is, however, certainly in favour of respondent that it is admitted that some descendants of the original purchasers have long lived quite separately and apparently never claimed any share. There seems no doubt that both Dina, uncle, and Baryar, first cousin, of Adhar Singh, were *kabuliyatdars* as was also Ganga Singh, son of Dina. When the relationship is so close it is not easy to determine the nature of the respective positions of persons living together as an undivided Hindu family. Ganga Singh certainly did not hold as *karinda* and it seems necessary that some further enquiry should be made though the Court agrees in the Assistant Settlement Officer's opinion that Lalta Singh, respondent, is the head of the family and ought to be sole *lambardar* of all the ancestral villages: certainly the further enquiry might be postponed to *khewat* but it is for some reason desirable that it should be made at once."

The same order is continued in Exhibit 68 on page 246. The learned Commissioner remanded certain issues. The first issue was: Were appellants and respondents or the persons through whom they claim living together as an undivided Hindu family up to any time within limitation? It was said that if this issue was found in favour of the respondent

(*i. e.*, in the negative) no further inquiry was necessary, but if it was found that there had been a separation within limitation a second issue was to be decided.—When and why did separation take place and had appellants or their ancestors at any time a fair claim to partition or to hold shares under the respondent, he being *sadar malguzar* according to the custom of the *pargana* and clan? And, if so, what shares? Two other issues were remanded with which we are not concerned. The importance of this remand is that it definitely raised the question of partibility which had not been in issue between the parties in the original litigation. The Commissioner, rightly or wrongly, made a new case for the appellants. The findings on these issues are not forthcoming. It is understood that the record has been destroyed. But we possess the orders of the Commissioner when he got the finding (Exhibit A 185 at page 240). He said: "The appellants have not improved their case. They failed to prove that as members of an undivided family they could claim shares." Certain other points are dealt with, and then the Court affirms the Assistant Settlement Officer's order with regard to all the villages except Niamatpur. This is a very important litigation. The branch of Dina Singh, which would have been entitled to a share amounting to half the estate if the estate was partible, brought their claims to the test of a legal decision. It is true that they themselves alleged impartibility but the reason of this may well have been that they believed the estate to be impartible. The Appellate Court demanded a decision on the question of (or at least of a subsisting claim to) partibility and decided that they had failed to prove it. It might of course be argued that this decision loses its force because Sital Singh had not set up partibility, but after the decision he did so. Exhibit A30 at page 270 shows that the same parties put in a claim for half of the village of Bahrampur but the Settlement Officer considered that the question was *res judicata* in virtue of the Commissioner's decision and the suit was dismissed. This second decision fills up any deficiency that may have been in the first, and the two taken together amount to a clear legal decision based on the existence of a custom of impartibility and primogeniture that Dina Singh's branch of the family was entitled to no share in the estate. The Commissioner's judgment is dated 13th April 1868. The attempt by Sital Singh to revive his claim to a share (Exhibit A28, page 252) is dated 2nd July 1868. It was disposed of by the Settlement Officer on 18th May 1869.

In the meantime, two other proceedings in Court had run their course. If the pedigree at page 29, Part I, is looked at, it will be seen that Lalta Singh was the second of three brothers. His eldest brother, Sheo Bakhsh Singh, held the *kabuliyat* for three years from 1844 as appears from the translation of that document (Exhibit A 13 at page 192 of Part III). On his death Lalta Singh seems to have obtained possession, but the third brother, Debi Bakhsh Singh, put in a petition (Exhibit A 48, page 202) in which he claimed to have his name entered in the column of proprietors. This was not the first time that he made such a claim. Exhibit A47 shows a demand for a one-third share by Debi Bakhsh Singh as far back as 9th December 1865. It does not appear what orders were passed on that application. Probably, it was held over until the Regular Settlement. Lalta Singh's reply is Exhibit 13 on page 204. He sets up primogeniture. This document by the way contains some interesting information as regards the formation of the estate. This claim by Debi Bakhsh Singh is of course evidence that the estate was partible, but it is rebutted by his withdrawal of the claim. (Exhibit A49, page 207). In this Debi Bakhsh Singh said:—"The rule of division is not in our family from six generations and this suit was brought on account of ill-feeling amongst the brothers." Accordingly the application (Exhibit A50, page 208, Part III) was dismissed on 12th May 1869.

On the same day another application was dealt with. It is of no real importance. Sheo Bakhsh Singh had left a widow *Musammat* Phul Kuar and she made an application (Exhibit A44 at page 258). It was not in any way opposed to impartibility and primogeniture. What it set up was an adoption by herself of Lal

Bahadur, the eldest son of Lalta Singh. As Lal Bahadur Singh would succeed his father in any case, this application was described by the Settlement Officer as a frivolous redundancy. The lady herself withdrew it. The final order is dated 10th May 1869 just two days before Debi Bakhsh's application was dismissed.

The next application was filed by Sarabjit Singh. He will be found on the pedigree as one of the descendants of Meharban Singh which carries us back a long way, for the common ancester is Mahpal Singh, one of the two sons of Achal Singh. His application is Exhibit A51, at page 260. He withdrew his claim altogether, agreeing to pay rent for such lands as he held apparently at the same rate that he was already paying. This appears from a comparison of Exhibit A83 with Exhibit 47, at page 262. This application is interesting as showing that even Meharban Singh's branch thought it worth while putting in some claim at the time of the Regular Settlement, but evidently did not consider their claim worth very much, as they withdrew it immediately. Orders were passed in that case on 2nd May 1869.

Before final orders had been passed in any of these three cases, Lalta Singh had applied for a primogeniture *sanad*. This was on the 20th April 1869. His application is Exhibit A38, page 190. He alleges an old family custom, and claims to be entered in List II of section 8 of the Oudh Estates Act, which is a list of *taluqas* which, according to the custom of the family on or before the 13th day of February 1856, ordinarily devolved upon a single heir. The Settlement Officer passed orders on 18th May 1869. He recommended that Lalta Singh should get a *sanad* and undoubtedly he based his recommendation on a finding of impartibility and primogeniture, but the evidentiary value of this recommendation is weakened by certain errors contained in it. The judgment says that "impartibility and primogeniture appear to have been the practice for the last four generations at least, and not unlikely for the four ones when some of the villages were first acquired by Surat Singh." There have not been eight generations even counting Surat Singh himself, but if we reckon the devolution from Sheo Bakhsh Singh to his brother Lalta Singh as a generation, the four generations would take us back to Gur Prasad Singh, and four more to Surat Singh. As we have already found Surat Singh did not acquire any of the villages. The judgment goes on to say: "Primogeniture may be accepted to have been the rule regarding the management and visible ownership of the estate." This might mean merely that the eldest son of the eldest son was manager on behalf of the whole joint family. But apparently what it does mean is that this management and visible ownership is to be regarded as evidence of proprietary right. The judgment then says: "No division too seems to have taken place, and thus whatever might have been the supposed custom it never appears to have been put into practice." This remark contains an error of law. Division is the ordinary Hindu Law. It is impartibility which is the special custom. The judgment then refers to the recent claims for shares saying that all but one have been dismissed and that that one is going to be dismissed. It says: "The result of this will be that plaintiff will have been secured by decrees in our Court in the position of an independent and sole owner of the estate he now has had settled with him. On this ground then he might be said to be entitled to a *sanad*." It goes on to say: "Plaintiff's documentary proofs do not establish his assertion that his estate was recognised in the Nawabi to be a *taluqa*, and it may be fairly considered as a fact that this estate was not a *taluqa* in the ordinary acceptation of the meaning of that word. The *jama* also is a small one, being only Rs. 3,619, and this too is the revised *jama* (*mal*)". In the other paragraphs the learned Settlement Officer repeats himself several times, and ends by recommending a *sanad*. This order is dated 18th May 1869. Four days later the Settlement Officer withdrew his recommendation. This is Exhibit A43, page 268. He says that it has come to his knowledge that Lalta Singh had received one year's imprisonment and a fine of Rs. 1,000 in connection with murder of certain Europeans during the

Mutiny, and for this reason he withdraws his recommendation. The learned Commissioner refused the *sanad* in the following short order:—"Independent of the fact of Lalta Singh's bad conduct as explained at page 17 of Settlement Officer's notes I do not consider that a case has been made out for granting a *sanad*." This is Exhibit 9, page 276. The *sanad* proceedings are evidence that the authorities regarded Lalta Singh as being the sole owner of an impartible estate which, however, was not entitled to rank as a *taluqa*.

Lastly, there were the proceedings at Regular Settlement. This Settlement was a very important one because by the Proclamation of the 15th March 1858 the proprietary right in the soil of the Province of Oudh was declared confiscated to the British Government "which will dispose of it in such manner as to it may deem fit." Therefore, the title to the estate of Bahrampur must be in some form or other a grant from the British Government. There were two forms in which Government conferred titles. The first is by *sanad*, but, as we have seen, a *sanad* was refused in the case of Bahrampur. The other was by establishment of what would, but for the confiscation, have been a title to proprietary rights at the Regular Settlement. (See the First Schedule of the Oudh Estates Act I of 1869). The object of Government was by no means to deprive the old proprietors of their rights provided they acknowledged the authority of Government and were ready to enter into an engagement to pay revenue. Accordingly, Settlement Courts were directed to inquire into the titles as they had existed before confiscation and to give decrees to the persons who had possessed rights before annexation. So this last proceeding is in the form of a suit by Lalta Singh against Government. The judgment of the Settlement Officer is Exhibit A37, page 250. It is based upon the previous litigation between Lalta Singh and Sital Singh. The judgment begins: "*Vide* the long proceedings between Lalta Singh plaintiff and Sital Singh his relation. From a perusal of those proceedings it is clear that the plaintiff's title to all these villages is good against the Government. The claim (obviously a slip for Court), therefore, decrees to Lalta Singh the proprietary right in the villages of which a list follows." This is dated 29th May 1868. It thus followed closely upon the decision of the original suit of Sital Singh where the Commissioner's order was dated 13th April 1868. It is considerably earlier than the rejection of Sital Singh's second application which was not disposed of till 18th May 1869. It is also earlier than the other three proceedings, namely, Debi Bakhsh Singh's application, *Musammat* Phul Kuar's application and the *sanad* proceedings. None of these began until late in 1868 and the latest which was the *sanad* was disposed of on 1st June 1869. The decree, therefore, is to be looked at in the light of the first litigation of Sital Singh, but not in the light of any of the other proceedings, which had not been begun at that time. It has been contended for the appellants that this decree itself conferred upon Lalta Singh a title to hold the estate as an impartible estate passing by primogeniture. We do not think that this is so. It certainly conferred upon Lalta Singh an estate as proprietor. It is a complete answer to any claimant who cannot claim through Lalta Singh. If any one else had any rights in the Bahrampur estate these rights were confiscated by the Proclamation and have not been restored. But the Settlement Officer was not deciding the question whether the estate was impartible or not. He had only to decide whether Lalta Singh, as he puts it, had a title good against the Government. The decree given was for the proprietary right. We do not think it is permissible to import into the decree everything that was decided in the litigation of Sital Singh. But Lalta Singh had got rid of all his rivals. It is surprising that Debi Bakhsh Singh and Sarabjit Singh were allowed to raise their claim at all. One would have supposed that they could be completely answered by saying Lalta Singh has already got his decree. But an equally effective course was taken by the withdrawal of their claim. And Lalta Singh stood forth as sole owner.

He died in 1882. Mutation proceedings then began. The details here are of more importance with regard to the plea of limitation than for that of custom. It is sufficient to say here that Lal Bahadur Singh claimed mutation on the ground of impartibility and primogeniture and that his claim was not opposed by any one. His brothers, Sher Bahadur Singh, who is the present defendant No. 5 and Nirman Singh, the present plaintiff No. 1, were minors at the time. Neither they nor their mother raised any objection. In spite of this, however, the learned Extra Assistant Commissioner considered that it was proper to follow the general law of inheritance and he entered the names of the younger sons as the co-sharers. Against this order Lal Bahadur Singh appealed. The Deputy Commissioner's order is Exhibit A64, page 303.

"Thakur Lal Bahadur Singh appellant *versus* Nirman Singh, Sher Bahadur Singh and wife of Lalta Singh respondents.

"Claim: *dakhil kharij* of *mehal* Byrampur.

"Extra Assistant Commissioner Munshi Janki Prasad had ordered *dakhil kharij* to take place, in the estate of the late Lalta Singh of Byrampur in the name of his eldest son Lal Bahadur Singh, but has directed that the names of the two younger sons be added as being also in possession.

"Lal Bahadur has appealed from this and relies on the numerous decisions by the Settlement Courts showing that the estate is indivisible, the brothers only getting maintenance.

"On consulting the *haqiyat misl* of *Mauza* Bharampur I find this to be correct and *prima facie* the Extra Assistant Commissioner's order seems incorrect as the only person who could be in possession as proprietor is Lal Bahadur. Latter's brothers admitted to Extra Assistant Commissioner that they had no objection to Lal Bahadur being recorded as *malik*. Also the mother said the same, the two younger sons being minors.

"The case seems pretty clear, but respondents should be summoned before passing final orders. Case for 20th instant.

8th July 1882. (*Sd.*) M. L. FERRAR,
Deputy Commissioner.

"21st—No time yesterday. To-day present applicant and the two minors. Their mother and guardian is not present. Sher Bahadur and Nirman Singh, aged 16 and 15, appear with an application from their mother excusing her appearance at such a distance (35 miles) in this weather, she being a *pardanashin*. She says in it that the estate has never been divided and that she has no objection to *dakhil kharij*, in the eldest boy's name Lal Bahadur's.

"Sher Bahadur, aged 16, declares that the signature to this is his mother's and was written by her in his presence.

(Sd.) FERRAR,
Deputy Commissioner.

"Order.

"Such being the facts of the case I accept the appeal from the order of Extra Assistant Commissioner and cancel so much of his order as not registers (*sic*) Sher Bahadur and Nirman Singh in the Tahsil Books as proprietors in possession. This order will not of course debar them from claiming, should at any time such a course appear to either of them advisable, their share in the Estate. No costs."

The custom was thus asserted and enforced.

Lal Bahadur Singh held possession till his death in 1916. The mutation proceedings that followed on his death are recent. The present suit was instituted on 6th July 1917. It will suffice to say that the Deputy Commissioner came to a finding that the estate was partible. This is Exhibit 15, at page 627. The Commissioner, however, reversed this finding. (Exhibit A47, page 687) and the Board upheld the Commissioner (Exhibit A75, page 675). So defendant No. 1, Rudra Pratap Narain Singh, is at present entered in the *khewat* as sole proprietor of the estate.

The state of things during the reign of Lal Bahadur Singh will have to be discussed in detail in deciding the question of limitation. It is sufficient to say here that these proceedings in Court are supported by the testimony of a large number of witnesses, members of the family, *patwaris*, family priests and so forth who assert the custom, and that the evidence to the contrary

does not appear to us to possess any value. We find, therefore, that there was an established usage of impartibility which carries us back as far as 1868, that is to say, 49 years earlier than the institution of this suit.

Now a custom must be ancient. It was said in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (5):—"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." This *dictum* was quoted with approval in a recent case, *Abdul Hussein Khan* v. *Bibi Sona Dero* (1).

That the custom must be ancient is clear from the authorities and it is admitted by the appellants' Counsel. We have been pressed with a decision of a Bench of this Court in *Yasin Ali Khan* v. *Murtuza Husain Khan* (6). It was said on page 299: A local custom and a family usage of impartibility or primogeniture do not stand on the same footing. "A local custom carries with it an idea of great antiquity, and derives its origin and force from its observance by successive generations of men belonging to different families, castes and tribes, resident within a specified local area. No such antiquity is necessary to prove a family usage of impartibility or primogeniture. There is some affinity between it and a usage of trade, for the essential condition in regard to each is that it must have 'fructuated into maturity' and that it must not be growing. 'A usage,' says Roy, 'may grow up within a very short period, but a custom must have a halo of ages and centuries' uniformity and consistency attached to it in order to be recognised as such. Usage may be defined to be a uniform practice among a people or class with respect to certain matters or things'. (Roy's Tagore Law Lectures, 1908, page 6).

"In *Juggomohun Ghose* v. *Manickchund* (7), their Lordships of the Privy Council, in dealing with the question of mercantile usage to charge interest upon contracts observed: 'To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contracts.' The same kind of evidence, which is needed to establish a local custom or an ordinary family usage, unconnected with the ownership of large compact estates, principalities or *raj*, is not required to establish a family usage governing the devolution of such compact estates, principalities or *raj*; for the principality or *raj* may have come into existence within a few generations in the same way as a new trade with certain mercantile usages attached to it might grow up within a few decades. To insist on evidence to prove an immemorial user in those cases would, therefore, be incompatible with the history of the acquisition of those estates, or the growth of such trade. Circumstances may prevent the formation of certain property, held by a family, into compact estate for a long time, and yet when an estate becomes compact and falls under the control of one man, usages may grow up in connection with it in the course of a few generations, which might be recognised as valid and binding on the subsequent holders of the property. The custom of impartibility and primo-

(5) 14 M. I. A. 570 at p. 585; 17 W. R. 552; 12 I. L. R. 396; 2 Suth P. C. J. 603; 3 Sar. P. C. J. 108; 20 E. R. 898.
(6) 22 Ind. Cas. 577; 16 O. C. 290.
(7) 7 M. I. A. 263; 4 W. R 8 (P. C.); 1 Suth. P. C. J. 357; 1 Sar. P. C. J. 681; 19 E. R. 308.

geniture has grown up round many estates in like manner, and it would be obviously futile to expect evidence of the existence of such a custom before the estates became compact or while it was undergoing the process of mutilation, extension or enlargement by the vicissitudes of time." The decision in that case was upheld by the Privy Council in appeal. Their Lordships' judgment is reported in *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (8); but the question of antiquity was not discussed by their Lordships. They decided the case on other grounds. To a certain extent the principles of law enunciated in this judgment have been abandoned by the appellants' Counsel who concedes that he must prove his custom to be ancient, but these remarks would still possess some weight in considering the degree of antiquity which must attach to a family custom for it to be held valid in law. With great respect, we venture to dissent from the view of our learned colleague. Usage should never be used as a synonym for custom. It has two distinct legitimate meanings but neither of them should be confused with custom. It is used to denote what is done by people uniformly and consistently. Used in this sense usage has not the force of law. It would only obtain the force of law when it is proved to be reasonable, invariable, ancient, etc., in which case it becomes what is known as custom. It is also used to denote what is done uniformly and consistently and has been so done in a certain locality or by a certain trade or profession, etc., for a period sufficient to make it probable that people in their contracts and in their contractual relationships adopt it as an implied term or condition. Where this is the case a Court which has to put a construction upon a contract imports into the terms of the contract the trade or local usage. Here, again, usage has not the force of law nor will it be sanctioned by the Courts if contrary to positive law. The parties could eneter into a contract in contravention of the usage but if they enter into a contract which neither affirms nor denies the usage, the usage may be proved in order to ascertain what was in their minds when they wrote the contract. See Halsbury's Laws of England, Vol. 10, page 221. It was in this latter sense that the usage was given effect to in the case of *Edward Dalgliesh* v. *Sheikh Gozaffar Hossein* (9) where Rampini and Henderson, JJ., observed.

"It may be perfectly correct that a long period of time must elapse, before a custom in respect of their transferability, of an occupancy tenure can grow up; but it does not appear to us that this is necessarily the case with regard to the growth of a 'usage' or local 'usage' in respect of this matter."

This passage is quoted in *Yasin Ali Khan* v. *Murtuza Husain Khan* (6), as authority for the distinction drawn between a local custom and a family custom. But with all respect we submit that it will not bear this interpretation. The Calcutta case itself related to a local usage and not to a family custom. A distinction was drawn between custom and usage and the usage was enforced not on the ground that it was enforceable as a custom but solely on the ground that section 183 of the Bengal Tenancy Act made an express saving that the Act should not affect either custom or usage. Usage in this case was invoked as interpreting a contractual relationship.

Then, again, there is the case where usage has some legal effect not *per se* but as *prima facie* evidence of a custom. Where a well-established recent usage is proved and the proof is carried back, as it is in the present case, for a period which may be regarded as covering the period of living memory, a presumption is thereby raised that this usage is in reality the exercise of an ancient and valid custom. If there is no rebutting evidence a decision in favour of the custom may be based on this evidence alone. If the presumption raised by recent usage is rebutted,

(8) 36 Ind. Cas. 299; 19 O. C. 290; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 111 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 269 (P. C.).

(9) 3 C. W. N. 21.

as we hold that it is in this case, by proof that an ancient custom could not have come into existence, then the usage fails to possess any legal effect.

This use of usage as *prima facie* evidence of custom must be distinguished from a position which is sometimes taken up, and we think wrongly, that there is any such analogy between a custom in India and a trade or local usage as to justify it being held that custom in India need not be ancient. No doubt, a local or trade usage need not be ancient and no doubt again a custom in India need not, as it must in England, be proved to have existed from time immemorial. For this distinction between English and Indian law there is an obvious reason. English law knows nothing of family custom. A family custom by its very nature cannot be immemorial in the sense that the beginning of it is lost in antiquity. The very expression postulates the possibility of tracing back the family to its separation from the tribe. Nor, again, is a family custom like to be as ancient as the Hindu or Muhammadan Law it supersedes. If, therefore, custom in India is to include family custom it follows that it is impossible to require that it be proved to have existed from time immemorial. In this one particular, custom in India resembles a local or trade usage but in this particular alone. There is no sound authority for holding that custom in India need not be proved to be ancient.

In the present case the custom cannot be regarded as ancient. It is carried back clearly enough to the year 1868, which is 49 years from institution, and in that year competent Courts decided that it was a valid custom. In our opinion their decisions were wrong though we are prepared to admit that there was in 1868 a strong idea, not unsupported by facts, that impartibility and primogeniture was the custom of the Bahrampur estate. We find, however, that it is impossible that the custom, as a certain and invariable thing, could have existed much earlier than 1868. The estate in the hands of Gur Prasad Singh comprised only four villages and his brother, Dina Singh, was successfully asserting a right of management and even of ownership. It is true that in the preceding generation Sardar Singh had succeeded and excluded his brother Meharban Singh from his estate, but it is by no means clear that Meharban Singh did not obtain compensation from other lands belonging to the family. In the words of the Privy Council, it is essential that special usages modifying the ordinary law of succession should be established by clear and unambiguous evidence to be ancient and invariable. The clear and unambiguous evidence here does not carry us back much more than 50 years and the evidence against the possibility of a custom comes down almost to the same date. Defendant No 1 has failed to prove the necessary antiquity of this custom.

The next question with which we deal is the finding of the Subordinate Judge that the parties to the suit on both sides constitute a joint Hindu family. It is maintained that about 1890 when the mother died the two younger brothers of Lal Bahadur Singh separated from him. What would be gained by the appellants if this were proved, is not very clear. Even if separation took place the plaintiffs could (apart from the question of limitation) claim partition of the estate on the ground that it had not been partitioned up to date. The Subordinate Judge has given convincing reasons for holding that there was never any separation on the mother's death. The facts that the minor sons might live separately in a house built by their mother would not constitute separation. There are admissions by Lal Bahadur Singh of jointness of the family subsequent to this date We accept the finding that the family is still joint.

The next question is that of limitation. Three issues were framed by the Subordinate Judge, namely, 10, 11, and 12, but they were decided together and the 12th issue alone need be considered. It runs thus:—

If the property in suit be found to be joint family property, then have the plaintiffs been excluded within their know-

ledge from the enjoyment of it more than twelve years before suit?

It will be observed that in the plaint the plaintiffs maintain that they are still in possession. They admit in paragaph 7 of the plaint that on the death of Lal Bahadur Singh defendants Nos. 1 to 4, that is, the three sons and grandson of Lal Bahadur Singh, raised all sorts of disputes from the 24th of August 1916. Lal Bahadur Singh died on the 2nd June 1916. The defendant No. 1, Rudra Pratap Narain, reported his succession under section 34 of the Land Revenue Act. See Exhibit A65, page 608, Part III, and the following Exhibits. The Tahsildar made a report. Some evidence was taken before the Tahsildar and the matter went up to the Assistant Collector. He took the evidence of the defendant No. 1. See plaintiffs' Exhibit 70, page 630 of Part III. Defendant No. 1 unequivocally claimed that the property was indivisible and that he alone was entitled to mutation. The Assistant Collector granted his claim and ordered mutation in his name alone. See Exhibit A76, page 637 of Part III. On appeal to the Deputy Commissioner, the Deputy Commissioner reversed the order of the Assistant Collector and directed mutation equally in the names of all the parties. On appeal to the Commissioner the Assistant Collector's order was restored and the Commissioner's order was again upheld on further appeal to the Board of Revenue. See Exhibit A75, page 675 of Part III. The entry in the *khewat* was in the name of defendant No. 1 alone. In the circumstances, it appears to us impossible to hold that the plaintiffs were in possession at the date of the suit. It is clear that defendant No. 1 never assumed possession on their behalf after the death of Lal Bahadur Singh (if he got possession immediately on such death which is improbable). He has been in possession from the date of mutation under a clear claim to possession on behalf of himself as the person entitled to an indivisible estate.

The fact, however, that the plaintiffs were not in possession at the date of institution of the suit, will not prove fatal to their claim if they were co-parceners with Lal Bahadur Singh. Co-parceners are entitled to claim partition of property even though they are excluded from possession. A claim for partition is one of the modes of enforcing a right to share in joint family property, Article 127 of the Litmitation Act is the Article applicable. It may be that a right to a share is not the same thing as a right to share but, that a claim to partition is one of the means of enforcing a right to share, seems well establised by authority. See *Kali Kishore Roy* v. *Dhununjoy Roy* (10). What we have, therefore, to decide in this case is, first, when the plaintiffs were excluded from enjoyment in the estate and, secondly, when the exclusion became known to them.

The Subordinate Judge appears to us to have misdirected himself in considering these two questions. He has fixed a single issue, whether the plaintiffs have been excluded within their knowledge from the enjoyment of the property, and proceeded to hold that at no point of time were the plaintiffs excluded within their knowledge. It was, however, open to the defendants to prove that exclusion took place at one time and the bringing of the fact to the knowledge of the plaintiffs at a subsequent time. It was not necessary to prove exclusion and knowledge of exclusion at one and the same moment. Much superfluous argument on behalf of the respondents in this appeal has resulted from their adopting this method of the Subordinate Court. No doubt, exclusion by a co-owner will not become adverse to those other co-owners until they become aware of it but nonetheless there may be exclusion in fact. There can be little doubt that the plaintiffs were excluded in fact in the year 1882 when Lal Bahadur Singh obtained mutation in his favour. The documentary evidence of the proceedings that took place then consists of Exhibits A55 to A64 and Exhibits A96 to A106. These are all documents relied on by the defendants. Exhibit 32 is a document relied on by the plaintiffs. Briefly

(10) 3 C. 228; 1 Ind. Dec. (N. S.) 733.

speaking what took place was as follows. Lal Bahadur Singh put in a claim for mutation (Exhibit A55, page 295 of Part III) to be entered in the place of his father as he had performed the funeral rites. Evidence was adduced to support the fact that the eldest son became sole owner of the estate. Amongst the witnesses called was the widow of Lalta Singh and mother of himself and his two brothers. She clearly stated in her evidence (Exhibit A58) that there was a custom among them that the immoveable property became the property of the eldest son. There were other wirnesses to the same effect. The Tahsildar reported in favour of such family custom. The Assistant Collector, notwithstanding this evidence, directed that the names of the younger sons also should be entered as co-sharers. Lal Bahadur Singh appealed (Exhibit A62, page 301, Part III) and clearly claimed a right of sole ownership on the basis of the custom. This memorandum of appeal is important as it has been argued that his original application for mutation did not unequivocally set up his right to sole ownership. His appeal was successful. We find the Deputy Commissioner's order in Exhibit A64, page 303 of Part III. This order shows that the mother was treated as guardian and her admission was treated as conclusive against the two brothers of Lal Bahadur Singh. The Deputy Commissioner decided that Lal Bahadur Singh was alone entitled on the evidence to have his name entered though he added that his order would not debar the brothers from bringing a suit to establish their claim at any time. It appears to us that these proceedings are clear evidence that on the death of Lalta Singh, Lal Bahadur Singh took possession of the estate as property to which he was entitled to exclusive ownership and not on behalf of his younger brothers. There can be no doubt that he had sole physical possession, in the sense that he was able to deal with the property and to exclude others, and there can be no doubt that he showed determination to exercise that physical power on his own behalf. He, had, therefore, legal sole possession.

It has, however, been argued that Lal Bahadur Singh and not the mother was really the guardian of the younger brothers and that where a guardian takes possession of property owned or partly owned by his wards his possession must be deemed to have been on behalf of the wards. This does not appear to us to be a correct statement of the law. No doubt a very strong presumption arises that possession in such a case is taken on behalf of the wards but it is not an irrebuttable presumption. We may refer to two cases relied upon by the respondents. One is *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna* (11). In this case, where the owner of property died leaving a mistress and she took possession of his property, it was held that, even though she was not guardian, she should be held to have taken possession on behalf of the minor sons of the man whose mistress she had been. This case is to be distinguished from the present case because there was no proof of clear assumption by the woman on her own behalf. The other case is the Privy Council case, *Corea* v. *Appuhamy* (12). Great reliance is placed on the statement in this judgment by Lord Macnaghten that the principle recognised by Wood, V. C., in *Thomas* v. *Thomas* (13) holds good: "Possession is never considered adverse if it can be referred to a lawful title." In this case the property had belonged to one Elias. He left a son Iseris and three sisters. The title was common to all four. At the time of the death of Elias, Iseris was in jail and the property was in the hands of the authorities. On coming out of jail he got possession from the authorities. Lord Macnaghten held that there was nothing to show any intention on his part to enter as a plunderer. He had a lawful title to enter as co-owner and must be presumed to have entered under the lawful title. He could not divest himself of lawful title by pretending that he had no title at all. This case is to be distinguished from the present case by the fact that Lal Bahadur

(11) 8 Ind. Cas. 639; 35 B. 79; 12 Bom. L. R. 956.
(12) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.
(13) (1855) 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701; 110 R. R. 107.

Singh did at the time of entry set up his edverse title in clear terms before the Revenue Authorities and they accepted his claim.

Having, therefore, decided that Lal Bahadur Singh in 1882 entered into possession to the exclusion of the plaintiffs, it is necessary to decide when that exclusion became known to the plaintiffs.

It is strongly contended by the defendant that it became known to Lal Bahadur Singh's two brothers the very day when it commenced. It is pointed out that in the mutation proceedings the sons were 16 and 15 years of age and of an age to understand what was going on. The report of the Tahsildar actually stated that these two younger sons had given assent to the mutation in favour of the eldest brother. It is pointed out again, that when the case came up finally before the Deputy Commissioner he recorded a note showing that both the boys were present and that the eldest boy verified the signature on a letter from the mother excusing her inattendance. We do not feel that it would be safe to hold that these two boys of 16 and 15 at the time were fully aware of the nature of the claim to the estate made by Lal Bahadur Singh. At the same time, it appears to us that the facts in this case necessitate an irresistible inference that the two brothers of Lal Bahadur Singh knew of his claim to hold the estate as an indivisible estate from the time that they came of age. The chief fact on which we base this inference is the fact held proved earlier in this judgment that there had been long usage of impartibility. This long usage rules out entirely the possibility of Lal Bahadur Singh having obtained possession of the property under any secret intention to hold it as his own. Another fact is that, admittedly, the brothers were living for several years after 1882 jointly with Lal Bahadur Singh and their mother. Lal Bahadur Singh could not possibly have failed to disclose to them as soon as they were of the intelligence to understand the fact that he held the estate as an indivisible estate. The mother of the boys, who, as we have seen, during the mutation proceedings in 1882, supported Lal Bahadur Singh's claim, must have informed them of the same fact. It has been objected that the evidence of the mother in these mutation proceedings (Exhibit A58, page 291, Part III) was not admitted in evidence by the Subordinate Judge. It was admitted by him on the 10th January 1918 but a year and a half later, that is, on the 15th September 1919, he has made a note: "On a further consideration presumption of thirty years does not apply to this document." We understand that this last remark arose from the fact that the lady had not signed the document but only made a mark which purported to have been attested by an identifying witness. That this evidence was duly taken must be presumed because both the Tahsildar and the Commissioner referred to the statements in it. We think that it should have been presumed genuine. Even if it were not, we could fall back on the statements of the Tahsildar and the Commissioner that the widow had admitted the claim of Lal Bahadur Singh. These statements are relevant under section 35 of the Evidence Act inasmuch as they form part of the record. The relation to whom the boys would go if they had any doubts in the matter must have informed them of the same fact. The defendants' oral evidence has received insufficient respect from the Subordinate Judge. That evidence is at least weighty evidence to show what was the opinion in the neighbourhood and among the relations. They held that the estate was indivisible and their opinion could not have failed to come to the knowledge of the boys if they consulted them. In this connection we would advert to the fact that the defendant No. 1's two brothers, who are arrayed as defendants Nos. 2 and 3, have admitted the plea of indivisibility to their own disadvantage. It is extremely improbable that, when the boys came of age, they would not have been put to enquiry as to their right to share in the profits of the property. Two witnesses for the defendant No. 1 depose that they never received anything except small sums given to them solely as *guzara*. The Subordinate Judge has wrongly objected to this evidence on the ground

that the witnesses of the defendant do not depose to any amounts being actually paid in their presence. He must have forgotten the evidence. Defence witness No. 6 clearly states that *guzara* amount was paid in his presence. So also D. W. No. 11. So also D. W. No. 16. These witnesses have all stated unequivocally that money was paid to the boys as mere *guzara*. Indeed, the plaintiffs' witness No. 12 has admitted the fact that money was paid merely as *guzara*. It is true that there is no clear evidence that whatever was paid to them was accepted by them as persons only entitled to *guzara* but the evidence is sufficient to show that they were put to enquiry as to why they received only the small amounts that they did receive. Reliance has been placed also on a set of twelve letters. Exhibits A109 to A120. We cannot find that Exhibit A109 has been printed. None of these letters, however, were written until 1906. At the most, they only prove that at that date the brothers of Lal Bahadur Singh were very dissatisfied with the sums allowed to them. They are of some value as they show that the brothers of Lal Bahadur Singh must, by this date, have accepted the position that the estate was indivisible, otherwise they would not have acquiesced in the small sums allowed. In particular we would refer to Exhibit A111 printed on page 10 of Appendix 2 which purports to be a letter dated 14th March 1906 by Nirman Singh, plaintiff, to his brother Lal Bahadur Singh. In this he expresses great bitterness at his hard lot and begs his brother for sufficient amount to purchase a conveyance without which he thought that he could not continue to hold a small appointment under the Court of Wards. This document was at first admitted in evidence by the Subordinate Judge but on further consideration he doubted its genuiness. It appears that he doubted the capacity of the witnesses called to prove that it was in the handwriting of Nirman Singh, plaintiff. The letter bears every internal sign of being genuine. It would have been an extraordinary forgery. We consider, that, in the absence of clear rebutting evidence that it was not in Nirman Singh's handwriting, there was sufficient evidence that it was.

It is, however, strenuously argued that the fact that his brothers got maintenance and actually held some lands is conclusive proof that they were not in point of fact excluded from the estate by Lal Bahadur Singh. This argument requires us to construe the word "exclusion" as it occurs in Art. 127 of the First Schedule of the Limitation Act. No doubt, if exclusion there means mere physical exclusion the receipt of maintenance and holding of land out of the estate must prevent its being held that there was exclusion. But we are of the opinion that in "exclusion" just as in "possession" there is a mental as well as a physical element. We must look not only to the physical act but also to the intention accompanying that act. Legal possession is not defeated by the person in such possession putting another person in physical possession (*i.e.*, in detention) as his servant or tenant, because such physical possession in one person is consistent with legal possession in another. In the same way, legal or juridical exclusion from an estate by one co-owner of his co-owners is consistent with their physical admission to it. For such, mere physical admission to put an end to exclusion it must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. No doubt, such intention will be inferred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such presumption is, however, rebuttable. Here the facts are these. Lal Bahadur Singh was, as we have found, a co-sharer in point of law. But he was holding under an express assertion of his title to hold as sole proprietor. He gave money and lands to his brothers in the way a sole proprietor would do. Such gifts do not save his brothers from exclusion. The cases cited to us appear to us no authority for the contrary.

In order to rebut the plea of exclusion the appellants have produced evidence that on the 16th November 1882 a suit was instituted on a mortgage (see Ex-

hibit 20) against Lal Bahadur Singh and his brothers. No defence was set up by Lal Bahadur Singh that he was the sole exclusive owner of the property and a decree was passed against the mortgaged property. The Subordinate Judge thinks that if the younger brothers were not in possession of the mortgaged property through Lal Bahadur Singh, Lal Bahadur Singh should have raised the objection that he alone was the owner of the property. In filing an appeal against the decree passed on the mortgage Lal Bahadur Singh filed the appeal on behalf of his brothers as next friend,—see Exhibit 22. The judgment, Exhibit 23, shows that no plea of Lal Bahadur Singh being exclusive owner was raised. In our opinion as Lal Bahadur Singh resisted the claim on its merits, no useful purpose would have been served by his resisting it on the claim of improper joinder of his brothers as defendants. It might have greatly protracted the hearing of the case without any benefit to Lal Bahadur Singh. In the circumstances, the evidential value of these proceedings is insignificant.

Lastly, it is proved that his two brothers lived with Lal Bahadur Singh for some years after 1882 and it is said that their living joint in residence and mess with their brother was inconsistent with the claim of Lal Bahadur Singh to hold the estate in his exclusive right. He claimed that the estate was impartible and an impartible estate in Hindu Law is not only consistent with but postulates that the family to which it belongs is joint. No presumption against indivisibility of possession or title can arise by reason of joint living.

We, therefore, hold that about three years after 1882, when the youngest brother of Lal Bahadur Singh namely, Nirman Singh, attained his majority, that is, in 1885, the two brothers must have become aware of their ouster from the estate and that three years from this date, namely, about 1888 Lal Bahadur Singh's title by adverse possession became absolute against them. The suit of the plaintiff No. 1 is, therefore, barred by limitation. Limitation began to run against the other three plaintiffs Nos. 2, 3, and 4, his sons, from the dates of their births, which, according to the plaint, occurred in 1887, 1893, and 1897, respectively. But under sections 6 and 8 of the Limitation Act, read with section 3 of the Indian Majority Act of 1875, they had a right to sue at any time within 21 years of these dates. The only one, therefore, whose suit for partition would now be within time would be the youngest Baldeo Bakhsh Singh. It is clear, however, that this suit not being one by the plaintiffs for partition of their individual shares but for partition of their united fractional share from the whole estate, must fail on proof that any one of the plaintiffs is barred by limitation. It was no doubt for this reason that no proof of Baldeo Bakhsh Singh's age was produced in the lower Court and no argument has been addressed to us in this Court that a decree could be given in his favour. Any claim now by him to have his share partitioned off will obviously be time-barred.

Accordingly, we allow this appeal. The appellants will get their costs in both Courts.

Z. K. & N. H. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL.

July 12, 1922.

Present:—Mr. Justice Greaves.

In re HARI NARAIN DAS (AN INFANT) APPLICANT.

Hindu Law—Mitakshara—Minor co-parcener—Guardian of property, appointment of—Principles applicable.

It is not the practice of the Bombay High Court to appoint a guardian of the property of a minor member of a Hindu joint Mitakshara family owning no separate property. But when the person applying to be appointed guardian is the manager of the family, an order appointing him guardian may, under proper circumstances, be made, as in such a case there is no introduction of any element of possible disturbance in the family.

A father and an only minor son formed a Hindu joint Mitakshara family. There was a mortgage on certain property belonging to the family. They received an offer for purchase of the property considerably above its real value, but the purchaser insisted that an order of the Court sanctioning the sale should first be obtained. Upon this, the father, who was the manager of the family, applied to be appointed guardian of the property of his minor son:

HARI NARAIN DAS, *In re.*

Held, that, under the circumstances, the manager may be appointed guardian on the condition that after the mortgage was discharged and the different costs and charges in respect of the property paid, he should invest one-half of the sale-proceeds for the benefit of the minor.

Mr. *T. Chatterjee*, for the Applicant.

JUDGMENT.—This is an application by one Laluram Das, the father of the infant Hari Narain Das, that he may be appointed guardian of the person and property of Hari Narain Das and that he may be given liberty to sell and convey the undivided half share of No. 16, Cowie Lane, for the purpose of paying off the moneys due under the mortgage now subsisting on the property.

The infant is governed by the Mitakshara School of Hindu Law. He is the only child of his father and he has no separate property of his own. There is a mortgage on 16, Cowie Lane, of Rs. 5,000 or thereabouts and certain costs have, I understand, also to be paid. An offer has been made to purchase the property for a sum of Rs. 16,650 and I am told and it so appears in the petition that this is considerably above the real value of the property, the real value it is said being something in the neighbourhood of Rs. 10,000. The purchaser insists that an order of the Court should be obtained sanctioning the sale before he completes the purchase and I understand that he is not prepared to complete the purchase unless such order is made.

It is not the practice of this Court, where persons are governed by the Mitakshara School of Hindu Law, to make orders of this nature and in *Sham Kuar* v. *Mohanunda Sahoy* (1) Mr. Justice Macpherson and Mr. Justice Ameer Ali, sitting on the Appellate Side of this Court, refused to make an order under the Guardians and Wards Act appointing a guardian of the property of a minor who was a member of a joint Mitakshara family owning no separate estate. The person who was in that case sought to be appointed guardian was not the *karta* of the family and clearly he could not have taken possession of any of the property of the minor, and it was not suggested by the applicant that he could do so but it was suggested that he might be appointed in order to watch the interest of the minor. In these circumstances, as I have already stated, the application was refused but I am asked to make the order on the authority of *In re Manilal Hurgovan* (2). The Bombay Court in that case held that, under its general jurisdiction and apart from the Guardians and Wards Act, the Court had power to appoint a guardian of the property of a minor who was a member of a joint Hindu family and where the minor's property was an undivided share in the family property but the order was only made in the special circumstances of the case and Sir Lawrence Jenkins in delivering the judgment of the Court stated at page 357:

"We make appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an application unless the appelicant were the manager and it is expressly upon this ground that we make the appointment in this case." Sir Lawrence Jenkins points out also in his judgment that the Bombay Court in numerous cases had made such appiontments. The facts in the case before me are practically identical with those that arose in the Bombay case to which I have just referred; the father there, as here, was the *karta*: there, as here, was an only child: there, as here, the ground of the application was that a far better price could be obtained if the leave of the Court had been obtained than if the *karta* sold merely as manager of the joint family. In the circumstances, and for the reasons stated in the case to which I have referred, I am prepared to make the order here but I make it only on the condition that after the mortgage is discharged and the different costs and charges in respect of the property are also paid, one-half of the sale proceeds is invested by the guardian for the benefit of the infant. Accordingly, I appoint the applicant the guradian of the prerson and property of Hari Narain Das and give him liberty to sell and convey the undivided share of 16,

(1) 19 C. 301 9 Ind. Dec. (N. S.) 646.

(2) 25 B. 353; 3 Bom. L. R. 411.

Cowie Lane, which constitutes the only immoveable property belonging to the estate of the infant. Out of the minor's half share of the sale-proceeds he will discharge a moiety of the mortgage and pay a moiety of the costs referred to in the petition and a moiety of the costs of the sale and, after deducting the costs of this application, he will invest the balance of the share accruing to the minor in trust securities for the minor's benefit and in his name. The guardian undertakes that after the mortgage is discharged and the costs and charges in respect of the property are paid, one half of the sale-proceeds will be invested by him for the benefit of the minor Hari Narain Das and in the minor's name and he must report to the Court that this has been done and give security for one year's income of the investment.

The costs of this application will be as between attorney and client and will come out of the share.

Certified for Counsel.

N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 32 OF 1921.

September 8, 1922.

Present:—Mr. Ashworth, J. C., and Mr. Simpson, A. J. C.

FAGHFUR MIRZA AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Babu KHUSHAL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of decree—Redemption decree—Amount decreed payable with interest within fixed time—Future interest payable on 'entire decretal amount, on default, meaning of—Contract Act (IX of 1872), s. 38—Tender of mortgage amount—Partial tender, validity of.

When under a decree the contractual rate of interest ceases to be payable at a given date and the Court rate is substituted for it therefrom up to the date of realisation, the Court rate is chargeable on the whole amount due with interest at the contractual rate up to the given date. [p. 247, col. 1.]

Venkatachalapathi Aiyar v. *Thavasi Servai*, 51 Ind. Cas. 67; 42 M. 465; 36 M. L. J. 288, *Maharaja of Bhartpur* v. *Rani Kanno Dei*, 23 A. 181; 3 Bom. L. R. 511; 5 C. W. N. 137; 28 I. A. 35; 7 Sar. P. C. J. 792 (P. C.) and *Sundar Koer* v. *Rai Sham Krishen*, 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.), relied on.

A compromise decree was passed in a redemption suit under which the plaintiff was to pay the defendant a certain sum within a fixed time with interest at a certain rate from the date of the compromise. In case of failure of plaintiff to pay the entire decretal amount within the time fixed, the defendant was to realise the 'entire decretal amount' by sale of the mortgaged property with future interest at a different rate from the date of default to the date of realisation. There was a default and the defendant applied for a decree for sale:

Held, that the defendant was entitled to future interest on the entire amount due on the date of default, comprising the amount decreed under the compromise, as well as the interest on it up to that date, and not simply on the amount due under the decree.

A tender to be valid must be of the whole amount due and not of a part only. [p. 247, col. 2.]

Section 38 of the Contract Act requires an offer to be of the whole of what the promisor is bound by his promise to do, and the same rule applies as to the tender of a sum decreed in respect of a mortgage. [p. 247, col. 2.]

Chunder Caunt Mookerjee v. *Jodoonath Khan*, 3 C. 468; 1 C. L. R. 470; 1 Ind. Dec. (N. S.) 883, relied on.

Haji Abdul Rahman v. *Haji Noor Mahomed*, 16 B. 141; 8 Ind. Dec. (N. S.) 570, dissented from.

Digambar Das v. *Harendra Narain Pandey*, 5 Ind. Cas. 165; 14 C. W. N. 617; 11 C. L. J. 226, distinguished.

Appeal against a decree of the Additional Subordinate Judge, Lucknow, dated the 28th January 1921.

Mr. *Niamat-Ullah*, for the Appellants.

Messrs. *A. P. Sen* and *Tara Shankar Sharma*, for the Respondents.

JUDGMENT.—The appellant brought a suit for redemption of a mortgage. He then entered into a compromise with the respondents on the following terms:—

(1) that a decree for redemption be passed subject to the payment of Rs. 39,907-10-0 with further interest from the date of the compromise, namely, 3rd Janauary 1920, to 3rd July 1920, at Rs. 1-8-0 per cent per month;

(2) that the plaintiff shall pay the entire decretal amount to the defendants within 3rd July 1920 and in case of non-payment defendants shall be entitled to get the mortgaged property sold and to realise their entire decretal amount with future interest from 3rd July 1920 up to the date of realisation at Re. 1 per cent per month. A decree was passed in terms of this compromise.

The appellant transferred the property to one Kaniz Abbas and he left with her Rs. 44,200 as the amount due under the decree. Accordingly, this amount was tendered on 8th September 1920; but by that time the amount due was Rs. 44,441-9-11. Defendants accordingly refused to accept this sum, and on 17th November 1920 an additional sum of Rs. 1,150 was deposited with a prayer that so much as was due to the defendants might be given them and the rest returned to Kaniz Abbas. But by this time the amount due was Rs. 45,441-13-1.

On 16th December 1920 the defendants applied for a decree for sale for Rs. 45,906-4-3. The plaintiffs objected :—

(1) that interest at Re. 1 per cent. per month should be calculated on Rs. 39,907-10-0 being the principal amount due under the decree and not on Rs. 44,499-5-0 being the amount due on 3rd July 1920;

(2) that interest should cease on Rs. 44,200 from 14th September 1920 and on Rs. 1,150 from 18th Nobvember 1920;

That his transferee *Musammat* Kaniz Abbas should be made a party.

All these objections were overruled and a final decree for sale was passed for Rs. 45,906-4-3. The plaintiff has appealed.

His first point is that interest should be charged on Rs. 39,907-10-0. But the words "realise their entire decretal amount with future interest" would naturally mean future interest on the entire decretal amount. It is also settled law that when, under a decree, the contractual rate of interest ceases to be payable at a given date and the Court rate is substituted for it therefrom up to the date of realisation, the Court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date: *Venkatachalapathi Aiyar* v. *Thavasi Servai* (1), *Maharaja of Bharatpur* v. *Rani Kanno Dei* (2) and *Sundar Koer* v. *Rai Sham Krishen* (3). So, there is no reason to suppose that the parties meant in the compromise anything different from what the learned Subordinate Judge has found them to mean.

The second point is that the payments, even if they were insufficient, ought to have been allowed to count for stopping interest. But this is not so. A tender to be a valid tender must be a tender of the whole amount due and not of a part only. Section 38 of the Indian Contract Act (IX of 1872) requires an offer to be of the whole of what the promisor is bound by his promise to do. See Pollock and Mulla's Commentary on Indian Contract Act, 4th Edition, p. 267, and the ruling *Chunder Caunt Mookerjee* v. *Jodoonath Khan* (4). There is nothing to prevent this general law as to tenders applying to payments decreed in respect of a mortgage. See Ghose's Law of Mortgage, 4th Edition, Volume I, page 234. One ruling relied upon by the appellant is *Haji Abdul Rahman* v. *Haji Noor Mahomed* (5) where it was stated that the rule laid down in *Dixon* v. *Clark* (6), that the tender of only a part of debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered. This was merely an *obiter dictum* and we cannot accept it as sound law. Both the commentaries just mentioned express the opinion that it was based on a misunderstanding of *Dixon* v. *Clark* (6). Another ruling relied upon is *Digambar Das* v. *Harendra Narain Pandey* (7). The head-note* to this ruling is misleading. It states that an unconditional tender of a sum which turns out in the end to be less than what is really due may be valid *pro tanto*

(1) 51 Ind. Cas. 67; 42 M. 465; 36 M. L. J. 288.

(2) 23 A. 181; 3 Bom. L. R. 51; 5 C. W. N. 137; 28 I. A. 35; 7 Sar. P. C. J. 792 (P. C.).

(3) 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.).

(4) 3 C. 468; 1 C. L. R. 470; 1 Ind. Dec. (N. S.) 883.

(5) 16 B. 141; 8 Ind. Dec. (N. S.) 570.

(6) (1847) 5 C. B. 365; 75 R. R. 747; 5 Dowl. & L. 155; 16 L. J. C. P. 237; 136 E. R. 919.

(7) 5 Ind. Cas. 165; 14 C. W. N. 617; 11 C. L. J. 226.

*Refers to 14 C. W. N.—[*Ed.*].

if there is a dispute as to the amount due though a tender, of a part of what was admittedly due is of no avail. But in that case the tender was of the whole sum found due under a subsisting decree. That decree was set aside in appeal and a larger sum found due. It follows that the tender was a tender of the entire amount that could be considered due at the time. The fact that the Appellate Court increased the decretal amount on appeal could be deemed to alter the fact that the amount tendered was the full amount due at the date of tender. The case is clearly to be distinguished. The appeal is, therefore, dismissed with costs.

Z. K. & N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1416 OF 1921.

November 20, 1922.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

LACHMI NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 149—Railway Company—Delivery of goods.

Plaintiff brought a package to a Railway Station for despatch to another place. The Loading Clerk filled up a number in the forwarding note presented by the plaintiff and returned the same back to him with a request to call the next day and have the package marked with the number assigned and obtain a Railway Receipt. The plaintiff without waiting for the next day got the number assigned put on the package and left it in a shed within the premises of the Railway Station meant for the deposit of goods prior to their acceptance by the Railway. During the night the package was stolen. The plaintiff sued the Railway Company for damages:

Held, that the suit of the plaintiff must fail as there had been no delivery of the package to the Railway Company within the meaning of s. 149 of the Contract Act. The mere filling up of the forwarding note could not amount to such delivery.

Second appeal from a decree of the District Judge, Aligarh, dated the 2nd of August 1921, confirming a decree of the Munsif, Hathras, dated the 6th of May 1921.

Maulvi *Iqbal Ahmad* and Maulvi *Muhammad Abdul Aziz*, for the Appellants.

Pandit *Ladli Prasad Zutshi*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of damages, on the allegation that they had made over certain goods for despatch to the respondent Company and that by the neglect of the latter the goods had been lost.

One of the objections taken to the suit was that no delivery of the alleged lost goods had been made to the respondent Company.

Both parties gave evidence. The Court of first instance was of opinion that the goods had not been delivered to the Railway Company, and, therefore, no claim for damages could be maintained against them. The claim was accordingly dismissed.

On appeal the decree of the First Court was affirmed.

The plaintiffs came up in second appeal to this Court and the case was heard first by a Bench of this Court on the 19th of July 1922. On that date an argument was advanced on behalf of the plaintiffs-appellants that some important evidence in the possession of the respondent Company, though required by the plaintiffs-appellants and summoned at their instance, had not been produced and tendered by the respondent Company. By an order dated the 19th of July 1922 the Bench hearing the appeal adjourned the case with a direction to the respondent Company to produce certain documents. One of the Railway clerks has been produced to-day with two documents and has been examined. The documents that he has produced are called the tally book and the reciept register, which is really a file of receipts.

The contention on behalf of the plaintiffs-appellants is that they sent one large package containing cloth to the Railway Station at Hathras for despatch to Farrukhabad on the 23rd of December 1919. One Maharaj Kishore, a servant of the broker, approached the Goods office clerk of the Hathras Railway Station with a request that the said package be accepted for despatch

to Farrukhabad. Brij Bihari Lal, the loading clerk, filled up a number in the forwarding note presented by Maharaj Kishore. The number was 675. The forwarding note was returned to Maharaj Kishore with a request to call the next day and have the package marked with the number entered in the forwarding note, and obtain a Railway Receipt. The package in question, it seems, was not brought to the Railway Station by Maharaj Kishore but sent there by the plaintiffs and deposited in a tin-shed within the premises of the Railway Station. According to Maharaj Kishore, those goods which the Railway Authorities do not accept are deposited in a tin-shed within the premises of the Railway Station and are watched by a man appointed by the owner of the goods. Maharaj Kishore, without waiting till the next day, got the contractor's man to put the number 675 on the package. During the night of the 23rd of December 1919, the package in question was stolen. The next morning a formal report was made to the Railway Police who took up the investigation at once. Twelve pieces of cloth and the covering, commonly known as "*bardana*," were discovered by the wire fencing of the Station compound. The other pieces were never traced. According to the Sub-Inspector, the "*bardana*" bore the number 675. The position taken up by the plaintiffs-appellants is that the giving of the number 675 by the loading clerk was sufficient to amount to the registration of the goods offered and to the delivery of the goods. We think that on the evidence of Maharaj Kishore the plaintiffs-appellants have no case. The mere fact that the loading clerk filled up what is called the serial number in the forwarding note, without doing anything further, would not amount to the delivery of goods to the Railway by the consignor. Section 149 of the Contract Act defines delivery of goods in the case of bailees. It is as follows:— "The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person auhtorized to hold them on his behalf."

On the evidence in the present case we are unable to find that anything was done by the plaintiffs consignors which would amount to putting the goods in question in the possession of the Railway or any person authorized on behalf of the Railway. The appeal, therefore, fails and is dismissed with costs.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 99 OF 1922
September 14, 1922.
Present:—Mr. Ashworth, J. C.
KARIM BAKHSH AND ANOHTER - -
PLAINTIFFS—APPLICANTS
versus
ABDUL HAQ—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 24, 115—Transfer of case—Notice to opposite party, absence of—Irregularity — Revision.

In a matter coming before the High Court under section 115 of the Civil Procedure Code, it is open to the Court to refuse to interfere with any irregularity unless it considers that the irregularity is one of which the applicant in revision has real cause to complain. [p. 249, col. 2; p. 250, col, 1.]

A transfer of a case by a District Judge from one Court to another, on the application of a party, without giving notice to the opposite party, is an irregularity, but the irregularity will be treated as material only if it has made a difference to the party affected by it. [p. 250, col. 1.]

Zuool Qadar Jang Bahadur v. *T. B. W. Bishop, Manager Nanpara Estate*, 58 Ind. Cas. 667; 23 O. C. 216; 7 O. L. J. 523, 2 U. P. L. R. (O.) 162 and *Fatema Begam* v. *Imdad Ali*, 58 Ind. Cas. 560; 18 A. L. J. 351; 2 U. P. L. R. (A.) 83, dissented from.

It is better for a case to be decided by a Judge who has actually heard the evidence or a great part of it, if this is possible without dislocation of work. [p. 250, col. 1.]

Civil revision against an order of the District Judge, Lucknow, dated the 11th July 1922.

Mr. *Ali Muhammad*, for the Applicants.

Mr. *Har Dayal*, for the Opposite Party.

JUDGMENT.—This application in revision is made in respect of an order of the District Judge of Lucknow, directing the transfer of a certain case pending in the Court of the Additional Munsif of Lucknow to the Court of the Munsif (North) of Lucknow. The order directing transfer was made on an application by

the defendant for the transfer. The reason alleged for the transfer was that the Munsif had heard the evidence for three continuous days while he was acting as Additional Munsif and that the case should go along with him on his transfer to another Court. There can be no question that the District Judge should have given notice to the other side as he was dealing with a transfer case on the application of one of the parties and not *suo motu*. His failure to do so was certainly an irregularity. It was held in *Zuool Qadar Jang Bahadur* v. *T. B. W. Bishop Manager Nanpara Estate* (1), that such an irregularity was a material irregularity. No reason was given in this case for calling the irregularity material and it would appear to me that it would only be material if it made a difference to the party affected by the irregularity. In an Allahabad case, *Fatima Begam* v. *Imdad Ali* (2), a Judge of the Allahabad High Court went further and called the irregularity action without jurisdiction. Having regard to the fact that a Judge is not debarred from ordering, in certain circumstances, a transfer without notice to the parties I consider that to call his order in any case as without jurisdiction is an abuse of the term jurisdiction. In a matter coming before this Court under section 115, Civil Procedure Code, it is open to this Court to refuse to interfere with any irregularity unless it considers that the irregularity was one of which the applicant in revision has real cause to complain. Before me the applicants have set forth their reasons on the one side for objecting to the transfer and the opposite party on the other side for wishing it. The reason of the applicants' Counsel in revision for objecting is stated as follows. His clients had a right to choose a forum and that right should not be taken away except by lawful proceeding and on good grounds. He also added that the Additional Munsif before whom the case would be heard but for transfer was an officer of more experience than the Munsif to whom the District Judge had ordered the transfer. On the other side it is stated, as before the District Judge, that the Munsif had actually spent three days on recording the evidence and would be in a better position to judge the value of it. It appears to me that, allowing that the order of the District Judge was irregular, it was not an order with which the present applicants in revision have any sufficient reason to be dissatisfied. On the other hand, it cannot be denied that it is better for a case to be decided by the Judge who has actually heard the evidence or a great part of it if this is possible without dislocation of work. Although, therefore, I agree, that the District Judge's order was irregular, I am not disposed in revision to interfere with it. The application is, therefore, dismissed. I, however, direct that the parties bear their own costs in this appeal and for the following reason. The opposite party should certainly have drawn the District Judge's attention to the necessity of issuing notice to the other side.

Z. K. *Application dismissed.*

(1) 58 Ind. Cas. 667; 23 O. C. 216; 7 O. L. J. 523; 2 U. P. L. R. (O.) 162.

(2) 58 Ind. Cas. 560; 18 A. L. J. 351; 2 U. P. L. R. (A.) 83.

CALCUTTA HIGH COURT.

DIVORCE SUIT NO. 6 OF 1920.

July, 21, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., and Mr. Justice Richardson.

BUTTERFIELD—PETITIONER

versus

BUTTERFIELD—RESPONDENT.

Divorce Act (IV of 1869), ss. 17, 44—Decree nisi—Death of petitioner—Confirmation of decree—High Court, jurisdiction of—Order for custody of children.

Where, after obtaining a decree *nisi* for dissolution of marriage, and an order for the custody of the children of the marriage, the petitioner dies, the High Court has no jurisdiction to confirm the decree, or to make an order in the proceedings for the custody of the children. [p. 251, col. 2.]

Stanhope v. *Stanhope*, (1886) 11 P. D. 103; 55 L. J. P. 36; 54 L. T. 906; 34 W. R. 646; 50 J. P. 276, followed.

JUDGMENT.

Sanderson, C. J.—This is a case which was referred to us by the District Judge in which he made a decree *nisi* for the dissolution of the marriage on the

ground of adultery and desertion by the respondent. The petitioner was the wife. The learned District Judge further made an order that, pending the final disposal of the case by the High Court, the petitioner would have the custody of the three children of the marriage. The respondent was directed to pay a sum of Rs. 150 a month towards the maintenance of the three children from the date of the decree to the date of final disposal of the case. The decree came before this Court for confirmation and it was necessary, in our judgment, to remand the case to the lower Court for further findings, but, unfortunately, before the findings could be considered by this Court, the petitioner had died on the 6th August 1921. The question, therefore, arises what course this Court is to adopt. In my judgment, in consequence of the death of the petitioner, this Court in these proceedings has no jurisdiction to make any order. A similar position was under consideration by the Court of Appeal in England in the case of *Stanhope* v. *Stanhope* (1). The head-note runs thus:—"A husband who had obtained a decree *nisi* for dissolution of his marriage died before the time for making it absolute had arrived," and it was held "that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute." Lord Justice Bowen in giving the judgment said that " a man can no more be divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved sooner and the Court cannot dissolve a union which has already been determined." Lord Justice Fry said: "The only decree that could be asked for would be that the marriage should be dissolved or that it should be deemed to have been dissolved from the date of the decree *nisi*. Neither alternative is possible. As regards the first, no power can dissolve a marriage which has been already dissolved by the act of God. As regards the second, the Court cannot pronounce a decree declaring that the marriage was dissolved at an earlier date, because the Statute gives it no such power, but only authorises it to pronounce a decree 'declaring such marriage to be dissolved." The result is that, in my judgment, we have no jurisdiction to confirm this decree for dissolution of the marriage.

With regard to the order which was made in respect of the custody of the children, it seems to me that section 44 of the Divorce Act (IV of 1869) is applicable. That provides that "the High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed, may, upon application by petition for the purpose, make from time to time all such orders and provision with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be) or by such *interim* orders as aforesaid." It appears, therefore, that, inasmuch as we have no jurisdiction to make the decree absolute for dissolution of marriage, we have no jurisdiction in these proceedings to make any order as regards the custody of the children.

Woodroffe, J.—I agree.

Richardson, J.—I agree.

W. C. A. *Order accordingly.*

(1) (1886) 11 P. D. 103; 55 L. J. P. 36; 54 L. T. 906; 34 W. R. 446; 50 J. P. 276.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1577 OF 1921.
April 10, 1923.

Present:—Mr. Justice Daniels.

Haji MAQBUL HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Haji AHMAD HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—User of vacant land—Pleadings—New issue in appeal—Objection not raised by other party, effect of.

In a suit for possession of land it appeared that the land in suit had been lying unoccupied for many years and the Municipal Board had been using it for depositing refuse. It was found,

MAQBUL HUSAIN *v.* AHMAD HUSAIN.

however, that some ten years before suit the Board made it *pucca*. The Trial Court decreed the suit but on appeal the Board raised the plea that even if the possession of the Board was not found to be adverse, it was entitled to the benefit of section 51 of the Transfer of Property Act. Notice of this plea being raised was given to the plaintiff who took no objection to it. In second appeal before the High Court it was urged that this plea ought not to have been allowed to be raised:

Held,(1) that as the issue was raised with notice to, and consent of, the plaintiff it could have been entertained by the Appellate Court; [p. 253, col. 1.]

(2) that until the land was made *pucca* the acts alleged on the part of the Municipal Board were not sufficient to amount to dispossession of the plaintiff or to constitute adverse possession. [p. 253, col. 1.]

Framji Cursetji v. *Goculdas Madhowji*, 16 B. 338; 8 Ind. Dec. (N. S.) 703, followed.

Second appeal against a decree of the Additional Subordinate Judge, Bareilly, dated the 25th June 1921.

Mr. *Iqbal Ahmad*, for the Appellants.

Dr. *M. L. Agarwala* and Mr. *M. A. Aziz*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises relates to a small plot of land in the City of Bareilly. The plaintiffs claimed as owners of the land alleging that they had been dispossessed by the first defendant, Hafiz Ahmad Husain, who had built a shop on the plot. They accordingly asked for restoration of possession with demolition of the shop as well as for damages and mesne profits. The Municipal Board of Bareilly applied to be and was made a defendant during the progress of the suit. The defendants denied the plaintiff's ownership and pleaded adverse possession and limitation. The Trial Court decreed the suit and two appeals were preferred to the lower Appellate Court by Hafiz Ahmed Husain and the Municipal Board respectively.

The learned Subordinate Judge found on the evidence that the title in one-third of the land was with the plaintiffs. He found that the plot had been for many years lying unoccupied and that the Municipal Board had been using it for the deposit of refuse. He found, however, that this use of the land by the Municipal Board did not amount to adverse possession or to the dispossession of the plaintiffs. He found that the Municipal Board did in fact take adverse possession of the land some ten years before the suit when they made it *pucca*. This, however, was within limitation. In 1913 the Municipal Board sold the land to the defendant, Hafiz Ahmed Husain, who erected a shop upon it. An issue was argued before the learned Judge with reference to section 51 of the Transfer of Property Act. The learned Subordinate Judge held that the respondent, Hafiz Ahmed Husain, being a transferee of the plot in suit, made the improvement upon it believing in good faith that he was absolutely entitled thereto. He, therefore, made an order under section 51 requiring the plaintiffs to transfer their share in the land to the defendant at the market-value which he decided to be Rs. 40.

Against this decree the plaintiffs appeal. They have not appealed against the appellate decree passed on the appeal by the Municipal Board, and the question was raised at the hearing, though not strongly pressed, as to whether this decree might not operate as *res judicata*. It appears to me that it cannot do so. The Municipal Board, if it ever had any interest in the land, has parted with that interest to the first respondent. The only relief granted to the plaintiffs or asked for by them was a relief against Hafiz Ahmed Husain. They complain that the relief given them is inadequate and hence their appeal. As they require no relief against the Municipal Board they had no occasion to appeal against the decree passed on the Board's appeal.

On the merits of the case the sole ground taken by the plaintiffs appellants is that the issue under section 51 of the Transfer of Property Act was not raised in the Trial Court and that the defendant ought not to have been allowed to raise it in the Court below. It is found by the learned Subordinate Judge that the issue was not raised in the Trial Court and this I find to be correct. The defendant relies on paragraph 7 of his written statement in which he said that if for the sake of argument the plaintiffs be proved to have any right even then they were not entitled to have the shop demolished or to obtain possession after the shop had been erected at great expense by the defendant. This was really a plea of acquiescence and

estoppel and the issue raised upon it by the Munsif was an issue of estoppel, namely:—

"Whether the suit is barred by section 115 of the Evidence Act."

It is not, however, true that the issue was raised for the first time at the hearing of the appeal. The case was not decided till 25th June 1921. On 9th November 1920, more than seven months earlier, Hafiz Ahmed Husain had put in an application urging that, even if the plaintiff's ownership were upheld and the possession of the Municipal Board found not to have been adverse, he was still entitled to the benefit of section 51 of the Transfer of Property Act. The application was considered in presence of the Pleaders of both parties and the plaintiffs' Pleader agreed to the land being valued by an *Amin*. Subsequently, on 7th December, the parties came to an agreement as to the value of the land. The appellants are quite correct in urging that this does not mean that they agreed that plea under section 51 of the Transfer of Property Act was a good plea. On the contrary, they stoutly resisted it and the plea was strenuously contested before the learned Subordinate Judge. It does, however, mean that they had notice that the plea was going to be raised and that they took no objection to the plea being raised and heard in the Appellate Court. Under the circumstances, they cannot be heard to u ge now that the plea ought not to have been entertained by the learned Subordinate Judge.

A cross-objection is taken by the respondent that the finding of the Court below as to adverse possession is wrong and that the suit ought to have been dismissed as time-barred. The appellants have cited the ruling in *Framji Cursetji* v. *Goculdas Madhowji* (1) in support of the decision of the Court below and the circumstances are very similar. I agree with the view taken by the Court below that, until the land was made *pucca*, ten years before the suit the acts alleged on the part of the Municipal Board are not sufficient to amount to the dispossession of the plaintiffs or to constitute adverse possession.

(1) 16 B. 338; 8 Ind. Dec. (N. S.) 703.

For the reasons already given the appeal and the cross-objection are both dismissed with costs including in this Court fees on the higher scale.

K. S. D. & N. H. *Appeal and cross-objection dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISIONS NOS. 52 TO 57 OF 1922.

August 17, 1922.

Present:—Pandit Kanhaiya Lal, J. C.

Lala BENI MADHO AND OTHERS—PLAINTIFFS—APPLICANTS

versus

Syed SHAMSHAD ALI—DEFENDANT—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Appeal—Delay in filing—Mistake of Court—Extension of time—Sufficient cause—Oudh Rent Act (XXII of 1886), s. 108 (16)—Jurisdiction of Civil and Revenue Courts—Suit by pattidar *to recover revenue paid from sub-*pattidars.

A mistake of law might be a sufficient reason for asking the Court to exercise its discretion under section 5 of the Limitation Act, more so when the mistake is one in which the Court which was seized of the suit shared. [p. 254, col. 2.]

Brij Indar Singh v. *Kanshi Ram*, 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917. 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.), followed.

A suit was filed in the Civil Court. The Civil Court declined jurisdiction and returned the plaint for presentation to the Revenue Court. The Revenue Court held that it had no jurisdiction to hear the suit. Plaintiff went up on appeal to the Collector, but the latter upheld the order of the lower Court. Plaintiff then re-filed the plaint in the Civil Court, but that Court held that the matter was *res judicata*. Plaintiff then appealed to the District Judge against the first order of the Civil Court declining jurisdiction. The appeal was considerably beyond time:

Held, that the plaintiff having acted in good faith in prosecuting the suit in the Revenue Courts before he came back to the Civil Court and there having been no undue delay in the meanwhile in filing the appeal, he was entitled to the benefit of section 5 of the Limitation Act. [p. 254, col. 2.]

A suit by a *pattidar* to recover from the sub-*pattidars* the amount of land revenue paid by him on their account is cognisable by a Civil Court and not by a Revenue Court, as the parties are not co-sharers within the meaning of section 108 clause (16) of the Oudh Rent Act. [p. 254, col. 1.]

Civil revisions against the decree of the Subordinate Judge, Unao, dated the

31st January 1922, confirming that of the Munsif, (North) Unao, dated the 9th August, 1920.

Mr. *Parbhu Dayal Rastogi*, for the Applicants.

Mr. *Ali Muhammad*, holding brief of Mr. *Shahanshah Husain Rizwi*, for the Opposite Party.

JUDGMENT.—These applications in revision arise out of three suits which were instituted in the Court of the Munsif, (North) Unao, by a *pattidar* for the recovery of revenue paid by the plaintiffs on account of the defendants, who were their sub-*pattidars*. The Munsif before whom these suits were pending thought that they were excluded from the cognizance of the Civil Court by section 108, clause (16), of the Oudh Rent Act (XXII of 1886). He returned the plaints for presentation to the proper Court. When the plaintiffs went with the plaints to the Revenue Court, the latter held that the suits were cognizable by the Civil Court. The order of the Revenue Court was upheld in appeal by the Deputy Commissioner. The plaintiffs then came back to the Civil Court and sought relief by filing the same plaints again in the Court of the Munsif, (North) Unao. The Munsif rightly held that the decision in the previous proceedings operated as *res judicata*.

The plaintiffs then filed two sets of appeals directed against the original order of the Munsif and against the subsequent order. The form r set of appeals was barred by time. The plaintiffs sought refuge under section 5 of the Indian Limitation Act (IX of 1908), which the lower Appellate Court refused to grant. The other set of appeals was within time, but the lower Appellate Court upheld the order of the Munsif therein. By these applications the plaintiffs seek to challenge the propriety of the order of the lower Appellate Court, refus ng to extend the time under section 5 of the Indian Limitation Act.

The circumstances set forth above show that the plaintiffs were merely complying with the orders passed in each instance when they moved from Court to Court in order to seek relief. It was open to them to have filed an appeal in each case, when they were first directed to go to the Revenue Court, but they took the order of the Munsif as sufficient justification for losing no further time and seeking relief in the Court to which they were directed to go. As pointed out by the their Lordships of the Privy Counscil in *Brij Indar Singh* v. *Kanshi Ram* (1), a mistake of law might be a sufficient reason for asking the Court to exercise its discretion under section 5, more so where the mistake is one in which the Court which was seized of the suits shared. The real question for consideration in such cases is whether the plaintiffs had acted in good faith in prosecuting their suits in the Revenue Court before they came back to the Civil Court. If they did, the time spent in prosecuting those suits in the Revenue Court ought to be taken into account, and if there has been no undue delay meanwhile, the delay in filing the appeal from the original decree, by which the plaints were directed to be returned for presentation to the Revenue Court should be excused.

The plaintiffs are shown to have acted with due diligence throughtout these proceedings and they are entitled to the benefit of section 5. The Munsif was in error in holding that the suits were not cognizable by the Civil Court. The parties to the suits are not co-sharers. The defendants are described as sub-*pattidars* of the plaintiffs. They occupy a position similar to that of subordinate proprietors and, as held by this Court in *Musammat Niaz Fatima* v. *Hakim Jawwad Husain*, Rent Appeal No. 107 of 1900, decided on the 19th November 1901, the Civil Court ought to have entertained the suits.

The applications are, therefore, allowed and the decrees of the lower Appellate Court set aside, the result being that the suits will be remanded to the Court

(1) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

of first instance with a direction to reinstate them under their original numbers and to dispose of them in accordance with law. The costs here and hitherto will abide the result.

Z. K. *Applications allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 118 OF 1922.

March 11, 1922.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

NAGESHAR SAHAI—DEFENDANT—RESPONDENT—APPLICANT

versus

SHIAM BAHADUR AND OTHERS—PLAINTIFFS—APPELLANTS—OPPOSITE PARTY.

Court-Fees Act (VII of 1870), Sch. I, Art. 5—Review, application for—Court-fee payable.

The words "leviable on the plaint or memorandum of appeal" in Art. 5 of Schedule I of the Court-Fees Act, mean "leviable on the plaint or memorandum of appeal in which the judgment, review of which is asked for, was passed" and cannot be construed as meaning "leviable on a plaint or memorandum of appeal asking for the same relief as that asked for in the application for review." [p. 255, col. 2.]

In re Manohar Tambekar, 4 B. 26; 2 Ind. Dec. (N. S.) 528, *Proceedings, 6th January* 1872, 7 M. H. C. R. App. 1, *In the matter of Sheikh Ali Ahmad*, 1 Ind. Cas. 209; 31 A. 294; 6 A. L. J. 215, *Nobin Chundra Chuckerbutty* v. *Mohamed Uzir Ali*, 3 C. W. N. 292 and *Fakhur Ali* v. *Sahib Nur*, 20 Ind. Cas. 3; 254 P. L. R. 1913; 159 P. W. R. 1913, relied on.

An application for review must therefore, if presented before the ninetieth day from the date of the decree, bear one-half the fee levied or leviable on the plaint or memorandum of appeal, out of which the application has arisen, without reference to the relief asked for in the application for review. [p. 256, col. 1.]

Miscellaneous application against a decree of the First Additional Judicial Commissioner and Second Additional Judicial Commissioner, dated the 2nd March 1922, modifying a decree of the Subordinate Judge, Lucknow, dated the 31st January 1920.

Dr. *T. N. Misra* and Mr. *K. P. Misra*, for the Applicant.

Messrs. *Raghubir Sahai* and *Bishambhar Nath Srivastava*, for the Opposite Party.

JUDGMENT.—This is an application for review of a judgment passed by this Court on the 2nd of March 1922. That judgment was passed in Appeal No. 23 of 1920 between Kuar Nageshar Sahai and Shiam Bahadur and others and in the Cross-Appeal No. 25 of 1920. The Appeal No. 25 of 1920 of Shiam Bahadur and others against Nageshar Sahai was valued for Court-fees at Rs. 29,069 and the Court-fee of Rs. 975 was paid on that valuation and a fee of Rs. 10 for a declaratory relief. The applicant for review Kuar Nageshar Sahai has valued his application at Rs. 1,412, the actual value of the property in respect of which relief is sought in the application for review, and has paid a Court-fee of Rs. 50 thereon. The office has reported that this Court-fee is deficient by Rs. 442-8 in view of the provisions of Art. 5 of the First Schedule of the Court-Fees Act. We have heard the Counsel for both parties on the question of Court-fee and are constrained to hold that the report of the office is correct. Art. 5 of the First Schedule of the Court-Fees Act provides that the proper fee payable on an application for review of judgment, if presented before the ninetieth day from the date of the decree, is one-half of the fee leviable on the plaint or memorandum of appeal. The learned Counsel for the applicant would argue that had it been intended that one-half of the full fee paid on the memorandum of appeal should be payable on such an application for review the word used would have been "levied" and not "leviable" and would argue that the words "plaint or memorandum of appeal" should be construed as if they meant "plaint or memorandum of appeal asking for the same relief as that asked for in the application for review." This question has been before all the High Courts in India and while the Courts of Bombay and Madras incline to the view put forward by the learned Counsel for the applicant the Allahabad, Calcutta and Lahore Courts have taken a contrary view and have held that the words "plaint or memorandum of appeal" mean the plaint or memorandum of appeal in which the judgment, review of which is asked for, was passed.

NAGESHAR SAHAI *v.* SHIAM BAHADUR.

In re Manohar Tambekar (1), *Proceedings, 16th January 1872* (2), *In the matter of Sheikh Ali Ahmad* (3), *Nobin Chundra Chuckerbutty v. Mohamed Uzir Ali* (4) and *Fakhur Ali* v. *Sahib Nur* (5).

It is urged that the latter view might in many cases cause considerable hardship and that in a fiscal enactment where there is any doubt as to the correct interpretation of any provision a construction favourable to the subject should be placed on that provision. We do not think, however, that there can be any reasonable doubt as to the correct construction to be placed upon the words of the enactment. The words themselves are very clear and definite and we should not be justified in adding to them in order to avoid possible hardship. We note that, formerly, a fixed fee was chargeable on such applications and the Legislature has deliberately in the present Act provided for an *ad valorem* fee. We note, further, that in Art. 5 there is no entry in the second column of the Schedule. Had the Legislature intended that an *ad valorem* fee should be levied only on the value of the subject-matter in respect of which relief was sought by the application for review we think it would have said so in clear and definite terms. This change in the law was, no doubt, made to prevent frivolous applications for review and though in some cases the Court-fee leviable may be disproportionate to the relief asked for, yet if the application is successful the applicant can recover the greater portion of the fee paid by a certificate granted to him under section 15 of the Act. As has been pointed out by Mr. Justice Aikman in *In the matter of Sheikh Ali Ahmad* (3), the word "leviable" seems to have been used instead of the word "levied" in order to provide for an application for review by a defendant or respondent in the case of a suit or appeal *in forma pauperis* and the use of this word would not justify us in giving an interpretation to the Article which the plain words of the Article cannot bear. For these reasons, we hold that the Court-fee payable on the present application is one-half of the Court-fee which was paid on the memorandum of appeal and that, therefore, there is a deficiency of Rs. 442-8. We allow the applicant three weeks to make good the deficiency; and the case will be put up for orders on the 3rd of April.

At the same time, however, we find that there is an accidental omission in the judgment which can be corrected by us under section 152 of the Civil Procedure Code. The plaintiff has been given a decree for certain items of moveable property but we have omitted to state, as required by O. XX, r. 10 of the First Schedule of the Code of Civil Procedure, the amount of money to be paid as an alternative if delivery cannot be had. No evidence was placed before us as to the value of these items and we must, therefore, accept the value as stated by the defendant in list J attached to his written statement. The amount of money which shall be paid as an alternative if delivery of each of the items mentioned in the decree cannot be had is given in the attached statement. In the last paragraph of the judgment after the words "will be given a decree for possession of those items" the following will be inserted "and if delivery cannot be had in respect of any such item the amount of money to be paid by defendant to the plaintiff is given in the statement attached to this judgment" and the statement attached to this order shall be attached to and form part of the judgment.

Note:—The rest of the judgment is not material for the purpose of report—[*Ed.*]

Z. K.

Order accordingly.

(1) 4 B. 26; 2 Ind. Dec. (N. S.) 528.
(2) 7 M. H. C. R. App. 1.
(3) 1 Ind. Cas. 209; 31 A. 294; 6 A. L. J. 215.
(4) 3 C. W. N. 292.
(5) 20 Ind. Cas. 3; 254 P. L. R. 1913; 159 P. W. R. 1913.

EMPEROR *v.* UMRAO.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 6 OF 1923.

February 9, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Banerji.

EMPEROR—PROSECUTOR

versus

UMRAO—ACCUSED.

Penal Code (Act XLV of 1860), *s.* 300 (4), *Ill.* (c)—*Quarrel and exchange of abuse—Death caused by single* lathi *blow—Intention—Knowledge that death would ensue—Offence—Criminal Procedure Code (Act V of* 1898), *s.* 439 *—Revision—Alteration of charge—High Court, power of.*

If a person, owing to a quarrel and exchange of abuse and without intending to kill, causes the death of another by delivering a single *lathi* blow on his head, he must be taken to have known when striking the blow that his act was so imminently dangerous that it must in all probability cause death; and if he does the act without any excuse he is guilty of murder and his case comes under section 300, clause (4) Illustration (*c*) of the Penal Code.

A High Court has, when sitting as a Revision Court, power to alter a charge from that under a minor offence to one under a more serious one and enhance the sentence.

Criminal Revision from a Sessions Statement.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—Upon reading the Sessions Statement in this case a Judge of this High Court directed notice to be served upon the accused to show cause why this Court should not either (*a*) order his re-trial on a charge framed under section 302 of the Indian Penal Code, or (*b*) whilst maintaining the conviction enhance the sentence. The accused was charged with having caused the death of one Murari. There is really no difficulty about the facts, and we accept the facts which the learned Sessions Judge considered to be proved. On the occasion in question the accused struck one blow with a *lathi* which fell upon the head of Murari. This blow fractured Murari's skull and he died shortly after. There were no circumstances which brought this case within the exception of grave and sudden provocation. There was, however, evidence of the quarrel between the two men and there seems very little doubt that there was an exchange of abuse. In the result the learned Sessions Judge convicted the accused under section 304 and sentenced him to three years' rigorous imprisonment. As regards the length of the sentence we do not, on a review of the whole of the circumstances, disagree with the learned Sessions Judge but having regard to clause (4) of section 300 of the Indian Penal Code and Illustration (*c*), the question which we have to decide is, whether on the facts as proved the offence was not murder. We are of opinion that the accused when committing the act did know that it was so imminently dangerous that it must in all probability cause death, and that he did commit that act without any excuse. Illustration (*c*) is clear in terms that a man is guilty of murder although not intending to cause murder if intentionally he gives to another a "club" wound sufficient to cause death in the ordinary course of nature. That is in fact what happened in this case, but it is to be observed that the accused struck one blow only, and if intention was an element we should come to the conclusion that he did not by that single blow intend to kill the deceased. That, therefore, is a circumstance of extenuation. The fact that there was a quarrel is another circumstance. Holding him guilty under section 302 we sitting in revision have power to alter the conviction from one under section 304 to one under section 302. Under that section this Court has power to pass one of two sentences, and we chose the lesser sentence for the reasons which we have given, and sentence the accused to transportation for life. At the same time, we desire to draw the attention of the Local Government to this case; and in accordance with the practice which this Court was invited to pursue recently, we intimate to the Local Government that we are of opinion that this is a case in which clemency may be shown to the accused. If the Local Government adopt our view we think the appropriate sentence would be the same sentence as that already passed on him by the Sessions Judge, namely, three years' rigorous imprisonment. We, therefore, alter the conviction under

section 304 to one under section 302 and sentence the accused to transportation for life.

We direct that the record be submitted to the Local Government.

M. A. A. *Order accordingly.*
N. H.

PATNA HIGH COURT.

CRIMINAL REVISION No. 230 OF 1923.
May 22, 1923.

Present:—Mr. Justice Macpherson.

WAYEZUL HUQ AND OTHERS—FIRST PARTY—PETITIONERS

versus

SHOBRATI JOLAHA AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Magistrate, duty of—Attachment of property, when permissible.

In cases under section 145 of the Criminal Procedure Code a easonable effort must be made to decide the question as to possession before there is jurisdiction to attack the subject-matter under section 146. [p. 259, col. 2.]

Sheobalak Rai v. *Bhagwat Panday*, 15 Ind. Cas. 486; 40 C. 105; 13 Cr. L. J. 486; 16 C. W. N. 1052, followed.

It is not a Magistrate's business to speculate whether his order under section 145 of the Criminal Procedure Code will prejudice a future decision in a revenue proceeding. It is also not sound to check his hand because his decision is not final. [p. 259, col. 1.]

Application against an order, dated the 22nd February 1923, passed by the Sub-Divisional Officer, Nawadah.

Mr. *Shiveshwar Dayal*, for the Petitioner.

Messrs. *W. H. Akbari* and *Sultan-ud-din Hussain*, for the Opposite Party.

JUDGMENT.—This is an application under section 107 of the Government of India Act. It is contended that the Sub-Divisional Magistrate of Nawadah acted with material irregularity in the exercise of his jurisdiction in attaching, under section 146 of the Code of Criminal Procedure, forty-five plots of land which were the subject of a proceeding under section 145 of the Code between the present petitioners as first party and the present opposite party as second party.

The hearing of the section 145 case commenced on the 12th February. The first party examined six witnesses and tendered a considerable amount of documentary evidence, and the Magistrate, actuated by what later he considered undue tenderness for the second party, adjourned the cross-examination of these witnesses till the 16th February intimating that further delay would not be allowed. On the 16th February, however, the Pleader for the second party filed a petition praying for postponement to enable him to move for transfer of the case. No grounds were given in the petition nor were any stated verbally. It was obviously a move with the object of having the case tried by the successor of the Magistrate who was about to proceed on leave, and was in keeping with the obstructive tactics which had been adopted by the Pleader on the 12th and which had led to a reprimand from the Court. Eventually, the petition for postponement was refused and the case proceeded *ex parte*.

The Magistrate came to the conclusion that the first party was possessed of what appeared to be complete papers to substantiate his story; they also rebutted the presumption arising out of the entries in the Record of Rights which was the only evidence in favour of the se ond party, The evidence went to show that there had been an exchange of lands subsequent to a partition and that the second party had received other lands in exchange for the plots in dispute. He held that the second party was not in possession and proceeded as follows:—

"The case of the first party is no doubt more probable. The documentary evidence fully supports it. But as the case has not been contested on behalf of the second party, I cannot be sure of my finding. There is also one point more, namely, that this very controversy is the subject-matter of an issue in the commutation of rent cases. To decide the point here definitely when one party has not contested the case might prejudice the decision in the commutation case. The Court is mainly concerned with preventing a breach of the peace. My decision on possession cannot finally decide the issue. Therefore

I consider the best course would be to attach the lands as I cannot positively say who is in actual possession."

The inference to be drawn is that all the judicial considerations before him led the Magistrate, who had already found that the second party was not in possession, to the conclusion that the first party was in possession of the subject of dispute but that, influenced by extraneous or non-judicial considerations, he flinched from the apparently inevitable decision to that effect and the consequent order under sub-section (6). It is not the Magistrate's business to speculate whether his order under section 145 will prejudice a future decision, perhaps several years hence, in a revenue proceeding. It is also not sound to check his hand because his decision is not final. And, as has been aptly pointed out, the reason given for failure to give effect to the evidence of the first party, which he believed, would apply to all *ex parte* proceedings, and the best course for a party to a proceeding under section 145 who has no case but wishes to harass the other party, would be to evade a contest and perhaps also, as in this instance, be rude to the Court, whereupon the Magistrate would shrink from the responsibility of passing an order favourable to the contesting party. It is indeed true that an attachment under section 146 will as effectually prevent a breach of the peace as a decision in favour of a party under section 145, but a reasonable effort [*Sheobalak Rai* v. *Bhagwat Panday* (1), varying of course with the circumstances of each particular case, must be made to decide the question as to possession before there is jurisdiction to attach the subject-matter under section 146.

The order of the Sub-Divisional Magistrate must, therefore, be set aside. Petitioners desire that the case should be remanded for a fresh decision on the existing record. This suggestion fails to commend itself. The Trying Magistrate is no longer available. Moreover, the sugar-cane which was the standing crop on the disputed land has been removed and the Magistrate should be left free to take such action according to law as he deems to be required by the circumstances as they present themselves.

The application is allowed and the order of the 22nd February attaching the property in dispute is set aside.

K. S. D. *Rule made absolute.*

(1) 15 Ind. Cas. 486;40 C. 105; 13 Cr. L. J. 486; 16 C. W. N. 1052.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL NO. 905 OF 1922.

Present:—Mr. Justice Heald.

NAGAPPAN MADALIAR—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 537—Penal Code (Act XLV of 1860), s. 182, offence under—Sanction to prosecute, absence of—Irregularity.

Although sanction to prosecute for an offence under section 182, Penal Code, is necessary, the absence of such sanction, unless a failure of justice is occasioned thereby, is a mere irregularity under section 537 of the Criminal Procedure Code, and would not vitiate the prosecution.

Criminal appeal from an order of the Eastern Sub-Magistrate, Rangoon, passed in Criminal Regular Trial No. 433 of 1922.

ORDER.—On the 25th March last appellant laid an information to the Police alleging that one Kumaran Mudaliar had borrowed a necklace from him and refused to return it. The Police classified the offence charged as falling under section 420 of the Indian Penal Code and began an investigation.

Appellant apparently was dissatisfied with the enquiry made by the Police and on the 31st March he laid a complaint before the District Magistrate on the same allegation charging Kumaran Mudaliar with criminal breach of trust.

The Magistrate who dealt with the complaint came to the conclusion that the accusation was false and on the 17th of June discharged Kumaran and ordered appellant to pay him Rs. 50 as compensation for having made a vexatious charge against him.

As a result of the trial before the Magistrate the Police also classified appellant's information as false and on the 20th June the Commissioner of Police sanctioned his prosecution for giving false information.

Appellant was sent up by the Police for trial for an offence under section 182, Indian Penal Code, and has been convicted and sentenced to one-half month's rigorous imprisonment

He appeals mainly on the ground that the sanction of the Magistrate who dealt with the complaint, or of the District Magistrate was necessary in view of the fact that the proceedings before the Magistrate had followed the enquiry by the Police.

So far as the law is concerned, the case of *Po Hlaing* v. *Ba E* (1) leaves no doubt that his contention is correct, but under section 537, Criminal Procedure Code, the want of sanction is an irregularity which does not vitiate the proceedings unless it has occasioned a failure of justice.

I have read the Magistrate's records and I see no reason to believe that there has been any failure of justice. It appears that the parties are enemies, being members of rival gangs, whose accusations have brought them before the Courts on various occasions. Under these circumstances, it is unlikely that appellant would lend the ornament. The evidence which he called to prove the loan was discrepant and suspicious and was, in my opinion, entirely insufficient to establish the allegation.

I see no reason to doubt that appellant did give false information to the Police with intent to injure his enemy and he may consider himself lucky that he was not prosecuted on the more serious charge under section 211, Indian Penal Code.

False charges of this kind deserve serious punishment and, in spite of the fact that appellant has also had to pay Rs. 50 to Kunaran as compensation, I am of opinion that he has got off lightly.

The appeal is dismissed and appellant will be re-arrested and sent to Jail to serve the remainder of his sentence.

W. C. A. *Appeal dismissed.*

(1) 15 Ind. Cas. 981; 6 L. B. R. 50; 5 Bur. L. T. 111; 13 Cr. L. J. 565.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 632 OF 1922.
December 6, 1922.
Present:—Mr. Justice Stuart.
ALLU—ACCUSED
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 228—Threatening witness in Court—Offence.

An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box commits an offence under section 228 of the Penal Code.

Criminal Reference made by the Sessions Judge, Budaun.

REFERRING ORDER.—This is an application for revision by Allu against his conviction, under section 228 of the Indian Penal Code. I accept the facts found by the Court below as correct, and were as follows:—Allu was on his trial before a Third Class Special Magistrate while Gendan Lal was being examined as a prosecution witness. Allu appears to have had reason to believe that the witness was turning so often towards the complainant possibly for some inspiration. Allu, at first, objected but when he found the witness repeating the same trick, Allu, addressing the witness, said that he (Allu) would pull his ears. This is all that happened and which is said to constitute the offence of the contempt of the Court. Even the Trial Court has found that there was no intention to insult the Presiding Officer, but inasmuch as this conduct of this accused had the effect of the Special Magistrate starting at once proceedings under section 228, that has been taken to amount to an interruption to that public servant while sitting as a Court. The facts speak for themselves and hardly need any comment. In my humble opinion, they do not constitute any interruption offered to the Special Magistrate himself. If upon this unusual expression used by the accused the Court considered himself called upon to take notice of it as a matter of his duty, it cannot be said that it amounted to an *interruption by the accused himself*. I, therefore, regret to have to note that, in spite of the fact that Allu expressed his regret and apologised to that Special Magistrate he

was sent up, under custody and kept in *havalat* for some days, and, to cap it all, he has now been fined Rs. 5. I, therefore, beg to report this case to the Hon'ble High Court with the recommendation that his conviction may be quashed. Any explanation which the Magistrate may deem proper to submit will be forwarded to the Hon'ble High Court.

JUDGMENT.—The learned Sessions Judge has misapprehended the scope of the section. An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box, has clearly committed an offence under section 228. I refuse to interfere and return the papers.

M. D. J. *Application disallowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 233 OF 1923.
May 11, 1923.
Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.
SURESH CHANDRA GHOSE *alias* BARKA—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 172—Calcutta Suburban Police Act (III of 1888), s. 47 (A)—Evidence Act (I of 1872), s. 145—Police diary of case in suburban area, whether privileged—Right of accused to inspect diary.

In the suburban area covered by the Calcutta Suburban Police Act the Investigating Police Officer keeps his diary under section 47 A of that Act and not under s. 172 of the Criminal Procedure Code and no privilege attaches to such diary and the accused is entitled to see the statements of the witnesses recorded by the Investigating Police Officer who have been examined in Court and to use them to contradict the statements made by those witnesses under section 145 of the Evidence Act. [p. 262, col. 2.]

Mr. *Monmotho Nath Mukherji*, with him Babus *Satindra Nath Mukherji* and *Santosh Kumar Bose*, for the Petitioner,—The occurrence in this case took place at Bhawnipur in the suburbs of Calcutta. Sections 162, 172 of the Code of Criminal Procedure do not apply to the Police in the Town of Calcutta. To determine what is the Town of Calcutta see Calcutta Police Act (IV B. C. of 1866), section 3, and Act II B. C. of 1866, section 1, and Notification in *Calcutta Gazette* of the 22nd September 1880 Part 1, page 851. Section 172 of the Criminal Procedure Code not applying, the examination of witnesses by the Investigating Police Officer, a member of the Calcutta Police Force, must be governed by section 47 A of the Calcutta Suburban Police Act (III B. C. of 1888) and no privilege could be claimed in respect of the statements recorded. The High Court should follow in this case the course laid down in *Salt* v. *Emperor* (1).

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.—I concede that sections 162, 172 Criminal Procedure Code do not apply to the case.

Mr. *Mukherji*.—The result is that the diary in the case is a piece of writing to which I am entitled to refer.

[**Ghose, J.**—Section 47 (*A*) of the Suburban Police Act is the section which applies].

Mr. *Orr*.—There is no procedure for the Calcutta Police keeping diaries but for the sake of convenience they do so.

[**Cuming, J.**—But having done that can a Police Officer claim privilege?]

Mr. *Orr*.—The witness is not bound to refresh his memory and unless he so refreshes the accused cannot have access to it, when the witness refuses to refresh his memory how would the diaries come in? The accused did not cause summons to be served on the Police Officer for the production of the document.

Mr. *Mukherji*.—The position is the same. The document is there and I want to see it.

[**Ghose, J.**—You mean to say that he has not taken the necessary steps to have it produced in Court by legal process].

Mr. *Orr*.—Yes; had he done it it could have gone in as his evidence.

[**Ghose, J.**—It is immaterial in a criminal case on whose behalf it is put in].

(1) 2 Ind. Cas. 591 36 C. 560; 10 Cr. L. J. 3[illegible]

JUDGMENT.

Cuming, J.—The facts of this case are as follows. The petitioner, Suresh Chandra Ghose, was on his trial on charges under sections 324 and 326. In the course of the trial an Investigating Police Officer was examined as a witness. The accused, for the purpose, apparently, of contradicting the witnesses for the prosecution, questioned the witness (Police Officer) with regard to certain statement made to him by the witnesses and on his stating he did not recollect asked him to refer to his diary to refresh his memory. The witness refused to do so on the ground that it was a special diary and had been recorded under section 172. Upon this the defence filed a petition asking the Court, in the interests of justice, to send for the diary of Panchanon Mukherji and to look at it and allow the defence Pleader to inspect the said diary on certain points which had been raised by the petitioner. The Magistrate made an order on the petition rejecting it on the ground that the petitioner was not, under the law, entitled to inspect the diary as it was a diary prepared under section 172 of the Criminal Procedure Code. Mr. Mukherji, who appeared for the petitioner, has contended that the diary in question comes neither under section 162 nor under section 172 of the Code of Criminal Procedure as it was not made under that Code. The diary, he contends, and this point has not been disputed by Mr. Orr who appeared for Crown, was prepared under section 47 (A) of the Calcutta Suburban Police Act (III of 1888)—the offence in question having been committed in Bhowanipur which falls within the area covered by the Suburban Police Act and that the diary in question being prepared under section 47(A) of the Suburban Police Act there is no question that a privilege attaches to it, that section 172 has no application and that, therefore, the accused person would be entitled to use those statements, recorded by the Police Officer, of witnesses who have been examined in the case, to contradict those witnesses who had given evidence before the Magistrate under section 145 of the Evidence Act. Mr. Orr contened that if the accused person desired to use the document to contradict the witnesses, he should have proceeded under section 94, Civil Procedure Code, and that he should have asked for a summons on the Police to produce the necessary document. No doubt that would have been a correct procedure but it is quite possible that the accused or his Counsel was misled by the procedure which is usually adopted in the matter of dealing with diaries of Police Officer under the Criminal Procedure Code. I think that the accused is entitled to see the statements of the witnesses recorded by the Investigating Police Officer who have been examined in Court and to use them to contradict the statements made by these witnesses under the provisions of section 145 of the Evidence Act. The findng and sentence must be set aside and the case be sent back to the learned Police Magistrate to pass orders after allowing the accused an opportunity of cross-examining and contradicting the statements of those witnesses by their statements made to the Police. The trial will be resumed from that point and the Magistrate will pass orders after allowing the accused this opportunity.

Pending the disposal of the case the accused will remain on the same bail as he is on now. The judgment in appeal is also necessarily set aside.

Ghose, J.—I agree.

S. C. M. *Order accordingly.*
N. H.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 450 OF 1922.
October 14, 1922.
Present:—Mr. Justice Stuart.
EMPEROR—PROSECUTOR
versus
J. JOHN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 345—Penal Code (Act XLV of 1860), ss. 323, 504—Compounding offence—Document of compromise.

EMPEROR *v.* J. JOHN.

S., a Railway passenger, complained to the Police that he had been assaulted and abused by *J.*, the Guard of the train in which he had travelled. Upon this *J.* was charged with the commission of offences under sections 323 and 504 of the Penal Code. At the trial, he produced a document alleged to have been written by *S.*, which said: "Mr. *J.* has come to me and offered an unconditional apology. I beg to withdraw the case against him." *S.* admitted the agreement but said that it was 'given for office and not for Court' and that he wished the accused to be tried. The Magistrate held that the agreement was not a compromise but a withdrawal which could only be made by 'intimation to the Magistrate,' and finding the accused guilty sentenced him to a fine. On a reference of the case to the High Court:

Held, that the case had been compounded by *S.* and the conviction of *J.* was illegal.

Reference made by the Sessions Judge, Benares.

REFERRING ORDER.—The facts which give rise to this application are as follows:—

A student, named Sushil Chandra Chakraverti, was travelling by train from Benares to Ballia. At Benares City Station he asked the Gaurd of the trian, J. John, the time. The latter abused him and assaulted him with his flag. Sushil Chandra made a complaint to the Police which was recorded. On this complaint a case was instituted under section 120 of the Railways Act. Four days later, on the 17th July, John apologized to Sushil Chandra in the presence of Dr. Rai, Assistant Civil Surgeon. Sushil Chandra wrote out and gave to John a document which runs as follows:—'This is to say that Mr. John, Guard, B. N. W. Railway, came to me and offered an unconditional apology before Dr. L. N. Rai, Assistant Surgeon, Benares. I beg to withdraw the case against him.' This was signed, dated and given to the accused, who produced it in Court on the 19th of July.

The Magistrate took evidence. Sushil Chandra admitted the agreement of the 17th but said that it was 'given for office only and not for Court,' and that he wished the accused to be tried for having abused and beaten him. John at first made a statement minimizing the offence, but when charges were framed under section 120 of the Railways Act and sections 504 and 323 of the Indian Penal Code he pleaded guilty to all. The Magistrate acquitted him of the charge under section 120 of the Railways Act and found him guilty of offences under sections 504 and 323 of the Indian Penal Code and imposed a sentence of fine.

It is pleaded that the offence had been compromised, and that, therefore, a conviction was illegal. The Magistrate appears to think that the agreement was not a compromise. He says it was a withdrawal, which can only be made by "intimation to the Magistrate" but he is led astray because the word "withdraw" happens to be used in the agreement. It is not a withdrawal in the technical sense, as this can only be made by the prosecuting authority. Then he says that there is "no consideration." There is no provision of law which forbids the compounding of offences for an apology. In fact cases are constantly withdrawn when an apology is offered, in particular cases of defamation or abuse. In my opinion the document, Exhibit B, has only one meaning, namely, that Sushil Chandra had accepted an apology and did not wish any further proceeding to be taken. Technically speaking, he had at that time no case to withdraw, but it is an offence, not a case, which is compounded. Once an offence is compounded, no Court can take further action in the matter. In cases of a more serious nature the Court can refuse permission to compound an offence, but not an offence of this nature, which is merely the use of offensive language and a more or less technical assault with a guard's flag. When Sushil Chandra gave the document, Exhibit B, to John he compounded any offence which John had committed against him, and as far as their personal quarrel was concerned the Magistrate had no jurisdiction. He had still to go on with the case under section 120 of the Railways Act, which could not of course be compounded by Sushil Chandra, who was merely a witness. If the Magistrate had found that an offence under the Railways Act had been committed, he could have disregarded Exhibit B and sentenced the accused on his plea of guilty. For some not very clear reason, the Magistrate holds that section 120 does not apply to Railway servants. I do not agree with the Magistrate. There is nothing to limit the scope of section 120 to the general public, any more than section 119, which undoubtedly includes Railway ser-

vants. As the matter stands, however, the accused has been acquitted of the offence charged under section 120 of the Railways Act. Having acquitted the accused of the only offence for which there was a prosecuting authority, the Magistrate could not, in my opinion, legally charge the accused and convict him of offences under section 504 and section 323. The only person aggrieved, once the charge under section 120 of the Railways Act was dropped, was Sushil Chandra. He had, I consider, compounded the offence against him, and the Court was, therefore, without jurisdiction in convicting and sentencing the accused.

I have not seen any ruling of the Allahabad High Court defining the word "compound," but my view of the document filed in the present case appears to be in accordance with the rulings of the Madras and Calcutta High Courts; *vide Mahomed Kanni Rowther* v. *Pattani Inayathulla Sahib* (1) and *Murray* v. *Queen-Empress* (2).

As I consider that the conviction was illegal I refer the matter to the Hon'ble High Court for any orders that may be considered necessary. The Magistrate will be asked to submit any expanlation that he may wish forwarded within ten days.

Munshi *Bhagwati Shankar*, for the Applicant.

Mr. *A. Sanyal*, for the Opposite Party.

JUDGMENT.—Mr. Sanyal, for Sushi Chandra Chakraverti, states that his client does not oppose the application. His client accepted the applicant's apology, and had no intention of proceeding with the case. He did not prosecute. He withdrew. The Police, however, *challaned* under section 120, Railways Act, and he was called as a witness. The applicant was acquitted under that charge.

I accept the learned Sessions Judge's view. The case, in so far as the charges under sections 504 and 323 of the Indian Penal Code were concerned, was clearly compounded.

I set aside the convictions and sentences and direct the fine, if paid, to be refunded.

N. H. *Conviction set aside.*

(1) 31 Ind. Cas. 819; 39 M. 946; 2 L. W. 1200; 18 M. L. T. 602; 16 Cr. L. J. 803.
(2) 21 C. 103; 10 Ind. Dec. (N. S.) 701.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 39 OF 192.
June 15, 1922.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Panton.

EMPEROR—PROSECUTOR
versus
GANESH CHANDRA GOLDAR
—ACCUSED.

Evidence Act (I of 1872), s. 24—"Person in authority"—Collecting and assistant panchayat—*Confession to* panchayat *upon inducement, admissibility of—Subsequent statement to Magistrate —Confession retracted afterwards, effect of.*

Where a collecting *panchayat* and an assistant *panchayat* take a prominent part in holding an inquiry into the circumstances of the commission of a murder, they must be taken to be "persons in authority" within the meaning of section 24 of the Evidence Act, and if the accused person is assured by the assistant *panchayat* that he would be let off if he disclosed everything, and in consequence of that assurance he makes a statement, that statement is inadmissible under the provisions of the section above quoted. A similar statement made subsequently to a Magistrate, and retracted afterwards, would be inadmissible in evidence, unless it could be shown that the impression which was made upon the accused's mind had been entirely removed therefrom. [p. 266, col. 2.]

Criminal Reference made by the Sessions Judge, Faridpur, dated the 22nd April 1922.

Babu *Atulya Charan Bose*, for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Sanderson, C. J.—This is a Reference by the learned Sessions Judge of Faridpur in a case in which Ganesh Chandra Goldar was charged with murder and with conspiracy. There is no doubt that the deceased man, Kali Kumar Mozumdar, was murdered on his way home about the middle of the night after having attended an arbitration, and the case for the prosecution was that the accused person and others attacked him as he was passing a clump of trees and injured him severely. Although he was able to drag himself to the nearest house, which belonged to a man named Kailash Chandra Sarkar, he died very shortly afterwards without being able to give any indication as to the persons who had attacked him.

The case against the accused depends almost entirely upon certain confessions which the accused is alleged to have made. Certain of the neighbours assembled at the house of Kailash in answer to a summons from Kailash, including the two *panchayats*, Amrit Lal Basu, who was the collecting *panchayat*, and Mahadeo Biswas, who was the assistant *panchayat*, and a man called Dinabandhu Sarkar, who described himself as a cultivator, but who seems to be one of the men who took a lead in what took place subsequently and he described himself as a "Thakur". It was after these people had assembled that the accused person, who was known to have been animated by feelings of enmity against Kali Kumar Mozumdar, was summoned to the house. This was in the early morning after the night when the attack upon Kali Kumar Mozumdar was made, and the evidence is that he was brought into the presence of the corpse, that he was trembling and pale and could hardly speak or stand up. When asked to say what he knew about it, after some little time he is supposed to have said that he could not say anything. Eventually he asked to be taken aside and said that then he would state what he knew. Thereupon he was taken to another part of the compound, and in the presence of Banamali Biswas, Manikya Bala Dinabandhu Thakur, Mohendra Nath Biswas, Mahadeo Biswas, Amrita Lal Basu and perhaps one or two others he is alleged to have made a confession that he was concerned in the murder of the deceased man with others whose names he mentioned. This confession is spoken to by the witnesses to whose evidence the learned Judge has referred. The accused was detained by the villagers. The Sub-Inspector arrived on the next day and committed him to custody. On the following day he was taken before a Magistrate who, after warning him and after satisfying himself that the statement he was about to make was to be made voluntarily, recorded his confession, which amounted to a statement that he had been concerned with others in the murder of this deceased man. At the trial that confession was withdrawn, and the accused person said that he had never made the statement which was spoken to by the *panchayat*, the assistant *panchayat* and Dinabandhu and others shortly after the murder.

The Jury were unanimous in their verdict of acquittal and they added that they were not satisfied that the confessions of the accused were true or that they had any evidentiary value. The learned Judge came to the conclusion that there was no doubt that these confessions were proved, and there was a certain amount of corroboration and that he was convinced that the accused was guilty and clearly ought to be convicted.

There is one point in this case which does not seem to have been noticed by the learned Judge and that is that Amrita Lal Basu, when he was giving evidence before the Committing Magistrate, said as follows:—"He", that is to say, the accused, "was then taken in another part of the compound, and in the presence of Banamali Biswas, Manikya Bala, Dinabandhu Thakur, Mohendra Biswas and one or two other persons he stated that he was ready to speak out the truth if he was saved from the consequences. Dinabandhu and others told him that he would be let off if he disclosed everything." That evidence was given in February 1922. This witness while giving evidence at the trial said: "None of us told the accused that they would let him go if he spoke the truth. I did not say before the Committing Magistrate that Dinabandhu and others told him that he would be let off if he disclosed everything." Therefore he contradicted the statement which he had made before the Committing Magistrate. He went so far as to say that he did not say what appeared in his deposition. In my judgment, however, it must be taken for the purpose of this reference that he did say before the Committing Magistrate that which appears in his deposition, which I have read. It is significant that the statement was made in February and his renunciation of it was made in April. I do not know what influence may have been brought to bear upon him in the interval. Dinabandhu was cross-examined on behalf of the accused and he said, "We did not tell the accused that he need not be afraid and that no harm should come to him." That state-

ment was made in April at the trial. For the purpose of my judgment, I propose to assume that that which appears at page 27 of the paper-book in the evidence of Amrita Lal Basu before the Committing Magistrate is true, that the accused did ask whether if he spoke out the truth he would be saved from the consequences, and that he was assured that he would be let off if he disclosed every thing, and that in consequence of that assurance he made the statement.

Now, the question is whether that statement is admissible in evidence; and that depends upon the provisions which are to be found in section 24 of the Evidence Act, which provides : "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." I have no doubt that the inducement was given to the accused. I have no doubt that it was sufficient to give the accused grounds which would appear to him reasonable in supposing that he would gain an advantage in reference to the proceedings; and the only question which causes any difficulty in my mind is whether the inducement was one which proceeded from a "person in authority." It has been suggested by the learned Vakil on behalf of the accused that the collecting *panchayat* and the assistant *panchayat* were both "persons in authority" within the meaning of the section. There is no definiton in the Indian Evidence Act of a "person in authority." The words have been construed in England , and the test which has been applied is this: Had the persons authority to interfere in the matter? As far as the accused is concerned, I have no doubt that he thought that the persons, or some of them, to whom he addressed the question whether he would be saved from the consequences if he spoke out the truth, were "persons in authority," but that would not be sufficient to justify us in holding that they were "persons in authority." In my judgment, having regard to the position of the collecting *panchayat* and the position of the assistant *panchayat* and the part which they were taking in holding the enquiry into the circumstances of the murder, it must be held, on the facts of this case, and I confine myself to the facts of this case, that they must be taken to have been "persons in authority."

Then the next question is : Did the inducement proceed from either of these two men whom I have held to be "persons in authority" on the facts of this case? There is no sufficient evidence in my judgment, to show that the inducement proceeded from the collecting *panchayat*, Amrita Lal Basu, but I think there is just sufficient evidence to justify us in holding that the inducement proceeded from Dinabandhu and others who would, in my opinion, include Mahadeo Biswas—the assistant *panchayat*. Consequently, I am prepared to hold that the inducement did proceed from the assistant *panchayat* and others and that, under the circumstances of this case, the assistant *panchayat* was a "person in authority". Consequently, in my judgment, the confession, which the accused is alleged to have made after he had been assured that he would be saved from the consequences, was not admissible by reason of the provisions of section 24 of the Evidence Act. If that be so, the real ground upon which the learned Judge referred this case to this Court disappears.

It is true there is the confession which the accused made before the Magistrate. That was a retracted confession, and it would not be admissible in evidence unless it were shown that the impression which was made upon the accused's mind by the inducement, which was held out to him in the way which I have described, had been entirely removed from his mind before he made his confession before the Magistrate. That matter has not been considered by the learned Judge, and there is no finding by the learned Judge upon this point. It is difficult for this

Court to come to the conclusion that, if the accused was induced by the promise which was made to him by Dinabandhu and others to make the first confession, that inducement was not, to some extent, the cause of his making the confession before the Magistrate.

For these reasons, in my judgment, this Reference ought not to be accepted, and the accused should be discharged and released from custody.

Panton, J.—I agree.

W. C. A. & N. H. *Reference rejected.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 29 OF 1922.

May 26, 1922.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Panton.

EMPEROR—PROSECUTOR

versus

PROFULLA KUMAR MAZUMDAR—ACCUSED.

Penal Code (Act XLV of 1860), ss. 34, 114, 302—Murder—Several accused—Doubt as to actual murderer—Procedure—Jury trial—Verdict of Jury partly accepted by Magistrate—Reference to High Court—Case, whether re-opened—Criminal Procedure Code (Act V of 1898), s. 307.

Section 34 of the Penal Code does not create an offence, but merely lays down a rule of law. [p. 269, col. 1.]

Emperor v. *Nirmal Kanta Roy*, 24 Ind. Cas. 340; 41 C. 1072; 18 C. W. N. 723; 15 Cr. L. L. J. 460, referred to.

An accused person cannot be convcited under section 114, Penal Code, when no charge has been framed against him under that section. [p. 269, col. 2.]

A person was waylaid by two men one of whom stabbed him in the neck with a dagger. They were pursued and one *P.* was seized while the other escaped. *P.* was identified by the deceased as one of the assailants. In consequence of a statement made by *P. M.* was also arrested. The two men were tried under sections 302 and $\frac{302}{34}$, Penal Code. The Jury unanimously found *M* not guilty and further said that there was a doubt as to whether *P.* struck the fatal blow. The Sessions Judge accepting the verdict as to *M.* acquitted him but as to *P* while accepting that there was a doubt as to whether he struck the fatal below, the Judge did not agree that there was any doubt as to the two acting in furtherance of a common object and holding that *P* was guilty under section $\frac{302}{34}$, Indian Penal Code, referred the case to the High Court:

Held, (1) that the Jury having found that there was a doubt whether *P.* struck the blow and the Judge having accepted the verdict, the High Court could not enter upon the consideration of that question; [p. 268, col. 2.]

(2) that under the circumstance it was doubtful whether section 34 of the Penal Code was applicable, and that, instead, *P.* should be tried again under section 302 read with section 114 of the Code. [p. 269, col. 2.]

Criminal Reference made by the Additional Sessions Judge, Dacca, dated the 16th March 1922.

Babu *Manmatha Nath Mookerjee*, (with him Babu *Narendra Kumar Bose*), for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Sanderson, C. J.—This is a Reference under section 307 of the Criminal Procedure Code by the Second Additional Sessions Judge of Dacca in a case in which two persons, Manindra Kumar Sen and Profulla Kumar Mazumdar were charged with murder. The name of the man who is alleged to have been murdered was Mukunda Lal Goon, and I do not suppose that any one who has read the evidence in this case, has any doubt that Mukunda Lal Goon was, in fact, murdered. The Jury were unanimous in their verdict which runs as follows:—

"We think Manindra not guilty: but we think there is a doubt in the case of Profulla, and that he should get the benefit of the doubt."

The learned Judge accepted the unanimous verdict of the Jury that Manindra was not guilty: he found that this accused was not guilty and he directed him to be acquitted and released from custody.

With regard to Profulla, the learned Judge disagreed with the verdict of the Jury, and referred the case for the decision of the High Court under section 307 of the Criminal Procedure Code. The Letter of Reference sets out the reasons which actuated the learned Judge to refer this matter to the High Court, and he stated the offence of which he considered Profulla to be guilty, *viz.*, under section $\frac{302}{34}$, of the Indian Penal Code.

Mukunda was stabbed in the neck and when assistance came to him, he as

asserted that he had been stabbed by two men, whom he pointed out, and who were at that time running away. The two men were pursued. One of them was caught and taken into custody. This was Profulla whose case is the subject of this Reference. The case of Manindra turned to a large extent upon the question of identification, and the learned Judge, in a charge which is conspicuous for its clearness and fairness, dealt with the evidence relating to this question, and I gather from his charge that the reason why he accepted the verdict of the Jury as to Manindra was that the learned Judge, having regard to the evidence as to the identification of Manindra, could not say that the verdict was unreasonable.

In his Letter of Reference the learned Judge dealt with the verdict of the Jury with regard to Profulla as follows:—"The Jury were unanimous that there is not sufficient evidence to find Profulla Kumar Mazumdar guilty under section 302 without the aid of section 34. This verdict too I accept, though I do not agree with it. But the Jury also found unanimously that there was a doubt that accused Profulla was guilty under section $\frac{302}{34}$. I am clearly of opinion that it is necessary for the ends of justice to refer the case. I have the honour to submit the records for the orders of the High Court under section 307 of the Criminal Procedure Code." A later passage in the Reference is as follows:—"Though, I personally am satisfied that Profulla, accused, struck the fatal blow, I can accept the Jury's verdict that there is a doubt on the matter." I understand the learned Judge to mean that, although he himself was satisfied that Profulla was the man who struck the blow, the Jury evidently had a doubt on the matter, and that he was not able to say that, that doubt was unreasonable; consequently, he could accept the verdict of the Jury as to that part of the case. He then went on to say, "But the Jury also held that there is a reasonable doubt that the two youths acted in furtherance of a common intention. This I consider perverse. To my mind the admitted circumstances are wholly inconsistent with the view that either of the two youths could be ignorant of his companion's intention." He then set out the reasons for that conclusion; and continued," I am of opinion that accused Profulla is clearly guilty under section $\frac{302}{34}$, of the Indian Penal Code, and the verdict of the Jury is perverse due to reluctance to find any one guilty of a capital crime."

The learned Counsel for the Crown contended that, having regard to the form in which the verdict regarding Profulla Kumar Mazumdar was given, and to the fact that the learned Judge recorded his disagreement with it and referred the case under section 307 of the Criminal Procedure Code, it was open to this Court to examine the evidence and to hold that it was Profulla Kumar Mazumdar who stabbed the deceased man. But we must have regard to the Letter of Reference, and it is clear therefrom that the learned Judge accepted the Jury's verdict as to this part of the case. That being so, in my judgment, we ought not to consider that question on this Reference. It is not necessary for me to decide the question whether upon this Reference we have jurisdiction under section 307 of the Code of Criminal Procedure to enter upon the enquiry as to whether the accused Profulla did strike the fatal blow, because, having regard to the terms of the Letter of Reference, I am clearly of opinion that we ought not to do so. The Jury found that there was a doubt whether Profulla struck the blow and the learned Judge has clearly accepted the verdict of the Jury on that part of the case. Consequently, in my judgment, this Court ought not to enter upon the consideration of the question involved in that part of the case.

The only question we have to decide on this Reference is whether the learned Judge was right in his conclusion that the admitted circumstances were wholly inconsistent with the view that either of the two youths could be ignorant of his companion's intention, and we have to consider that part of the case upon the assumption that one of the two men, who were present, struck the fatal blow, and

on the further assumption that it is not proved which of the two men struck the fatal blow. The learned Judge with respect to this part of the case directed the Jury as follows:—"By section 34 of the Indian Penal Code when a criminal act is done by several persons, in furtherance of the common intention of all, each of the persons is liable for that act in the same manner as if it were done by him alone. If, therefore, the man who accompanied the stabber had a common intention with the stabber, *viz.*, the causing the death of Mukunda, then such companion is liable for the stabbing as if he had actually stabbed," and he concluded his charge to the Jury as follows:—"If you are of opinion that the two men had a common object in view, *viz.*, to cause the death of Mukunda, then both are equally guilty. If, however, you are of opinion from the evidence and circumstances that one of the two might reasonably have been ignorant of his companion's intent on then only the man who struck the fatal blow can be found guilty: and if supposing that you are of opinion that one of the two men only is guilty and you are unable to decide which of them struck the fatal blow, then it is your duty to find both not guilty."

Here, in my judgment, arises a difficulty. Assuming that this Court has to approach the case on the basis that it is not proved which of the two men stabbed the deceased man and that one of them only undoubtedly did, I have considerable doubt whether the provisions of section 34 are applicable. It must be remembered that section 34 does not create an offence. The provisions thereof merely lay down a rule of law. The meaning of that section was considered by Mr. Justice Stephen in the case of *Emperor* v. *Nirmal Kanta Roy* (1), and I need not do more than to refer, for my present purpose, to the decision of the learned Judge in that case. The deceased man was killed by one blow with the dagger, which was left sticking in his neck. The defence of the accused, Profulla Kumar Mazumdar, was that the fatal blow was struck by the man who was with him; it seems to me, therefore, that the charge which should have been preferred against the accused as an alternative to the main charge under section 302 of the Indian Penal Code was a charge under section 302 read with section 114 of the Penal Code.

The learned Vakil for the accused has argued that the accused was not charged under section 114 with abetment, and that he cannot now be convicted by this Court under section 114, inasmuch as the charge was not framed against him in the Trial Court. We are of opinion that we must accede to that argument. The result is that we accept the Reference to this extent that we direct that this case be remanded in order that the accused Profulla Kumar may further be placed upon his trial. We desire to make it clear, however, that, inasmuch as the Jury have given a verdict in his favour upon the question whether Profulla struck the fatal blow, and the learned Judge has clearly accepted that verdict, we do not consider it right that he should be put upon his trial in respect of that part of the case again. It may be said that, strictly speaking, inasmuch as the learned Judge has not registered an acquittal in respect of Profulla, he could be tried again on the basis that it was he who stabbed the deceased man. In our judgment, however, it would not be right, for the reasons already stated, to put Profulla Kumar Mazumdar on his trial again in respect of that matter. Consequently, we direct that the further trial be confined to a charge under section 302 combined with section 114 of the Indian Penal Code.

I conclude my judgment by saying that I do not feel that the course which we are directing is altogether a satisfactory one, but no other option is left to us by reason of the way in which the matter has been referred to us by the learned Judge. The learned Judge, apparently, was satisfied that Profulla had struck the fatal blow, and it might have been better if he had referred the whole case against Profulla to this Court, instead of dividing the verdict of the Jury in the manner in which he did, and accepting

(1) 24 Ind. Cas. 340; 41 C. 1072; 18 C. W. N. 723; 15 Cr. L. J. 460.

part and disagreeing with part. At the same time, we desire to express our recognition of the great care with which the learned Judge dealt with the case, which was by no means free from difficulty.

The result, therefore, is that the case must be sent down to the lower Court for re-trial in the limited way which I have indicated.

Panton, J.—I agree.

N. H. *Case remanded.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 449 OF 1922.

September 13, 1922.

Present:—Mr. Justice Stuart.

EMPEROR—PROSECUTOR

versus

KALE—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 369—Review—Revision—Order passed by one Judge, whether can be revised by another Judge.

A High Court Judge has no jurisdiction to revise an order passed by himself or by another Judge of the Court.

Reference made by the Sessions Judge, Meerut, on a motion made by the District Magistrate, Meerut.

FACTS appear from the following order of the Magistrate, Meerut:—

"I refer the case to you of one Kale *alias* Barati, Shaikh, who was convicted by Mr. Neave, Sessions Judge of Meerut, on the 18th of November 1921, under section 395, Indian Penal Code, and was sentenced to 10 year s rigorous imprisonment. I forward in original a lengthy and detailed report from the Superintendent of Police on the subject of this case. I also forward statements, which I have recorded, made by (1) Rafi and (2) Sub-Inspector Triloki Narayan who investigated the above dacoity case. I also forward the identification proceedings held in Agra Jail on the 18th of August 1922, which show that Rafi failed to identify the above Kale or Kale Khan *alias* Shubrati or Barati.

"The point of making this reference is that since the conviction of Kale *alias* Barati on the 18th of November 1921, one Rafi was arrested in Delhi. Rafi made a long detailed confession concerning a large number of dacoities committed in the Meerut District by himself and his associates. Amongst the dacoities mentioned by him was this identical dacoity for which Kale *alias* Barati was convicted. The confession of an admitted bad character may be worth much or little. In this instance the confession of Rafi has been tested in the most thorough, searching and satisfactory manner possible by the deputation of a DeputyMagistrate, Chowdhury Harpal Singh, to go round with the Police Inspector, M. Abdulla Khan, to the scenes of the various dacoities mentioned by the approver, and make notes of all he said and did. As a result of this searching test, the confession of Rafi has been proved true up to the hilt. He has been found wrong in practically nothing. With regard to this particular dacoity, he states definitely that Kale *alias* Barati was not one of the dacoits and he does not know him. He has failed to identify him at the Agra Jail. There is nothing to show collusion between the two, for Kale *alias* Barati was arrested and convicted some months before Rafi was arrested in Delhi in the month of March 1922.

"Supposing that the dacoity case in question was at the present moment under investigation with its identification evidence by three persons, Umrao, Constable, and the two other witnesses, and at the same time with the contradictory evidence of Rafi's statement, hitherto corroborated in all three cases, there can be no doubt that the Police would hesitate very greatly before sending the case up to Court and would almost certainly not *chalan* the case.

"Similarly, if Mr. Neave had had this additional evidence before him at the time he was writing his judgment, it is very probable, if not certain, that he would have modified the remark he made therein, *viz.*, 'I am, therefore, disposed to accept the identification evidence as genuine.'

"It cannot, of course, be said even now that the identification was not genuine, but I think it is certain that most Courts would now, under the circumstances, decide at the very least to give the accused the benefit of the doubt.

"I, therefore, send the record of the case to you with the request that you will, after perusing the record of the case *King Emperor* v. *Kale alias Barati alias Shubrati*, forward it to the Honourable High Court with the recommendation, if you agree with me, that the sentence passed on Kale *alias* Barati should be reversed and that he should be forthwith set at liberty."

JUDMENNT.—This is an application from the Sessions Judge of Meerut requesting me to set aside a conviction passed by his predecessor and affirmed by Piggot, J. in appeal, on the ground that on certain materials that have since come to the knowledge of the District Magistrate there is a doubt of the convict's guilt.

This is not a matter which I can possibly take up in revision. Even if I myself had passed the order dismissing the appeal I could not revise it and I certainly cannot revise the order of another Judge of this Court. There can be no revison in the matter.

I return the record to the District Magistrate in order that he may refer the matter to the Local Government who have power under Chapter XXIX of the Code of Criminal Procedure.

S. D. *Record returned.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1340 OF 1920.

March 29, 1920.

Present:—Sir Shadi Lal, KT., Chief Justice.

GANESHI LAL—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Property found in shed in joint possession of several persons and in charge of servant—Presumption.

Some stolen articles were recovered from a cattle-shed which belonged to three brothers, of whom accused was the youngest, and which was in the immediate charge of a servant. Accused lived at a place three miles distant from the shed and visited it occasionally:

Held, that, under the circumstances, it could not be said that the stolen articles were recovered from the possession of the accused and he could not be convicted of an offence under section 411 of the Penal Code.

Petition under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Hissar, dated the 22nd December 1919, modifying that of the Magistrate, First Class, Gurgaon, dated the 6th October 1919.

Dr. *Gokal Chand Narang* and Pandit *Nanak Chand*, for the Petitioner.

JUDGMENT.—The applicant, Ganeshi Lal, has been convicted of having dishonestly received certain stolen articles namely, two big kettles belonging to one Wazir, six bags of chillies belonging to one Ghasi Ram, and brass vessels belonging to the firm of Manohar Lal-Mohar Singh. The properties belonging to Wazir and Ghasi Ram were found in a *nohra* situate at a village called Chhuriawas, and so also some of the vessels belonging to the aforesaid firm which the rest of the utensils belonging to that firm were found in a shop situate at Rewari.

Now, the petitioner resides at Rewari, and the *nohra* referred to above is situate in a village at a distance of about three miles from that town. This *nohra*, which is used for storing fodder and for trying agricultural cattle, was in charge of a servant called Phusa, who, as the judgment of the Sessions Judge shows, is a disreputable person and has been convicted of having kept some stolen articles in his own house. Ganeshi

GANESHI LAL v. EMPEROR.

Lal himself was not in charge of the *nohra* and visited it about three times in a month. It is true that he is a joint owner thereof, but so are the other members of the joint family, namely, his two elder brothers and possibly also a cousin.

Considering that Ganeshi Lal was not in charge of the *nohra* at the time of the discovery of the property, that Phusa, admittedly a receiver of stolen property, was in physical possession thereof, and that the petitioner is the youngest of the three brothers who are joint owners of the entire property belonging to the joint family, I am not prepared to attribute to him the possession of the goods recovered from the *nohra*. The learned Sessions Judge bases the conviction upon the solitary fact that the shop at Rewari was, as will be shown hereafter, in possession of the petitioner, and that it contained some of the articles stolen from the firm of Manohar Lal-Mohar Singh, while the rest of those articles were found in the *nohra*; and he accordingly concludes that the *nohra*, too, should be deemed to be in possession of the petitioner. Now, in the first place, I find that in the case relating to the recovery of the property belonging to Wazir, which has resulted in Criminal Revision No. 135 of 1920, there is not an iota of evidence to prove the fact relied upon by the learned Sessions Judge, and though there is evidence in support of it upon the record of the case, which has given rise to Criminal Revision No. 134 of 1920. I do not think that the learned Judge was justified in basing the conviction upon evidence which was recorded, not in the case with which he was dealing but in another separate case though tried at the same time. Further, I am not prepared to hold that the above evidence, even if legally admissible, would warrant the conclusion against the petitioner. The circumstance referred to above is in no way incompatible with theory that Phusa was really the receiver of all the stolen articles, and that he delivered some of them to the petitioner for sale, and that the latter kept them in the shop though he was aware of the fact or had reason to believe that they were stolen property. Accordingly, I hold that the petitioner cannot be convicted in respect of the articles recovered from the *nohra*.

As regards the brass and copper vessels found in the shop, the case, however, stands on a different footing. It is clear that the petitioner is not only a joint owner of the shop, but had the key by which the lock of the shop was opened on the day the property was recovered. He must, therefore, be regarded to be in possession of the goods found in the shop. There is ample evidence upon the record that these utensils were stolen from Manohar Lal-Mohar Singh, and the circumstances referred to by the Courts below point to the conclusion that the petitioner had the guilty knowledge as contemplated by section 411, Indian Penal Code.

The result is, that I accept Criminal Revision No. 135 of 1920, and quash the conviction and the sentence. The fine, if realised, shall be refunded. As regards Criminal Revision No. 134 of 1920 I set aside the conviction and the sentence in respect of the charge relating to the goods recovered from the *nohra* but maintaining the conviction in respect of the articles recovered from the shop, I reduce the sentence of imprisonment to six months' rigorous imprisonment. The order of the Sessions Judge inflicting a fine of Rs. 200 in respect of this charge and imprisonment in default of payment of fine must stand.

This application for revision is accepted *pro tanto*, and the order of the Sessions Judge modified accordingly.

Z. K. *Revision partly accepted.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 797 OF 1919.
April 25, 1922.
Present:—Mr. Justice Rankin.

JITMULL-GIRDHARI LAL—PLAINTIFFS
versus
RAM GOPAL BOHITRAM—DEFENDANT.

Contract Act (IX of 1872), s. 230—"Principal contract"—Principal disclosed—Broker, liability of—Special custom—Arbitration.

"Principal contracts" as distinguished from "directcontracts" are a very well known feature in the Calcutta Hessian Market and to them is attached a custom, under which whether or not the names of the principals are disclosed, the brokers are liable to the buyers and the sellers for the due fulfilment of those contracts and are entitled likewise to enforce them as against the said buyers and sellers. Section 230 of the Contract Act does not in any way affect the position of these brokers. [p. 274, col. 2.]

The whole point of a "principal contract" is that the credit of the brokers is the main thing in the mind of the contracting parties. [p. 275, col. 2.]

Where there is a custom entitling the brokers to enforce a "principal contract" against the parties to it, an arbitration clause providing for settlement of disputes "between both parties" to such a contract, should be taken to include the brokers. [p. 276, col. 2.]

Joy Lal & Co. v. *Monmotha Nath Mullik*, 35 Ind. Cas. 3; 20 C. W. N. 365, followed.

Obiter.—Wherever the "principal contract" form is employed, a custom obtains making the brokers and the contracting parties mutualiy liable to one another. [p. 275, col. 1.]

Messrs. *S. M. Bose* and *R. N. Banerjee*, for the Plaintiffs.

Messrs. *H. D. Bose* and *S. Ghose*, for the Defendants.

JUDGMENT.—This is one of two suits which have been brought to set aside awards of the Bengal Chamber of Commerce in respect of a contract made in the Jute Market in Calcutta. The type of contract in question is, I am satisfied by the evidence before me and by the reported cases, a well-known type. It is called by way of distinction a "principal contract." The contract with which I am concerned is dated the 19th August 1918 and it is evidenced by Bought and Sold Notes, passed (as the phrase goes) by the firm of Ramgopal-Bohitram, who are defendants before me. The characteristic of a "principal contract," such as this, is that on the Sold Note, which the broker sends to the seller, the name of the sellers themselves appears but the name of the buyers does not appear; instead of the buyers' name the words "Our Principals" are inserted. In like manner on the Bought Note, which is sent to the buyers, the name of the buyers themselves appears and instead of the name of the sellers the words "Our Principals" are inserted.

The brokers in the present case are between two fires. What happened in the end appears to have been, that delivery was not taken of the goods and the sellers who, in this case were a firm called Maturam Dalmia, proceeded to claim arbitration against the brokers and got an award against the brokers. The brokers stoutly maintained that they were mere brokers but as they were being proceeded against for damages, they too made a claim before the Bengal Chamber of Commerce against the buyers Jitmull-Girdhari Lal. The Chamber has come to the conclusion that the brokers are liable under the contract to the sellers and are entitled to enforce the contract against the buyers. It has made two awards upon that footing of which one is in favour of the brokers and against the buyers. I am now giving judgment in a suit brought on the 14th March 1919, by the buyers to set aside that award.

Apart from any question of custom, the position of the broker in such cases as this, has been laid down by this Court on appeal from the Original Side in the case of *Patiram Banerjee* v. *Kankinarra Company Ltd.* (1). Following certain English cases, this Court there held that there is a difference between a broker and an agent for sale. It was of opinion that section 230 of the Indian Contract Act did not apply and it was further of opinion that the arbitration clause in the contract was no submission on the part of the broker. This then is the position apart from any questions of custom.

Very soon afterwards, however, in the case of *Joy Lal & Co.* v. *Monmotha Nath Mullik* (2) the question of a cus-

(1) 31 Ind. Cas. 607; 19 C. W. N. 623; 42 C. 1050.
(2) 35 Ind. Cas. 3; 20 C. W. N. 365.

tom in this particular market to the effect that in principal contracts the brokers are liable to both parties was raised and decided. Chaudhuri, J., held that a custom had been made out by which brokers are held liable upon such contracts. In the case before him it appears to have been common ground that until a considerable time after the contract was entered into the names of the respective parties were not disclosed to the other. Coming to the conclusion that the brokers were liable for the performance and fulfilment of the contract, Chaudhuri, J., upheld the award which had been made and made in favour of the brokers upon a submission clause exactly like the clause in the contract with which I am now dealing.

In the present case the matter is not wholly covered by the decision in that case. Here the brokers, who are defendants in this suit, expressly admit or assert that at the time the contract was passed the name of the sellers had been disclosed to the buyers and the name of the buyers to the sellers. That is paragraph 2 of the written statement. It would appear that this question as to whether the names of the principals were disclosed at the time of the passing of the contract is one on which brokers and buyers are not in dispute. But it seems that the sellers, Maturam Dalmia & Co., deny that the buyer's name was mentioned to them. I am not concerned with the seller's contention in this suit. For the purposes of this suit I must take it that when the contract was passed the buyers and the sellers knew who the other party was. On that it is contended on behalf of the defendants that the custom in the Calcutta Hessian Market goes as far as this:—That if a contract is entered into in the "principal contract" form then whether or not the names of the parties are disclosed, the brokers are liable to the buyers and to the sellers for the due fulfilment of the contract and are entitled likewise to enforce the contract."

The issues tendered and allowed were, first, as to whether there is a custom of the Market in Calcutta in respect of gunny, hessian and manufactured jute goods that the brokers are liable upon and entitled to enforce all "principal contracts" as against both buyers and sellers even if the principals are disclosed, *i.e.*, that the plaintiffs, the buyers, are liable to the defendants, the brokers, for whatever money they may be liable to pay to the sellers in respect of the transaction? Another issue is:—Is there a custom in the Hessian Market as pleaded in paragraph 8 of the written statement?

I framed a third issue:—Was there an implied or express contract to the effect that the brokers should be entitled to enforce the said contract of the 19th August 1918? The fourth issue is:—Whether the defendant is estopped from contending that he is entitled to enforce the contract by reason of his contentions before the Chamber of Commerce and of his conduct in not purporting at any time to be the sellers.

Now, on the evidence, I have no hesitation in coming to the conclusion that "principal contracts" as distinguished from "direct contracts" are a very well-known feature in this particular Market, and that to them is attached a custom of the Market as to liability for the performance of the contract resting upon the brokers and a right in them to enforce the contract. I have to consider whether the evidence satisfies me that in addition to that finding, which is no more than the custom found by Chaudhuri, J., it is proved to my satisfaction that it makes no difference whether, at the time of the making of the contract, buyers are informed of the name of the sellers and sellers of the name of the buyers. I hold it is proved that it makes no difference according to this custom. It is established by the evidence of two witnesses that "principal contracts" sometime come into existence not because it is desired by the parties that names should not be disclosed, but because on the brokers proposing a "direct contract" one or other of the parties is not satisfied with the credit of the other and prefers to have the liability of the brokers with whose character and circumstances he may have been familiar or who may be of better standing. Instead of passing the contract in the usual way, giving the usual Bought and Sold

Notes, the transaction is concluded in a different form, according to which the name of the other party is kept off the face of the contract. That must be for a special purpose. I have no doubt that it frequently happens that it is not desired to disclose the name of the buying party to the seller. This, however, is not always so. It is a matter of strong probability that contracts in this form are made for the purpose of attaching by custom a special incident to the contract. There is no other special incident that can be suggested excepting the incident of the broker's responsibility. This is a feature which, as the Law Reports show, has occurred in many Markets and for very long periods. I have no hesitation in finding that where the "principal contract" form is employed the custom as found by Chaudhuri, J., obtains even although the names are in fact disclosed.

Certain objections have been taken by Mr. Bose on behalf of the plaintiffs. The first objection is that, if the evidence of the witnesses be examined, it will be found that they say that in contracts in this form the only person liable to the buyers is the broker and the only person liable to the sellers is the broker. I agree that if that were so the evidence would be evidence of a custom that contradicts the contract. But I do not think that the evidence given is directed to mean that at all. The question in the mind of the witnesses was different. It appears that, according to them, the brokers may be let out by the buyers and sellers subsequently to the passing of the contract on their accepting each other, *i.e.*, that the broker's liability under the contract may come to an end by the joint action of his principals on either side. The witnesses have said that the brokers and the sellers are never both liable. This is, no doubt, their experience—nobody makes both principal and agent pay up. I do not think that their minds were directed or could without very special trouble have been directed to the question whether the buyers as being in fact the "principals" mentioned in the Sold Note would not be held liable by the sellers if they were so minded. That is a question of law. But in actual practice on these "principal contracts" that question is very unlikely to arise because from the first the buyers have preferred to look to the brokers. The only person to whom the sellers can really be giving credit—the only person mentioned in the contract—is the broker. Either they do not know the name of the other party, or if they do and still prefer a "principal contract," they prefer the brokers' credit. The evidence of business-men must be taken in the light of the fact that the whole point of a "principal contract" is that the credit of the brokers is in the mind of the contracting parties the main thing.

The next objection is this. There is no doubt that if the principals on both sides accept each other, the broker whose only interest is his commission cannot object and has every interest in favour of being allowed to drop out. There was some difference of opinion among the witnesses as to whether the brokers' liability could be determined by a mere verbal communication. There was a tendency on the part of some of the witnesses to think that, according to the custom of the Market, no important consequence could be allowed to hang on a mere verbal communication. I have no doubt that as a matter of practice and experience any one alleging mere verbal arrangements of this sort would be regarded as a vain babbler in the absence of some writing. I am not satisfied that there is anything more in what is said as to the broker's liability being brought to an end than would be operated by ordinary principles of law apart from custom. But it is not necessary for me to find whether or not the custom of this Market, in addition to the stipulations which the law ordains, requires the release of the broker's liability to be effected in writing. At present I am not satisfied that it does. But the custom is not vague and unreasonable or uncertain because there is room for a possible dispute over this.

I find no valid objection to the custom. The buyers have not come forward to say they did not know of it, and it is very plain that dealers in this Market using such forms of contract must have known. No objection can be taken under section 230 of the Contract Act. That section says:—that "an agent cannot personally

enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them." That is in the absence of any contract to the contrary. The section leaves it open to any one to make that contract if he likes. A further provision of the section is that "such a contract shall be presumed to exist in the following cases. ....." (2) where the agent does not disclose the name of his principal." There is no negative implication in that. If the agent has disclosed the name of his principal then there is no presumption that the agent can enforce the contract but it is open to any party by the very terms of the section to prove his contract without the aid of the presumption. In the present case such a contract is proved by the evidence of custom without the aid of that presumption.

The remaining question regarding the arbitration clause is covered by the decision of Chaudhuri, J. The submission clause in this case is in a somewhat ill-advised and antique form, *viz.*:—"any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the Rules of the Bengal Chamber of Commerce applicable for the time being for decision and such decision shall be accepted as final and binding on both parties to this contract. The award may, at the instance of either party and without any notice to the other of them, be made a Rule of the High Court of Judicature at Fort William in Bengal." The terms of the clause are framed on the supposition that there are two parties and only two parties. It is a matter for consideration whether, assuming that by the contract the brokers in addition to their principals are liable and entitled to enforce the contract, the submission clause is so framed as to bring within its scope disputes between the brokers and a party. Cases have been cited in which the opinion has been expressed that in this class of cases the liability of the broker is, strictly speaking, attached by custom to his contract of employment. There is a good deal to be said for and there is authority in favour of that view. The rule in England I understand to be that the brokers in such cases could under the old practice be sued on an ordinary count for the price (*e.g.*,) of the goods sold, and whether that is quite the best logic of the matter it is a sensible and convenient course. So, too, there is everything in favour of the view that a submission clause of this sort is wide enough to cover the brokers. In this case the buyers are interested to say that the brokers should not have gone to arbitration. But put it the other way. That submission clause is a valuable clause in a contract of this class. Buyers might well rely upon it when entering into the contract. If the brokers are entitled to enforce the contract and if the brokers brought a suit arguing that the submission clause did not bind them; then the buyers would have a real grievance. It would give to the brokers a larger right than the sellers would have. It must be remembered that section 230 of the Contract Act contemplates the case of an agent, who is allowed personally to enforce a contract entered into by him on behalf of his principal, *i.e.*, of a person who is allowed to enforce a contract entered into by some body else. In this case the contract, on the face of it, is between the buyers and the unnamed sellers and the language is adopted accordingly, but nevertheless there is a good custom entitling the brokers to enforce the contract and the arbitration clause should be so taken as to include the brokers. There is the decision of Chaudhuri, J., to that effect. That case has been often cited and its authority has never been impaired, though it has not been confirmed on appeal. I should be loath to disturb a settled practice of considerable standing, by throwing doubt on the right of the brokers to have recourse to arbitration. If the decision of Chaudhuri, J., is to be interfered with, it should be by a higher Court.

A question of estoppel has been raised, based on the proceedings before the Tribunal of Arbitration and on the correspondence. It is true that the brokers, like persons between two fires, ran hither and thither alleging sometimes one thing and sometimes another. But I am satisfied that there is nothing to base estoppel upon. The plaintiff

have given no evidence. I do not understand exactly how it can be here contended that owing to what took place before the arbitrators or owing to the letters that passed, the plaintiffs in this case have acted on the brokers' representation in such a way as to cause any loss or harm. There is no evidence on behalf of the buyers, and the correspondence makes out no ground of estoppel.

I propose, therefore, to dismiss this suit with costs on scale No. 2 and uphold the award. The defendants will not be entitled to the costs of the 29th March. Plaintiffs will get the costs, if any, occasioned by reason of the suit having been heard *ex parte* at one time, and then restored.

N. H. *Suit dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1399 OF 1921.

November 7, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Gokul Prasad.

RAM NARAIN—DEFENDANT—APPELLANT

versus

SOMI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Mortgage—Prior and subsequent simple mortgages—Execution sale under second mortgage—Subsequent sale under prior mortgage—Suit for possession by prior mortgagee, maintainability of.

A second mortgagee entered into possession of the mortgaged property in execution of a decree for sale obtained in a suit on his mortgage to which a prior simple mortgagee was not made a party. The prior mortgagee subsequently purchased the same property in execution of a decree for sale obtained in a suit on his mortgage to which the second mortgagee was not made a party. The prior mortgagee then brought a suit against the second mortgagee for recovery of possession of the property, and, in the alternative, for a conditional decree that the defendant should redeem his mortgage and in case of his failure to do so, he, the plaintiff, should be put in possession of the property in dispute:

Held, that the suit was misconceived and should be dismissed as the plaintiff had no right to the possession of the property under his simple mortgage on which he based his title.

Madan Lal v. *Bhagwan Das*, 21 A. 235; A. W. N. (1899) 41; 9 Ind. Dec. (N. S.) 859, followed.

Second appeal from a decree of the District Judge, Saharanpur, dated the 10th August 1921, reversing that of the Subordinate Judge, Saharanpur, dated the 27th January 1920.

Dr. *Surendra Nath Sen* and Pandit *Narmadeshwar Prasad Upadhiya*, for the Appellant.

Babu *Piari Lal Banerji*, for the Respondents.

JUDGMENT.—The only question in this appeal is, whether the plaintiff-respondent, who is the purchaser of the property in dispute under a prior mortgage-decree, to which the defendants-appellants were no parties, has a right to eject the defendants, the purchasers in execution of a decree, based on a puisne mortgage, to which the prior mortgagees were no parties. It appears that in the year 1910 the second mortgagees obtained a decree on foot of their mortgage for sale of the property and purchased the property on the 20th of April 1912, in execution of such decree. To this suit the prior mortgagee was not made a party. In the year 1916 the prior mortgagee got a decree for sale on foot of her mortgage, but to this suit neither the puisne mortgagee nor the purchaser in execution of his decree were made parties. The prior mortgagee got a decree and put the property to sale and, in execution thereof, purchased it herself. She has obtained possession over three-fourths of the property and has not got possession over one-fourth, which is in the possession of the defendants.

She brought the present suit for recovery of possession of the remaining one-fourth also, and, in the alternative, for a conditional decree that the defendant should redeem her mortgage, and in case of his failure to do so, she should be put in possession of the property in dispute.

The First Court partially decreed the suit. The learned District Judge in appeal has passed a decree in favour of the plaintiff to the effect that the defendants should redeem her by paying the sum of Rs. 1,640-13-0 and in case of his failure to do so within six months, possession of the property should be delivered to the plaintiff.

The defendant comes here in second appeal and the contention raised on

his behalf by his learned Vakil is that such a suit is not maintainable. This contention is fully covered by an authority of this Court in *Madan Lal* v. *Bhagwan Das* (1). That case is on all fours with the present case and this appeal must, therefore, be allowed on the ground that the plaintiff has no right to possession of the property under the mortgage on which she bases her title. It was a simple mortgage and not possessory mortgage. The suit was misconceived and should have been dismissed. We, therefore, allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all Courts.

N. H. *Appeal allowed.*

(1) 21 A. 235; A. W. N. (1899) 41; 9 Ind. Dec. (N. S.) 859.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 140 OF 1920.
June 12, 1922.
Present:—Mr. Justice Pratt.
ARLANDU—PLAINTIFF—APPELLANT
versus
C. T. A. A. L. SITHAMBARAM—
DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 11—*Fraud—Decree, setting aside of*—Res judicata.

Plaintiff sued to set aside a decree passed against him on the ground that it had been obtained by fraud. The alleged fraud consisted in a suppression by defendant of a part of the accounts whereby it was alleged the Court was deceived. The existence of any such accounts was denied by the defendant. It was found that in the previous suit, the truth or falsity of the accounts was adjudicated upon:

Held, that the alleged fraud had in fact been already adjudicated upon and the suit was not maintainable.

Kadirvelu Nainar v. *Kuppuswami Naicker*, 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; (1918) M. W. N. 514; 8 L. W. 103 (F. B.), followed.

Second appeal from a decree of the Divisional Court, Tennaserim, in Civil Appeal No. 43 of 1919.

Mr. *S. S. Halkar*, for the Appellant.

Mr. *N. N. Sen*, for the Respondent.

JUDGMENT.—Plaintiff sued to set aside the decree in Suit No. 17 of 1914 in the Sub-Divisional Court, Thaton, on the ground that it had been obtained by fraud.

The alleged fraud consisted in a suppression by defendant of a part of his account whereby the plaintiff was prevented from placing his case properly before the Court and the Court was deceived and unable to decide the case on a proper basis.

The Trial Court dismissed the suit, holding that there was no fraud alleged extraneous to the facts in the suit and that the suit was merely an attempt to reopen a suit on which there had already been a final adjudication; in other words, that the subject-matter of the suit was *res judicata*.

On appeal the Divisional Court in an able and instructive judgment pointed out that in the previous suit upon items of accounts on which each side produced evidence and the Court came to a decision, plaintiff was given every opportunity to produce accounts. The truth or falsity of the accounts was adjudicated upon and plaintiff cannot now be allowed to say he relies upon certain accounts, the existence of which is not admitted by defendant and that, therefore, the previous decree was not obtained by fraud.

Following the Madras Full Bench case of *Kadirvelu Nainar* v. *Kuppuswami Naicker* (1) the learned Divisional Judge held that in so far as plaintiff relied on perjured evidence the suit was not maintainable.

I entirely agree with the view taken by the Divisional Court.

The suit is clearly an attempt to reopen the previous case on the ground that the decree had been obtained by the suppression of evidence. The alleged fraud has, in effect, been already adjudicated upon.

I am of opinion the suit was not, on the allegations in the plaint, maintainable. The appeal is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; (1918) M. W. N. 514; 8 L. W. 103 (F. B.).

RAJANI BANDHU CHATTERJEE *v.* KALI PRASANNA CHATTERJEE.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 41 OF 1922.

December 22, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

RAJANI BANDHU CHATTERJEE AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

KALI PRASANNA CHATTERJEE—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), s. 14, Sch. I, Art. 182—Execution of decree—Direction that execution should take place in certain manner—Appeal, whether step-in-aid of execution—Exclusion of time spent in prosecuting previous application—Subsequent application, whether in continuation of previous application.

A decree-holder made an application for execution on which the District Judge directed that execution should proceed on the basis of a certain report. The decree-holder took no further steps in the matter and some time after made a fresh application for execution on which the Executing Court made the same order which the District Judge had made on the previous application. The decree-holder appealed to the District Judge, but his appeal was dismissed. A second appeal to the High Court was also dismissed. A third application for execution was made more than three years after the dismissal of the appeal by the District Judge but within three years from the date of the dismissal of the second appeal by the High Court :

Held, (1) that the second appeal to the High Court could not be treated as a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, inasmuch as the High Court was not in this case the "proper Court" within the meaning of clause (2) of Art. 182; [p. 280, col. 1.]

(2) that the decree-holder was not entitled under section 14 of the Limitation Act to the exclusion of the time spent in prosecuting the second application for execution inasmuch as it was not a proceeding which the Court had been unable to entertain from defect of jurisdiction or other cause of a like nature; [p. 280, col. 1.]

(3) that the previous application having proved infructuous owing to the conduct of the decree-holder himself, the subsequent application could not be treated as one made in continuation of the previous application. [p. 280, col. 2.]

Qamar-ud-din Ahmad v. *Jawahir Lal*, 27 A. 334; 2 A. L. J. 397; 1. C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.) and *Hulasi* v. *Maiku*, 5 A. 236; A. W. N. (1883) 5; 3 Ind. Dec. (N. S.) 214, distinguished.

Kristo Coomar Nag v. *Mahabat Khan*, 5 C. 595; 2 Ind. Dec. (N. S.) 986 and *Baroda Kanta Basu* v. *Chandra Kanta Ghose*, 6 C. W. N. 706; 29 C. 682, relied on.

Appeal against an order of the Second Additional District Judge, 24-Perganahs dated the 25th August 1921, affirming an order of the Munsif, First Court at Baruipore, dated the 9th February 1921.

Babu *Hira Lal Chakrwarty*, for the Appellants.

Babu *Pyari Mohan Chatterjee*, for the Respondent.

JUDGMENT.—This is an appeal by the judgment-debtors against an order in execution of a decree. The decree was made by the Trial Court on the 3rd July 1906 and was successively confirmed by the lower Appellate Court and by this Court on the 10th September 1907 and 9th March 1910. In 1912 the decree-holder made the first application for execution of the decree which directed the judgment-debtors to carry out certain works and to restore the disputed property to its original condition. The application was dismissed by the Trial Court on the 17th January 1913. On appeal the District Judge directed that a Commissioner should be appointed with a view to carry out the terms of the decree, and a Commissioner was accordingly appointed. He submitted a report to which exceptions were taken. These were overruled on the 9th July 1913 by the District Judge who accepted the report of the Commissioner and directed that the execution should take place on its basis. The decree-holder, however, did not proceed with the execution and the proceedings were apparently discontinued. On the 16th September 1914 the decree-holder made the second application for execution. This application was based on the assumption that the decree-holder was not bound by the determination of the District Judge on the previous application that execution should proceed on the basis of the report of the Commissioner. The result was that the judgment-debtors objected. On the 15th March 1916 the Trial Court directed that execution should take place on the basis of the order of the 9th July 1913. The decree-holder was dissatisfied and appealed. The appeal, as might have been expected, was dismissed on the 3rd July 1916. A

second appeal was preferred to this Court with the result that it was dismissed on the 9th February 1917. The obvious course for the decree-holder would have been, after the dismissal of the appeal by this Court, to proceed with the execution as was directed by the Court of first instance. No steps, however, were taken till the 23rd January 1920 when he presented the third application for execution. He was forthwith met with the plea of limitation on the part of the judgment-debtors. The Courts below have held that the aplication was not barred by limitation. We are of opinion that the view taken by the lower Courts cannot be supported.

In the first place, it is plain that Art. 182 of the Schedule to the Limitation Act is of no assistance to the decree-holder. He is not able to show that within three years of the date of the present application that is, subsequent to the 23rd January 1917, he applied to the proper Court to take a step-in-aid of execution. The fact that he brought an appeal to this Court on the 9th February 1917 against the decision of the District Judge could not clearly be treated as an application to the proper Court to take a step-in-aid of execution. The expression "proper Court" as defined in Explanation II to Art. 182 does not apply to a case such as this.

In the next place, it is clear that section 14 of the Limitation Act is of no avail. Sub-section (2) to section 14 which has been invoked on behalf of the respondents, provides that "in computing the period of limitation prescribed for any application the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." It cannot seriously be maintained that the previous application for execution could not be entertained by the Court from defect of jurisdiction or other cause of a like nature. The Court dealt with it on the merits and came to the conclusion that the judgment-debtors and the decree holder were alike bound by the order made in the course of the first execution proceedings. In these circumstances, it is difficult to appreciate how the decree-holder can possibly escape the bar of limitation.

It has been finally suggested, however, that the present application for execution may be treated, not as a fresh application but as one in continuation of the second application for execution. This view is clearly unsupportable on the authorities. It was pointed out by the Judicial Committee in the case of *Qamar-ud-din Ahmad* v. *Jawahir Lal* (1) that an application for execution may in certain contingencies be treated as one to revive and carry through a pending execution; thus, the second application might be treated as one not to initiate a new proceeding, but to revive the previous proceeding when the latter was arrested by reason of circumstances over which the decree-holder had no control. This principle clearly does not apply to the present case. Here the difficulty has been created entirely by the decree-holder himself, as he ignored the order made by the Execution Court in the first proceeding. In these circumstances, the principle has clearly no application: see *Kristo Coomar Nag* v. *Mahabat Khan* (2) and *Baroda Kanta Basu* v. *Chandra Kanta Ghose* (3). The decision of the Allahabad High Court in *Hulasi* v. *Maiku* (4) was prononnced under very special circumstances. If the principle recognised in that case could be applied, the result would be that the order made by the District Judge on the 9th July 1913 would have to be treated as an order capable by itself of execution, even that conclusion, however, would be of no assistance to the respondent, for he never sought to execute the decree till the 23rd January 1920 after the lapse of the period of limitation.

The result is that the order of the District Judge is set aside and the application for execution of the decree dismissed

(1) 27 A 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).
(2) 5 C 595; 2 Ind. Dec. (N. S.) 986.
(3) 6 C. W. N. 706; 29 C. 682.
(4) 5 A. 236; A. W. N. (1883) 5; 3 Ind. Dec. (N. S.) 214.

with costs in all Courts. The hearing fee is assessed at one gold *mohur* in this Court.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NOS. 257 AND 258 OF 1922.

February 16, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TANJORE—APPELLANT

versus

NAGARAJA AIYAR AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 16—Madras Revenue Recovery Act (II of 1864), s. 59—Suit for recovery of water-cess paid under protest—Limitation.

A suit for recovery of money alleged to have been illegally collected by Government as water-cess and paid under protest is governed by Art. 16 of Sch. I to the Limitation Act. [p. 282, col. 1.]

Ravula Vangala Reddi v. *Secretary of State*, 15 Ind. Cas. 328, *Ravala Nagamma* v. *Secretary of State*, 18 Ind. Cas. 699; (1913) M. W. N. 75 and *Secretary of State for India* v. *Zemindarini of Vegayammapeta Estate*, 59 Ind. Cas. 98; 12 L. W. 334, referred to.

Section 59 of the Madras Revenue Recovery Act is confined particularly to the cases of persons aggrieved by illegal or irregular proceedings taken for the collection of revenue under the provisions of the said Act. [p. 282, cols. 1 & 2.]

Appeals against the orders of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suits Nos. 1 and 11 of 1922, respectively, preferred against the decrees of the Court of the District Munsif, Valangaman, in Original Suits Nos. 226 and 220 of 1920.

Mr. *C. Madhavan Nair* (Government Pleader), for the Appellants.

Messrs. *C. S. Venkatachariar* and *R. Subramania Aiyer*, for the Respondents.

JUDGMENT.—The question for our determination is whether the period of limitation applicable to these suits which have been brought to recover amounts alleged to have been illegally collected by Government from the plaintiffs as water-cess on their lands, is one year from the date of payment under Art. 16 of the First Schedule of the Limitation Act, or six months from the date of the distraint of the plaintiff's paddy crop under section 59 of the Madras Revenue Recovery Act (II of 1864).

It is conceded on either side that, if the former period applies, the suits are in time, after giving the plaintiffs credit for the time required under section 80, Civil Procedure Code, to give notice of suit to the Government as allowed by section 15 (2) of the Limitation Act, but that, if the latter period of limitation is applicable, the suits are out of time. Under section 2 of the Madras Irrigation Cess Act (VII of 1865) arrears of water-cess are made recoverable in the same manner as arrears of land revenue. Section 59 of Act II of 1864 gives a right to persons deeming themselves aggrieved by any proceedings under that Act to apply to the Civil Courts for redress within six months of the cause of action arising.

In the plaint it is stated that the imposition and collection of penal water rate was unauthorised and illegal, and the relief claimed is the refund of the amounts thus illegally collected and paid under protest together with interest, the cause of action being given as the communication on June 24th, 1920, (five days before the institution of the suit) of the Collector's order of May 28th, 1920, in the village of Visalur where the amount was collected on April 30th, 1919. The nature of the suit thus falls exactly under the description in column 1 of the First Schedule of the Limitation Act, Art. 16 (suit "against Government to recover money paid under protest in satisfaction of a claim made by the Revenue Authorities on account of arrears of revenue or on account of demands recoverable as such arrears.") The only doubt is whether the fact that the plaintiff's crops were distrained in order to enforce payment of the demand (alleged to be unjustifiable) operates to introduce section 58 of Act II of 1864 by reason of section 29 (*b*) of the Limitation Act and so to shorten the period of limitation. The fact that the

plaintiffs do not even mention in their plaints the attachment of their crops clearly shows that they do not deem themselves aggrieved by that. It is not their case that the collection of water-cess from them was *intra vires* but irregular. They maintain that it was altogether *ultra vires* as they were not at all liable to pay the cess because they have an immemorial vested right to the water.

The distinction between proceedings for the collection of revenue which are taken professedly under the Act but amount to an illegal or irregular exercise of jurisdiction by which a party is aggrieved, and proceedings which are wholly without jurisdiction owing to the party against whom they are taken not being a defaulter was first made by a Full Bench in *Venkata* v. *Chengadu* (1) and the distinction has been since observed in *Iswara Patter* v. *Karuppan* (2), *Raman Naidu* v. *Bhassoori Sanyasi* (3), *Vadlur Chinna Nagi Reddy* v. *Devineni Venkatramaniah* (4) and *Bhamireddi Venkan Doragaru* v. *Secretary of State* (5).

In *Secretary of State* v. *Simhadri Jaghapathiraju* (6) quoted by the Subordinate Judge and in *Suryaprakasa Row* v. *Secretary of State for India* (7) this particular point was not raised and discussed.

In *Ravula Vengala Reddi* v. *Secretary of State* (8), *Ravala Nagamma* v. *Secretary of State* (9) and *Secretary of State for India* v. *Zemindarani of Vegayammapeta Estate* (10), where the suits were for the recovery of cess alleged to have been illegally levied, the one year's period of limitation under Art. 16 was held to govern them, section 59 of Act II of 1864 being confined in operation to the particular class of cases to which that section is directly applicable, namely, to the cases of persons being aggrieved by illegal or irregular proceedings taken for the collection of revenue under the provisions of Act II of 1864 according to the principles laid down in *Srinivasa Iyangar* v. *Secretary of State* (11). The learned Subordinate Judge was, therefore, right in his view that Art. 16 of the Limitation Act, which gives one year from the date of payment, governs these suits, and the civil miscellaneous appeals are dismissed with costs.

V. N. V. *Appeals dismissed.*

M. D. J. & N. H.

(1) 12 M. 168; 4 Ind. Dec. (N. S.) 467 (F. B.).
(2) 3 M. L. J. 255.
(3) 26 M. 638.
(4) 45 Ind. Cas. 653; 7 L. W. 468; 23 M. L. T. 231; (1918) M. W. N. 224.
(5) 48 Ind. Cas. 844.
(6) 26 Ind. Cas. 692; 2 L. W. 31; 17 M. L. T. 29; 28 M. L. J. 51; 39 M. 67.
(7) 13 M. L. J. 380.
(8) 15 Ind. Cas. 328.
(9) 18 Ind. Cas. 699; (1913) M. W. N. 75.
(10) 59 Ind. Cas. 98; 12 L. W. 334.
(11) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1732 OF 1921.

January 22, 1922.

Present:—Mr. Justice LeRossignol.

BHURU AND OTHERS—DEFENDANTS—APPELLANTS

versus

DATU RAM—PLAINTIFF—RESPONDENT.

Adverse possession—Intermittent user—Pond—Possession, whether follows title.

User of an intermittent nature accompanied by no assertion of right is a very common phenomenon in this country and arouses no opposition. Such user does not amount to adverse possession. [p. 283, col. 1.]

In the case of an ordinary natural depression which for some months each year after the rains holds rain water and is not susceptible of actual physical possession by the legal owner, possession must be deemed to follow title, unless the usurper can prove long and continuous exclusion of the rightful owner. [p. 283. col. 1.]

Second appeal from a decree of the District Judge, Karnal, dated the 26th April 1921, reversing that of the Munsif, First Class, Kaithal, District Karnal, dated the 15th April 1920.

Mr. *Prem Lal*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—On the findings of the Court below there is no valid ground for second appeal.

The pool in question is just an ordinary natural depression which for some months each year after the rains holds rain-water and I have no doubt that the *Dhobis* sometimes use it.

But such user of an intermittent nature accompanied by no assertion of right is a very common phenomenon in this country and arouses no opposition. The pond is not susceptible of actual pyhsical possession by the legal owner and possession follows title, unless the usurper can prove long and continuous exclusion of the rightful owner.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 567 OF 1920.

May 2, 1922.

Present:—Mr. Justice Richardson and Mr. Justice Suhrawardy.

NABA KISHORE TILAKDAS—PLAINTIFF—APPELLANT

versus

PARO BEWA—DEFENDANT—RESPONDENT.

Ejectment suit—Jus tertii—Res judicata.

A mortgagor brought a suit for possession against his mortgagee on the expiry of the term of the mortgage, which was dismissed on the ground that he had come to some settlement with the mortgagee entitling the latter to retain possession even after the termination of the mortgage. Subsequently, the mortgagee was dispossessed by a stranger. In a suit by the mortgagee against him for possession, the stranger set up the title of the mortgagor as *jus tertii*:

Held, that the defendant must take the title of the mortgagor as it stood, and as the plaintiff claimed a title from the mortgagor, which in view of the previous litigation the mortgagor could not be heard to contest, that title was, under the circumstances, a good title against the defendant who was liable to be evicted. [p. 285, col. 1.]

Shama Charan Roy v. *Surja Kanta Acharya*, 6 Ind. Cas. 806; 15 C. W. N. 163 and *Adhar Chandra Pal* v. *Dibakar Bhuyan*, 25 Ind. Cas. 76; 41 C. 394, referred to.

Appeal against a decree of the Subordinate Judge, Mymensingh, dated the 29th November 1919, reversing that of the Munsif of that place, dated the 1st February 1919.

Babu *Jatindra Mohan Chowdhury* for Babu *Profulla Chandra Nag*, for the Appellant.

Babu *Annada Charan Karkoon*, for the Respondent.

JUDGMENT.

Richardson, J.—The disputed land originally formed part of the occupancy holding of Fatiram Tilakdas. After his death his widow, Pratima, mortgaged the holding to the plaintiff. Under the terms of the mortgage instrument the plaintiff was to have possession as usufructuary mortgagee, or *ijaradar* for a period of nine years ending with Baisakh 1319 B. S. Tilakdas left four daughters, but it appears that since the death of his widow, two of the daughters Paro and Bhuban have been treated as his heirs and the case has been argued before us on both sides on the assumption that they were his sole heirs.

On the expiry of the term of his mortgage the plaintiff did not surrender possession of the holding or the agricultural land therein comprised. In 1912, therefore, Paro and Bhuban sued him in ejectment claiming title as their father's heirs. In that suit Paro succeeded in appeal to the extent of a moiety of the holding while Bhuban's claim to the other moiety was dismissed. It is not very easy to follow the reasoning of the Appellate Court. The plaintiff's case (he was then defendant) was that on the death of Pratima, the landlord took *khas* possession of the holding and settled it with him with the knowledge and consent of the two ladies. The Trial Court had accepted that plea and had dismissed the suit in its entirety. In the appeal the learned Subordinate Judge found in his own words that "the evidence is not satisfactory to show that the *malik* dispossessed the plaintiffs (*i.e.*, the two ladies) and took the lands into his *khas* possession." Nevertheless, he seems to have dismissed Bhuban's claim on the ground that she

NABA KISHORE *v.* PARO BEWA.

and the plaintiff (then defendant) had come to some am cable settlement with the landlord which did not bind Paro. It is not easy to conceive of an amicable arrangement between the plaintiff ar.d Bhuban which would deprive the latter of the whole of her share. Moreover, the claim of a person who has obtained possession of land as mortgagee to retain possession after the termination of the mortgage should always be jealously scrutinized. Nevertheless, it must be accepted that the previous suit makes the quest on of the title to Bhuban's original mo ety *res judicata* in the plaintiff's favour as between him and Bhuban.

In the present suit, the plaintiff seeks to recover possession of that moiety. The defendants are No. 1 Paro, No. 2 Paro's son, No. 3 Bhuban's husband and No. 4 Bhuban's son-in-law. Defendant No. 4 is a mortgagee from Paro of her moiety and apparently he makes no claim to the disputed moiety. Defendants Nos. 1, 2 and 3 have no title of their own to the latter and must be treated in respect thereof as mere trespassers.

In the state of things so disclosed, the learned Munsif in the Trial Court found in the plaintiff's favour and decreed his suit. In the lower Appellate Court the learned Subordinate Judge took a different view and made a decree of dismissal from which the plaintiff has appealed.

It is contended on the plaintiff's behalf that the learned Subordinate Judge has erred in law in so far as he holds that the findings of the Appellate Court in the previous suit are not admissible in evidence against the defendants or the contesting defendants "who were not parties to that suit and who do not claim to be in possession of the disputed eight-annas share of the land either through Paro or through Bhuban."

On that footing the view of the case taken by the learned Subordinate Judge is briefly this, that on the merits (apart from the previous litigation) the plaintiff has not succeeded in establishing his title to the moiety and that, inasmuch as he was dispossessed in 1323 (1916) and this suit was instituted more than six months later in August 1918, he cannot succeed on the mere ground of prior possession.

If his premises were granted, the conclusion of the learned Subordinate Judge could not in such a case as the present be disputed in this High Court. There is really no controversy as to the principle that prior peaceable possession furnishes a good title as against a mere trespasser. The result arrived at by this High Court in *Nisa Chand Gaita* v. *Kanchiram* (1) is based on the construction and effect of section 9 of the Specific Relief Act. Other High Courts may have taken a different view of the legal operation of that section but, at any rate, there is this to be said that if a true title may be defeated by twelve years' adverse possession by a trespasser, there is nothing shocking to the sense of justice in a legislative rule that the period of limitation for a suit by mere trespasser or squatter to recover possession should be six months from the date of his dispossession. If that be the true effect of section 9 of the Specific Relief Act, the learned Subordinate Judge is so far right, nor do the observations of Sir Lawrence Jenkins, C. J., in *Shama Charan Roy* v. *Surja Kanta Acharya* (2) and *Adhar Chandra Pal* v. *Dibakar Bhuyan* (3) amount to a dissent from the rule laid down in *Nisa Chand's case* (1). The *ratio decidendi* in both those cases was that the rule had no application to the facts. It was held in both cases that the plaintiff had not only been in possession but had a title to possession.

So, in the present case, though I should have no compunction in following the Subordinate Judge if I could see my way to so doing, in my opinion, he had applied the rule in *Nisa Chad's case* (1) in circumstances to which it has no proper application.

Here it is common ground that the true title was originally in Bhuban. The contesting defendants though they do not in terms claim a title through or under Bhuban are in effect setting up Bhuban's

(1) 26 C. 579; 3 C. W. N. 568; 13 Ind. Dec. (N. S.) 972.
(2) 6 Ind. Cas. 806; 15 C. W. N. 163.
(3) 25 Ind. Cas. 76; 41 C. 394.

title as a *jus tertii*. That being so, they must take Bhuban's title as it stands. The plaintiff claims a title from Bhuban which in view of the previous litigation Bhuban could not be heard to contest and that title, therefore, is in the circumstances a good title as against the contesting defendants.

In my opinion the appeal should be allowed. The judgment and decree of the Subordinate Judge should be set aside and the judgment and decree of the Munsif should be restored. The plaintiff is entitled to recover his costs of this appeal and his costs in the lower Appellate Court from the defendants Nos. 1, 2 and 3 as the contesting defendants.

Suhrawardy, J.—I concur in the order my learned brother proposes to pass in this case. I only wish to add that if the question whether a plaintiff can succeed in a suit for recovery of property as against a person having no title to it, only on the strength of his (plaintiff's) previous possession had not been settled in this Court by a series of decisions followed in a large number of cases, I would have deemed the proposition worth reconsideration in view of the reasonings of other High Courts which have taken a different view and some pronouncements of the Judicial Committee.

N. H.

Appeal allowed.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 156 OF 1922.

January 25, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BAPUJIRAO RAOJIRAO GHADGE —DEFENDANT NO. 22—APPELLANT

versus

RAGHUNATHRAO JOTYAJIRAO GHATGE AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11 —Mortgagee's suit for possession against stranger —Title at issue—Subsequent suit for redemption by mortgagor—Stranger, whether can set up title— **Res judicata**

A mortgagee's suit for possession was resisted by a stranger on the ground that the land belonged to him and that the mortgagor had no title to it. This suit was decreed. Subsequently, a son of the mortgagor brought the present suit for redemption. The contesting defendant in the earlier suit was also a party and raised the same plea of title :

Held, that in the previous suit the mortgage sued as representing the estate and in the present suit, the plaintiff was really claiming through the mortgagee and the defendant was debarred from raising the same plea of title which had been adjudicated upon in the previous suit. [p. 286, col. 1.]

Second appeal against the decision of the District Judge, Satara, in Appeal No. 208 of 1920.

Mr. *P. B. Shingne*, for the Appellant.
Mr. *A. G. Desai*, for Respondent No. 1.

JUDGMENT.—The plaintiff filed this suit to redeem the plaint lands from the mortgage mentioned therein. He has got a decree. But in the course of the suit he was met by defendant No. 22 who claimed to have an interest in the mortgaged land. That question was fought out in 1892 when the mortgagee filed a suit for possession against defendant No. 22's father. Defendant No. 22's father was then disputing the present plaintiff's father's exclusive title and asserted his own over the land. The Court decided that defendant No. 22's father was not the least interested either in the land or in the mango trees, and that the present plaintiff's father was full owner of the properties mortgaged by him to defendants Nos. 1 and 2's father. The Court also held that defendant No. 22's father was not joint in interest with the present plaintiff's father. It seems very strange to me that, 30 years later, when the plaintiff seeks to redeem, he should be met by the same contention on behalf of the 22nd defendant that the property did not belong to plaintiff's father. The Appellate Judge said: "But the mortgagee sued as representing the estate, that is, as representative of the mortgagor, and as such the decree he obtained was for the benefit of the mortgagor, so that the 22nd defendant could not again set up his title on the mortgaged lands against the mortgagor." He, there

fore, found that this question was *res judicata* as between the present plaintiff and defendant No. 22.

Under section 11 or the Code of Civil Procedure the matter must have been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title. Now the mortgagee was litigating against the 22nd defendant's father on the ground that the property belonged to his mortgagor. The father of defendant No. 22 disputed that title and lost. Now that the mortgagor seeks to redeem, he is really claiming through the mortgagee, and it seems to me that section 11 of the Civil Procedure Code would sufficiently dispose of the suggestion that the 22nd defendant is still at liberty to raise a contention against the plaintiff which was defeated in 1892 in proceedings between his father and the mortgagee. In my opinion, therefore, the appeal should be dismissed with costs. The cross-objections are dismissed with costs.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 44 AND 61 OF 1922.

February 26, 1923.

Present :—Mr. Justice Ryves and Mr. Justice Daniels.

GULAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHIB LAL—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 10, 34—Transfer by proprietor, effect of—Usufructuary mortgage of proprietary rights—Sale of equity of redemption—Position of vendee—Vendee in possession by arrangement with vendor—Suit for arrears of rent, whether maintainable.

When a proprietor makes a transfer, he loses his *sir* and *khudkasht* rights under section 10 of the Agra Tenancy Act even in the land which he has been cultivating for 12 years and becomes an ex-proprietary tenant. [p. 287, col. 1.]

When a proprietor executes a usufructuary mortgage of his land and then sells the equity of redemption, the vendee does not acquire *khudkasht* rights in the holding. [p. 287, col. 1.]

If the vendee by private arrangement with his vendor, obtains cultivatory possession of the holding he can be sued by the land-holder for arrears of rent under section 34 of the Agra Tenancy Act. [p. 287, col. 1.]

Second appeal from a decree of the First Additional District Judge, Aligarh, dated the 7th July 1921.

Mr. *Panna Lal*, for the Appellants.

JUDGMENT.—These appeals arise out of two connected suits between the same parties. The first suit in which Second Appeal No. 61 of 1922 is brought was for arrears of rent under sections 34 and 102 of the Agra Tenancy Act. The second suit in which Second Appeal No. 44 of 1922 is brought was a subsequent suit for the ejectment of the defendants.

The defendants are purchasers of the shares of three co-sharers, Kalua, Nadir and Moti. Their purchase was made in 1909. It was a purchase of the equity of redemption subject to a usufructuary mortgage of the same land previously made by the proprietors in favour of Debi Singh and Thakria. That mortgage is still subsisting. Under that mortgage ex-proprietary rights arose in favour of the mortgagors in respect of their *sir* and *khudkasht* land. When they executed the sale-deed in favour of the defendants the vendors relinquished their ex-proprietary lands and handed over cultivating possession to the defendants. The question in dispute between the parties is whether the defendants held these lands as tenants or as *khudkasht*. A suit to which the present plaintiffs were parties was brought previously by the mortgagees on an allegation that the cultivation of these plots by the defendants amounted to their dispossession. The suit was dismissed on a finding that the defendants were in possession by receipt of profits from the *lambardar* and that the rents were collected by the *lambardar* and not by the co-sharers. On these facts the Courts below have, in our opinion, rightly held that the defendants are not cultivating the land as *khudkasht*. The defendants not being in proprietary possession of any share it is difficult to see

how their possession can possibly be considered as *khudkasht*. *Khudkasht* can only be held by a proprietor who is in possession and the possession of the persons from whom the defendants obtained these plots was clearly that of ex-proprietary tenants. When a proprietor makes a transfer he loses his *sir* and *khudkasht* rights under section 10 of the Tenancy Act even in the land which he has been cultivating for 12 years and becomes an ex-proprietary tenant. He obviously cannot claim *khudkasht* rights in land which he only begins to cultivate at the time when he loses his possession.

It is next argued that, if the defendants must be considered to be in possession as tenants, section 34 does not apply as that section only applies to persons who are in possession without the consent of the landholder. The answer to this is that the arrangement between the defendants and their vendors was arrived at behind the backs of the mortgagees who were in possession of the proprietary interest.

Thirdly, and finally, it is argued that if the defendants are tenants at all they are tenants of the mortgagees only and that the mortgagees alone are entitled to collect rent from them. This contention was raised in the Courts below and the learned District Judge points out that all the rents in the village are collected by the *lambardar*; that the mortgagees themselves now admit this to be the case and do not claim to collect any rents themselves, and that the finding in the previous suit to which the defendants were parties was that the *lambardar* alone collected. In view of the findings in the previous suit it appears to us that it would be difficult, if not impossible, for the mortgagees to bring any suit for arrears of rent.

The result is, that we uphold the decrees of the Court below and dismiss both appeals. We make no order as to costs as the respondent is not represented.

K. S. D. *Appeals dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1 OF 1921.
ADMIRALTY JURISDICTION.
May 15, 1922.

Present :—Mr. Justice C. C. Ghose.

J. R. B. MORRIER—PLAINTIFF
versus
Lala RAGHUMULL AND ANOTHER
—DEFENDANT.

Maritime Law—Seamen's wages, security for—Chief Engineer, whether seaman.

Seamen have a triple security for their wages, namely, the vessel, the owner and the Master. [p. 290, col. 1.]

Jack Park, (1902) 4 Robinson 308 at p. 311, *Bunde* v. *Haven*, (1823) Gilpin's Report 592, *The Salacia*, (1862) 7 L. T. (N. S.) 440; 32 L. J. Adm. 41; 9 Jur. (N. S.) 27; 11 W. R. 189, referred to.

The term "seaman" is not confined to those who actually take part in the navigation of the ship. Every one who is regularly attached to the ship and who contributes to her successful handling is a seaman although he may not know one rope from another. [p. 290, col. 2.]

A Chief Engineer of a ship is a "seaman." [p. 291, col. 2.]

A Master of a ship is entitled to recover from the owner the wages and messing charges paid by him to the Chief Engineer. [p. 292, col. 1.]

Mr. *T. Ameer Ali*, for the Plaintiff.

Messrs. *S. C. Bose* and *J. N. Majumdar*, for the Defendant.

JUDGMENT.—In this case the plaintiff, who until lately was Master of the steamship *Singhaporean*, now lying in the Dry Docks in the Hooghly, sues for the recovery of a sum of Rs. 6,744-4-11 for his wages and messing and other expenses incurred by him on account of the ship in the course of his employment as Master during the period commencing from the 1st July 1921 and ending with the 6th November 1921 and for the wages and messing of the Chief Engineer and other seamen and for other liabilities incurred by the plaintiff on account of the ship as such Master during the said period. Particulars of the said claim are set out in the statement annexed to the plaint and marked Exhibit A. It is alleged that before the institution of this suit, accounts were furnished to the defendants and monthly portage bills with full details and vouchers were duly delivered, but that, notwithstanding demands, the defendants have failed and neglected to pay to the plaintiff the said sum of Rs. 6,744-4-11

MCRRIER J. R. B. v. RAGHUMULL.

or any part thereof. In the particulars annexed to the plaint, a sum of Rs 3,081-13 is claimed by the plaintiff on account of his wages and messing and on account of travelling expenses and refreshments, and a sum of Rs. 2,617 is claimed on account of the Chief Engineer's wages and messing, and three other sums, namely, Rs. 597-12-4, Rs. 33 and Rs. 117-10-10 on account of wages of the deck crew, engine-room crew and dinghy man, aggregating in all to Rs. 6,744-4-11.

The defendants are two in number; (*i*) Rai Bahadur Damodar Dass, and (*ii*) Lala Raghumull. It is alleged that they were joint owners of the SS. *Singhaporean*. As against the defendant Rai Bahadur Damodar Dass, the claim has been wirthdrawn, the defendant Rai Bahadur Damodar Dass not pressing any claim for costs. So far as the defendant Lala Raghumull is concerned, he states in his written statement that sometime in June 1921 an agreement was arrived at between the plaintiff and Lala Raghumull under which the plaintiff agreed to receive a sum of Rs. 325 a month till the vessel resumed work. At the Bar, however, Mr S. C. Bose, on behalf of Lala Raghumull, has stated that the figure should be not Rs. 325 but Rs. 500. In the second place, it is urged that the plaintiff has not rendered any accounts of the various sums which had been paid to him from time to time, and, in the third place, it is alleged that on an account being taken, it would be found that a very large sum of money was due and owing to the defendant Lala Raghumull. Lastly, the question of jurisdiction is raised and it is stated that this Court has no jurisdiction to try this suit which has been filed in the Vice-Admiralty jurisdiction of this Court.

The issues settled between the parties are as follows :—

(*i*) Is the plaintiff entitled to recover the wages and messing charges of the Chief Engineer in this suit?

(*ii*) Was there any agreement in June 1921 between the plaintiff and the defendant, that the plaintiff would accept a salary at the rate of Rs. 500 a month including messing charges and travelling expenses, from the 1st July 1921 till the vessel resumed work?

(*iii*) Was there a similar agreement between the Chief Engineer and the defendant?

(*iv*) Is the plaintiff entitled to any travelling expenses from the 1st July to the 6th November 1921?

(*v*) What sum, if any, is due to the plaintiff?

On behalf of the plaintiff, Mr. Ameer Ali has raised the following issues:—

(1) Did the plaintiff fail to render accounts and portage bills as alleged in paragraphs 3 and 4 of the written statement?

(2) Did the first defendant accept as accurate the portage bills and accounts in respect of the period from February to May 1921 inclusive and June to November 1921 inclusive?

The defendant Lala Raghumull has not given any evidence in this case, but on his behalf his constituted attorney and partner, Gopal Dass, was called for the purpose of proving that, so far as the deck crew and engine room crew and the dinghy men were concerned, they had all been paid off. In support of this last statement, the witness Gopal Dass has produced before me three receipts showing that a lump sum of Rs. 700 was paid in the presence of a Solicitor to the head man of the deck crew, the head man of the engine room crew and the dinghy man on account of their wages for the period mentioned in the account annexed to the plaint.

The plaintiff in his evidence states that on the 6th February 1921, he was appointed Master of these SS. *Singhaporean* by Messrs, Frederick Gaebele, who were the agents of the owners, on a salary of Rs. 650 per month, and on terms and conditions appearing in Exhibit A. He says, at the time of his appointment as Master, he was told that the owners of the ship were away from Calcutta. One of the owners was Rai Bahadur Damodar Dass and the other Lala Raghumull. On the 1st March 1921, he was introduced to Rai Bahadur Damodar Dass when the latter said that the portage bills should be submitted to him at the end of every month and that payment would be made

by the 6th of each month. He also said that as regards travelling expenses, the actual sums spent on account of travelling expenses should be included in the bills. The plaintiff states that the agreement entered into with Messrs. Gaebele was such as is usual throughout the shipping world, and that, under the agreement, provision was made for his boarding and travelling expenses and entertaining allowance. As regards the portage bills, they were all settled up to the 6th April, *i.e.*, he was paid on the 6th March for the February bill; on the 6th April for the March bill. After that there were delays, and in the end he found it difficult to realise the amount of his portage bills from the 1st July down to the 6th November. On this date he resigned his appointment as Master, but previous to that date the defendant Lala Raghumull had asked him to remain on board the *Singaporean* as Master thereof on a reduced salary. The plaintiff's evidence on this point was as follows. (Q. 55):—

"I then spoke to the Rai Bahadur and said, Gentlemen, I am quite prepared to enter into an agreement with you to receive Rs. 500 a month from the day the ship goes into the hands of the repairers until she is able to take in cargo, provided, of course, that the Chief Engineer will have to take the same reduction, because it will be impossible for me to be on board a ship with less salary than the Chief Engineer. I also pointed out to the Rai Bahadur that the agreement should be such that there should be no delays as regards payment: payment should be made regularly, and also if I were to engage myself with him, there should be a car at my disposal and at the disposal of the Chief Engineer while the ship was at Matiabruz, as it was impossible for me to run backwards and forwards between Matiabruz and Harrison Roard out of my own pocket."

He states further that the Chief Engineer had a similar conversation with the defendant Lala Raghumull, wherein the Chief Engineer pointed out that he was a member of the Engineers' Guild and that it was impossible for him to accept a reduced salary, but all he could do was to waive his claim to the messing allowance. Ultimately, nothing was settled; and the plaintiff continued to be Master on the terms mentioned in Exhibit A, down to the 6th November 1921, when he resigned. As I have said, the plaintiff has included in his bill the wages due to the Chief Engineer for the period 1st July to 6th November 1921, and the main contest in this suit has been whether the plaintiff was entitled to include in his claim a claim for the wages and for the messing allowance due to the Chief Engineer.

The Chief Engineer has given evidence, and he states that, according to the custom which prevails among seamen, he looked to the Master as being responsible for the wages due to him. The Chief Engineer corroborates the Captain as regards the conversation he had with the defendant Lala Raghumull with reference to the plaintiff staying on as Master of the *Singaporean* on a reduced salary. As I have said, no evidence has been called on behalf of the defendants except on the question of payment of the deck crew, the engine crew and the dinghy man.

On behalf of the defendant Lala Raghumull it has been contended that, in any event, there ought not to be any judgment in this suit against the defendant in respect of the wages alleged to be due to the Chief Engineer, and in support of this contention, my attention has been invited to various sections of the Merchant Shipping Act of 1894 and the Merchant Shipping Act of 1906, and the Indian Merchant Shipping Act of 1859 and to the Amending Indian Act of 1883. I shall refer to these sections later on but in the view which I take, it will be seen later that the sections to which my attention has been directed have no real bearing on the question. Prior to the English Act of 1854, it had been said in numerous cases that mariners were the favourites of the law and were placed particularly under its protection, and that the Court was always anxious to protect them against circumvention and error, and that in suits for wages the Court was always anxious that seamen should not be harassed with litigation, and that it was desirable that ques-

tions relating to wages due to seamen should be speedily settled. Now, following these principles, it was held in a series of cases, prior to the Admiralty Court Act of 1861, that the Court of Admiralty had jurisdiction *in rem* or *in personam* over claims by seamen for any wages earned by them under a special contract, or otherwise, and that the Master, ship and the owner were severally liable to a mariner for his wages, and that the mariner was entitled to choose who he would proceed against, and that in some respects a proceeding by a mariner against the Master was more covenient (see the cases collected in Pritchard's Admiralty Digest, Vol. II). In the case of *Jack Park* (1), it was held by Sir William Scott (who was afterwards to be known under the title of Lord Stowell) that for the wages of the mariners the Master was liable, the ship was liable and the owner was liable. The mariner was entitled to his option, and in some respects perhaps there was less inconvenience occasioned by proceeding against the Master because in that case the ship was not detained. In an American case [*Bunde* v. *Haven* (2)] it is said that seamen have a triple security for their wages, namely, the vessel, the owner and the Master; and in the case of *The Salacia* (3), it is laid down as an established rule, so ancient, that the origin thereof is not known, that seamen may recover their wages by action against the Master. [See also *Baily* v. *Grant* (4), *Anon* (5), *Hook* v. *Moreton* (6), *Armstrong* v. *Smith* (7)]. The principle of these decisions is that, although by the Law Maritime, the ship is the primary security of the mariner for his wages, and although as long as a plank remains, the seamen is entitled to the proceeds of the plank as security for his wages, the mariner is also entitled at his option to proceed against the Master or owner. It is observed rather quaintly in an old case that, "Contracts of seamen have always been considered amongst the most important outfit that a ship can have. Her construction may be the best that modern ingenuity may produce; every device of recent invention may be lavished upon her; yet unless she has a brain to direct her course, and skilful Chief Engineers to regulate the pulsation of her engines and manage her numerous complicated machinery, her propeller is paralysed, her syren is dumb. This is like the human body when the soul has departed. Mere machinery is of little service unless intelligently handled. It is not the gun, but the man behind it who is formidable, and in modern as in ancient times the personal equation is still controlling. On this account the utmost encouragement and fullest protection to seamen are the established policy of Admiralty Law, and as regards Courts they have been equally liberal in deciding questions as regards Statutes relating to seamen and as to who are seamen. The term is not confined to those who actually take part in the navigation of the ship. Every one who is regualrly attached to the ship and who contributes to her successful handling is a seaman although he may not know one rope from another."

In the present case, however, it is argued that the facts of the present case are such that it is impossible to hold that the plaintiff is entitled to include in his claim for wages and for messing due to the Chief Engineer. The argument is put in this way: it is said that Exhibit 1 proves the direct employment of the Chief Engineer by the owners, and, that being so, the defendant Lala Raghumull cannot possibly be held liable to the plaintiff for wages due to the Chief Engineer. The contention raised by the defendant is covered by authority. In the case of *Farrel* v. *M'Clea* (8) decided by the Supreme Court of Pennsylvania, the facts were as follows:— It was a claim against the Master of a vessel for payment of the wages of the mate. The mate had been appointed by the owner and had been shipped by the owner

(1) (1902) 4 Robinson 308 at p. 311.
(2) (1823) Gilpin's Report 592.
(3) (1862) 7 L. T. (N. S.) 440; 32 L. J. Adm. 41; 9 Jur. (N. S.) 27; 11 W. R. 189.
(4) (1700) 1 Salk. 33; 12 Mod. 440; 1 Ld. Raym 632; Holt. 48; 91 E. R. 35, 1322.
(5) (1680) 2 Show. 86; 89 E. R. 811.
(6) (1698) 1 Ld. Raym. 397; 91 E. R. 1165.
(7) (1805) 1 Bos. & P. (N. R.) 299; 127 E. 477.
(8) (1788) 1 Dallas (U. S.) 391; 1 Law. Ed. 191.

with a letter introducing him to the Master. On behalf of the defendant (the Master) it was argued that, inasmuch as the employment was by the owner, the Master could not be held liable, and that, although by the Law Maritime, the seamen has a triple security for his wages, inasmuch as the employment was by the owner, the case was taken out of the ordinary rule. Counsel for the plaintiff argued that mariners had a threefold security for their wages, they may proceed against the owner; secondly, they may liable the vessel, and, thirdly, they may sue the Captain. It was further argued that the Captain was not bound to receive any sailors shipped by the owners because he was not only liable to the owners, but to strangers for any wrong they may do when shipped, but if the Captain did receive them, he made himself liable for the wages. The President of the Supreme Court of Pennsylvania in delivering the judgment of the Court observed as follows:—

"It was quite true that the plaintiff (the Mate) has been shipped by the owner, but admitting that to be so, in his opinion the Captain was liable, for the law gave the plaintiff a threefold remedy to recover his wages, and unless by some positive act or word the plaintiff had released, as he might do, one of these remedies, a mere compliance with the solicitation of the owner cannot possibly defeat the plaintiff's claim."

The President said that there was no distinction in this respect between the Mate and a common mariner; they were alike subject to the orders of the Captain, who could equally refuse to receive either, or, when received, was equally empowered to dismiss them for his appointment as Captain and Master of the ship gave him the sole, undoubted and exclusive right of choosing every seamen under him, whatever courtesy he might be inclined to show to the recommendation of those by whom he was himself employed. It will be observed that the above is an exact authority on the facts of the present case. No doubt it is an American authority; but where the decision is not based on any consideration of Statute law peculiar to America I know of no reason which prevents me from following an American authority, especially on a matter like this. One last remark I have to add. It is not disputed that the Chief Engineer comes within the expression "seamen"; if authority is needed the definition of the word in the English and Indian Acts may be referred to.

I now turn to the question whether the authority of the English cases referred to above has in any way been affected by the Merchant Shipping Act of 1894. Like the Act of 1854, it was a consolidating Act and it was not a condification of the law like the Bills of Exchange Act, 1882, or the Partnership Act, 1890 and with trifling exceptions it left the Common Law and the case law untouched. The Indian Act of 1859 is a copy of some of the sections of the English Act of 1854. Section 58 of the Indian Act, to which my attention has been drawn by Mr. Bose for the defendant, is taken *verbatim* from section 191 of the English Act of 1854 and it, therefore, does not contain any such provision as is to be found in sub-section 2 of section 167 of the English Act of 1894. Neither section 58 of the Indian Act nor section 167 of the English Act of 1894 really affords any assistance so far as this case is concerned and I do not prospose to set out the sections here. It is also quite clear that there are no other sections in the two Acts which can be invoked in aid of the defendant in this case. The analogy of the Master being in a position to pledge the credit of the owner in a foreign port and not in a home port does not hold good at all in this case, and nothing more need be said about it.

On the authorities, therefore, I must answer the first issue in the affirmative.

As regards the second issue, I accept the testimony of Captain Morrier, and I hold that there was no such agreement as is referred to in the Issue No. 2.

As regards the third issue, the answer is in the negative.

As regards the fourth issue, the answer is in the affirmative on the evidence which has been adduced before me.

As regards Mr. Ameer Ali's issue, so far as the first issue is concerned, the answer is No.

Now, the question arises as to what relief I should award to the plaintiff. The plaintiff is clearly entitled to his wages and to his messing and travelling allowances. So far as the Chief Engineer's wages and messing are concerned, the plaintiff is entitled to include the same in his claim.

Now, as regards payments to the engine room crew, the deck crew and the dinghy man, certain receipts have been produced before me showing that they have been paid off. So far as the plaintiff is concerned, his liability to the engine room crew, the deck crew and dinghy-man is, on the authorities mentioned by me, clear, and although I am satisfied on the evidence before me that Rs. 700 has been paid to the head men of the three sets of the crews mentioned above, *viz.*, the engine room crew, the deck crew and dinghy-man, in order fully to protect the plaintiff I propse to make this order: that the plaintiff do recover judgment for the entire amount of the claim with costs on scale No. 2. This judgment will carry interest from date at 6 per cent. till realisaton. It will, however, be open to the defendant to produce before the Registrar receipts from the individuals composing the engine room crew, the deck crew and the dinghy man for the period mentioned in the plaint and on the defendant producing before the Registrar within a fortnight those receipts, the amounts due to these three sets of crew will be deducted from the plaintiff s claim and he will then only be entitled to execute the decree for the two sums of Rs. 3,081-13-9 and Rs. 2,617 aggregating Rs. 5,698-13-9.

K. S. D. & N. H. *Order accordingly.*

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 354 OF 1920.

February 6, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

VIJBHUKHANDAS KASHIDAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sardar ISHWARDAS JAGJIVANDAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bombay Land Revenue Code (Bombay Act V of 1879), s. 83—Tenant in possession for long time —Presumption of permanent tenancy—Signing of kabuliyat *by tenant, effect of.*

The mere fact that, during the currency of his holding, a tenant signs a *kabuliyat* in favour of the landlord, which purports to be in terms an agreement for an annual tenancy, will not necessarily displace the presumption of the tenancy being a permanent one, where it is proved that the tenant has been in occupation of the land for so long that one cannot ascertain the commencement of the tenancy. But each case of this class must stand entirely on its own facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of section 83 of the Bombay Land Revenue Code. But that can be rebutted by the landlord by the production of a *kabuliyat*. Again, the effect of the *kabuliyat* can be destroyed by further evidence on the part of the tenant. [p. 293, col. 1.]

Where a person having obtained possession as Court purchaser determined to establish his right to the village lands and took *kabuliyats* from the tenants:

Held, that, under the circumstances of the case, the signing of the *kabuliyat* by the tenants destroyed any presumption about the permanent nature of their holdings. [p. 293, col. 2.]

Second appeal against the decision of the Judge of the Court of Small Causes and Joint First Class, Sub-Judge with A. P. at Surat, in Appeal No. 112 of 1918.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Appellants.

Mr. *H. C. Coyajee* (with him Messrs. *D. B. S. Rao* and *Rattanlal Ranchhoddas*), for the Respondents.

JUDGMENT.—The plaintiffs brought this action to recover possession of the plaint lands, mesne profits and certain damages. The Trial Court dismissed the suit on the ground that the insertion in the *kabuliyat* of 1902, signed by the defendants, about giving up possession of the land was made fraudulently and without the knowledge of the defendants, and that, apart from the *kabuliyat*, the defendants were

entitled to the presumption on the facts found under section 83 of the Land Revenue Code that they were permanent tenants.

This decision was reversed in appeal, the learned Judge being of opinion that the defendants' contention that the *kibuliyat* of 1902 was taken by the plaintiffs fraudulently was not established by the evidence. He was also of opinion that the defendants could not prove their possession of the suit land further back than 1862, and there was nothing on the record from which the Court could presume that they had been in possession prior to 1862. In any event, the Court was satisfied that the fact that defendants were in possession in 1854 had not been established. It would follow then that, even without the *kabuliyat*, it would be rather difficult for the defendants to ask the Court to give them the benefit of section 83, and hold that they were permanent tenants. The execution of the *kabuliyat* of 1902, in our opinion, must be taken as an admission by the defendants that they were not permanent tenants but tenants bound to give up possession according to the terms of the document.

No doubt, when it has been proved that a tenant has been in occupation of certain land for so long that one cannot ascertain the commencement of the tenancy the mere fact that, during the currency of his holding, he has signed a *kabuliyat* which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the *kabuliyat*, on the same rent. But each case of this class must stand entirely on its own facts. At first, the tenant claiming to hold as permanent tenant must establish the facts which would entitle him to the presumption of section 83. But that can be rebutted by the landlord by the production of a *kabuliyat*. Again, the effect of the *kabuliyat* can be destroyed by further evidence on the part of the tenant. The fact of the signing of the *kabuliyat* as merely an isolated instance in the midst of a long holding at the same rent, will not necessarily prevent the tenant from succeeding.

There cannot be a clearer case than the one before us in which it has been proved that the *kabuliyat* was taken for a definite purpose. The plaintiffs were put in possession in 1892 as Court-purchasers. Prior to that time the land had been managed by the Collector, and as soon as the plaintiffs got into possession, they determined to establish their rights to the village lands. They began by filing suits against different occupants for possession. These suits were taken up to the High Court and ended in decrees for the plaintiffs. Thereafter, plaintiffs began taking *kabuliyat* from the tenants, of which a very large number have been recorded in the case, covering a period from 1902 to 1909. The purpose the plaintiffs had in taking these *kabuliyats* is perfectly clear. It is also clear that the tenants in occupation of the village lands must have known what the plaintiffs had in their minds. The tenants must have known that the plaintiffs were asking for *kabuliyats*; that they were asserting their rights against any claims of the tenants to hold as permanent tenants, and that many of the tenants were signing those *kabuliyats*.

In these circumstances, the plaintiffs obtained the *kabilayat* in suit from the defendants. Therefore, the signing of the *kabuliyat* at once destroyed any presumption that might have arisen from the previous holding of the defendants of the suit lands, and there is nothing that has occurred since which would lead one to suppose that the signing of a *kabuliyat* was a mere accident, which, on the continuance of the holding on the old terms, could be treated as a nullity in consequence of the later possession.

We think, then, the judgment of the First Class Sub-Judge was correct, and that, therefore, this appeal must be dismissed with costs.

N. H.

Appeal dismissed.

ISHER SINGH *v.* SURAT SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2340 OF 1920.

May 9, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Lumsden.

ISHER SINGH AND OTHERS—PLAINTIFFS—APPELLANTS—

versus

SURAT SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption, failure of—Gift to adopted son—Presumption.

Where a deed contains a testamentary disposition in favour of a person believed to be the adopted son of the executant, it is a question for consideration whether on the failure of the adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son, but where the instrument of adoption does not mention any gift *inter vivos* or any testamentary disposition in favour of the adopted son, and contains merely a declaration, of adoption, which declaration is found to be incorrect, the deed cannot be treated as a deed of gift. [p. 294, col. 2.]

Fanindra Deb Raikat v. *Rajeswar Das*, 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.) and *Lali* v. *Murlidhar*, 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402, 3. A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.), relied on.

Second appeal from a decree of the District Judge, Amritsar, dated the 3rd July 1920, modifying that of the Senior Subordinate Judge, Amritsar, dated the 31st March 1920.

Lala *Ram Chand Manchanda* and Lala *Badri Das*, R. B., for the Appellants.

Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—On the 2nd September 1913, Ganda Singh, a Jat of the village Khatrai Khurd, in the District of Amritsar, executed a deed of adoption in favour of the defendant, Surat Singh. The plaintiffs, who are Ganda Singh's collaterals, have brought the present action for a declaration that the deed of adoption is a fictitious document and shall not effect their rights to succeed to the estate of Ganda Singh. Now, the District Judge, concurring with the Trial Court, holds that Surat Singh was never actually adopted by Ganda Singh and that the alleged adoption was a mere paper transaction. The learned Judge has, however, treated the deed of adoption as a deed of gift and has granted a declaratory decree in favour of Surat Singh's right to succeed to the estate of Ganda Singh since the property held by the latter has not been proved to be ancestral, *qua* the plaintiffs.

Now, it has been repeatedly held, *vide, inter alia, Fanindra Deb Raikat* v. *Rajeswar Das* (1) and *Lali* v. *Murlidhar* (2), that, where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or the legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son. The instrument before us, however, does not mention any gift *inter vivos* to Surat Singh or any testamentary disposition in his favour. It contains merely a declaration of adoption, which declaration has been found to be incorrect, and does not even remotely refer to any property held by Ganda Singh. We fail to understand how such a deed can be treated as a deed of gift.

The learned District Judge has relied upon a judgment of the Punjab Chief Court in *Sant Singh* v. *Sadda* (3) where the adoption was found to have taken place, but according to the custom governing the parties it was held to be invalid. The property

(1) 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.).

(2) 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.).

(3) 14 Ind. Cas. 23; 63 P. R. 1912; 222 P. W. R. 1912.

affected by the adoption was, however, non-ancestral, and the learned Judges consequently held that as the adoptor was entitled to transfer his non-ancestral property to the adopted son without the consent of his collaterals, the adoption, though invalid by custom, should be viewed as a gift to the adopted son to take effect after his death. It is unnecessary to decide whether the rule laid down in that judgment can be regarded as a correct exposition of the law on the subject because the present case is distinguishable from that case. As pointed out above, even the *factum* of adoption has not been proved in the case before us, and there is, therefore, nothing in the deed which could by any stretch of reasoning be treated as a gift or a testamentary disposition in favour of Surat Singh.

The result is that we accept the appeal and, reversing the decree of the District Judge, restore that of the Court of first instance. The plaintiffs shall recover from Surat Singh the costs incurred by them in this Court as well as in the Dstrict Court.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8 OF 1922.
October 4, 1922.

Present:—Mr. Ashworth, A. J. C.

Musammat MAHESHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMESHAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Gift—Transfer by limited owner—Estate conveyed—Presumption—Burden of proof.

Where a transferor has merely a limited interest in the property transferred and purports to dispose of the property itself, the presumption is that he intends to dispose of only his limited interest, and if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than that interest. But for this purpose a positive declaration is not necessary. Regard may be had to the context of the deed of transfer, and to the inaptitude of the words of transfer if applied to the transferor's actual interest. [p. 296, col. 2.]

Where a deed of gift executed by a Hindu widow began by stating the fact of an oral Will made by her husband, which gave her nothing more than a life-interest, but further stated that the donees would have all the proprietary powers of transfer in respect of the gifted property and would, generation after generation, remain in possession and occupation of the same, because the Will gave them a remainder:

Held, that the deed of gift meant that the absolute title arose from the addition of the life-interest gifted under the deed to the remainder devised by the Will, and was not of itself intended to transfer an absolute interest in the property gifted. [p. 296, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 20th January 1922.

Messrs. *A. P. Sen*, *H. K. Ghosh* and *Ishri Prasad*, for the Appellants.

Messrs. *Hyder Hussain* and *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—This first civil appeal arises out of a suit brought by the three surviving daughters of one Jit Bahadur against Rameshar, husband of a fourth deceased sister (*Musammat* Parbati,) and against their mother *Musammat* Hubrani, for a declaration that a deed of gift executed by the latter on 16th September 1912, so far as it transfers to the former an absolute estate in a share of the *zemindari* left by Jit Bahadur, will have no effect against the plaintiffs after their mother's death.

The Officiating Subordinate Judge dismissed the suit on three findings as follows:—

1. The impugned deed of gift was executed in pursuance and execution of a family arrangement between the parties for the avoidance of future disputes;

2. the plaintiffs having accepted a transfer of *Musammat* Hurani's life-interest in certain property under the deed of gift, could not (by reason of operation of the principle of election) call in question the conveyance by the same deed of the absolute interest in other property to Rameshar;

3. the plaintiffs by their conduct generally, and in particular by their omission to impugn the deed of gift, had led the de-

fendant to believe that they would not impugn it, and acting on this belief the defendant No. 1 had parted with his interest in part of the property gifted to him by the said deed of gift.

All these findings are called in question in this appeal.

It is to be noted that the defendant in the lower Court also relied on an alleged oral Will by Jit Bahadur (referred to in the deed of gift) devising the fractional share in question (and indeed a larger fractional share) to the defendant No. 1 as a remainder after the death of his widow and the fourth daughter, wife of defendant No. 1. This oral Will was held not to be proved by the lower Court and the respondent-defendant No. 1 has not relied on it in contesting this appeal.

As to the first finding, the Subordinate Judge has not relied on, nor even mentioned any evidence in support of, the family arrangement set up, except such evidence as is afforded by the recital in the deed of gift now impugned, by the fact that the deed of gift was executed, and lastly by the subsequent conduct of the parties in respect of the deed of gift. Neither the execution of the deed of gift nor the recital therein can be construed as evidence of a previous family arrangement. On the contrary, the recital is destructive of any plea of such a previous family arrangement. The deed of gift plainly states that it was executed by the widow of Jit Bahadur to prevent future disputes which might have the effect of jeopardising the disposal of her husband's property according to his Will and ardent wishes. If there had been any family arrangement the widow must have referred to it in the deed of gift. As to the conduct of the parties subsequent to the deed of gift, it showed acceptance of the deed of gift but it is not shown how in any other way it could operate as evidence of the fact of a family arrangement previous to the deed of gift. Accordingly, the first finding as to the existence of a family arrangement preceding the deed of gift is incorrect.

As to the second finding, assuming that section 35 of the Transfer of Property Act is applicable to the case in other respects, it is to be seen whether *Musammat* Hubrani professed to transfer an absolute interest (that is to say, an interest continuing after her death) to the defendant No. 1. If she did not do so, no question of election by the plaintiffs can arise. In construing the deed of gift I would draw attention to the following passage in Lord Halsbury's Laws of England, Vol. 13, page 121, as succinctly setting forth the rules of construction applicable to this case, They are indeed merely a particular application of the general rules of evidence contained in sections 91, 92, and 114 of the Indian Evidence Act.

"Where a testator has limited interest in property and purports to dispose of the property itself, the presumption is that he intends to dispose only of his limited interest, and if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than that interest. But for this purpose positive declaration is not necessary. Regard may be had to the context of the Will, and to the inaptitude of the testamentary limitation if applied to the testator's actual interest."

I have had a translation of the Will made. A careful study of it convinces me that it is impossible to say that the lady intended to dispose of more than her life-interest. She begins by stating the fact of an oral Will which gave her nothing more than a life interest. The fact that she says that the donees have and shall have all the proprietary powers of transfer in respect of the gifted property and shall, generation after generation, remain in possession and occupation of the same must in view of the previous recital in the deed of an oral Will giving them a reminder, mean that the absolute title arises from the addition of the life interest gifted under deed of gift to the remainder devised by the Will. The only words favouring an intention to dispose of more than her life-interest is the expression of her desire to prevent disputes arising after her death which might prevent the oral Will and wishes of her husband being carried out. It has been suggested that disputes could not entirely be prevented unless the widow intended to give

an absolute estate by means of the deed of gift. It is, however, impossible to hold that she can have intended to give an absolute estate after reciting that she had only a life-interest herself. Putting the donees into immediate possession might well be a step in the direction of preventing future disputes. There is nothing in the Will to rebut the strong presumption that the widow only intended to give what she could give. The widow herself says that she made the Will under compulsion but even if this statement could be construed into an admission that the Will evidences an intention to transfer an absolute interest, her statement being parol evidence is not admissible to construe the deed of gift. I hold, therefore, that the widow did not dispose of more than her life interest by the deed of gift and the principle of election does not arise. The transfer which the plaintiffs' conduct may be said to have confirmed was only a transfer of the widow's life interest.

It has been urged by the respondent that, if this is so, the plaintiffs have no cause of action in respect of a deed of gift which does not hurt them. But under section 42 of the Specific Relief Act the plaintiffs are entitled to sue for declaration.

Illustration (*e*) of section 42 covers the case and it is only necessary for the plaintiffs to show that the defendant No. 1 is interested to deny their title to possess the property if they survive the widow.

There remains the question whether the plaintiffs are estopped. There are two positions only which can be taken up. One is, that all the parties believed up to the date of suit that Jit Bahadur had lawfully devised by Will the reversion to the property in the manner mentioned in the deed of gift in suit. If this is the position then there can be no question of estoppel as the plaintiffs could not have induced the defendant No. 1 to believe what he already believed and what they, the plaintiffs, believed. Another possible position is, that both parties knew that there was no effective Will by Jit Bahadur but chose to act on the supposition that there was one. In this case also there can be no estoppel. In any case the plea of estoppel must fail, because, when the defendant No. 1 parted with his interest in Basudha property to Rajah Shambhu Dayal to raise money to meet a decree for foreclosure on some of the property gifted by the deed in suit, it cannot be said that he parted with it because he was deceived into beliving that he had an absolute interes in the property in suit. He should have been bound to satisfy the foreclosure decree even if he held only a life-interest in the property in suit.

For the above reasons this appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 586 OF 1923.
April 20, 1923.
Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAM DAS RAI AND OTHERS—DEFENDANTS—APPELLANTS
versus
Sheikh ABDUL GAFOOR AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Pre-emption—Entery in wajib-ul-arz*—Presumption—Village owned by single proprietor—Presumption, whether rebutted.*

An entry in a *wajib-ul-arz* about the existence of a custom of pre-emption in a village is not rebutted by the mere fact that forty years or so before the time of the entry, the village was owned by a single person, for it is quite possible that the custom might have grown up during that interval.

Kulsumunnisa v. *Khaslat Husain*, 50 Ind. Cas. 179; 17 A. L. J. 345; 1 U. P. L. R. (A.) 149, distinguished.

Second appeal against a decree of the District Judge, Ghazipur, dated the 21st December 1922.

Mr. *A. P. Pandeya*, for the Appellants.

JUDGMENT.—This is a defendants' appeal arising out of a suit for pre-emption. The Court of first instance dismissed the suit. On appeal the learned District Judge has decreed it.

The plaintiffs, in order to prove the custom alleged, relied on an entry in the *wajib-ul-arz* of 1882 which *prima facie* raised a presumption of the existence of the custom. To rebut this evidence the defendants proved the fact that in the year

SHANKAR MAHABLESHWAR v. MANJUNATH SUBBA.

1840 there was a single proprietor in this *mahal*, and, further, that no suit for pre-emption had ever been brought between the years 1840 and 1882. The learned District Judge has considered all the circumstances in the case and has weighed the evidence. In our opinion the circumstance of there being a single proprietor in 1840 does not necessarily rebut the presumption of custom raised by the entry in the *wajib-ul-arz* of 1882; as the learned Judge has pointed out, it was admitted in the written statement that there had been numerous transfers and, therefore, it was possible that a custom might have grown up during that interval. In second appeal we find it impossible to hold that the learned Judge was wrong in holding that the evidence adduced by the plaintiffs had not been sufficiently rebutted.

The learned Vakil for the appellants relied on the case of *Kulsumunnisa* v. *Khaslat Husain* (1). We may point out that in that case stress was laid on the circumstance that the learned Judge of the Court below was under a misapprehension on a question of law, namely, that the fact that the property once was in the hands of a single proprietor did not put an end to the custom. It was in view of that erroneous assumption that the Bench said that, in the peculiar circumstances of that case, a question of law did arise and they were justified in going behind the findings of facts.

The result is that the appeal fails and is dismissed under O. XLI, r. 11.

N. H. *Appeal dismissed.*

(1) 50 Ind. Cas. 179; 17 A. L. J. 345; 1 U. P. L. R. (A.) 149.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 642 OF 1921.

January 23, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

SHANKAR MAHABLESHWAR BHATT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MANJUNATH SUBBA BALGYA AND OTHERS—DEFENDANTS Nos. 1 TO 3, 5 AND 8 TO 10—RESPONDENTS.

Will, construction of—Bequest by Hindu leaving two sons—Half share to be given by first brother to second in certain event—Deed of transfer, whether necessary—Succession Act (X of 1865), s. 118, application of.

A Hindu Will provided that one of the two sons of the testator should give one-half of the bequeathed property to the other if the latter reformed himself and lived amicably with his brother. The second brother lived respectably and in amity with the first brother for two or three years after the death of the testator and transferred his one-half share in the property. The transferee brought a suit for possession against him, also joining the first brother as a party. It was urged in defence that the transferee had got nothing as the property could not go to the second brother without a deed of transfer from the first:

Held, that a Hindu Will of the above character should not be construed very strictly; that section 118 of the Succession Act was applicable, and that on the happening of the uncertain event of the reformation of the second brother, half of the estate, which under the Will got vested in the first brother, became vested in the second and his transferee was entitled to the same. [p. 299, col. 1.]

Second appeal against the decision of the District Judge, Kanara, in Appeal No. 128 of 1920.

Mr. *S. S. Patkar*, for the Appellants.

Mr. *G. P. Murdeshwar*, for Respondents Nos. 1 to 4.

JUDGMENT.—We think the decree of the Trial Court must be restored. The learned Judge was of opinion that the 2nd defendant did not prove that, according to the terms of the Will of his father, defendant No. 3 was not entitled to any share in the plaint property. The Will, no doubt, standing by itself, is one which it would be very difficult to construe according to English ideas, but it was clearly intended that if Venkatesh behaved himself well, he should get half the share in his father's property. But the evidence shows that whatever Venkatesh's conduct may have been at the time the Will was written, he was living in amity with his brother, and presumably with his father at the time the father died. The Judge says: "It appears from the evidence of Exhibit 39 a witness for defendant No. 2 that after the death of the testator which took place immediately after the date of the Will the two brothers lived in amity for 2 or 3 years. There is no evidence to say that

NAND KISHORE v. KISHORI LAL.

during this period defendant No. 3 was not leading a respectable life."

The condition in the Will was that Venkatesh should turn to good ways and reside with Manjunath respectably, then only Manjunath should give the other half to Venkatesh. It was open to Manjunath to prove that the uncertain event, on the happening of which half the share was to go to Venkatesh, had not happened. But we find from Exhibit 38, which was his conveyance to the 1st defendant, that he admitted that, in accordance with the father's Will, himself and Venkatesh were together enjoying the below described property as rightful owners. Therefore, when he sold his half share to the 1st dedefendants he could not possibly have imagined that he was keeping the other half for himself. In any circumstances, the plaintiffs who derived title from Venkatesh are entitled to succeed.

The learned District Judge seemed to consider that half the share in the property could not possibly go to Venkatesh without a deed of transfer, but I should not be disposed to take such a strict view of the construction of a Hindu Will of this character. I think, that the provisions of section 118 of the Succession Act would apply, so that on the happening of the uncertain event half the estate which, under the testator's Will, vested in Manjunath would become vested in Venkatesh. The appeal is allowed, the decree of the lower Appellate Court set aside and that of the Trial Court restored with costs throughout.

N. H. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 130 OF 1922.

January 4, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

NAND KISHORE—PLAINTIFF—APPELLANT

versus

KISHORI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Reference to several arbitrators—Award made by some arbitrators, validity of.

On a reference to several arbitrators together, when there is no clause providing for an award made by less than all the arbitrators being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for, as the office is joint, if one refuse or omit to act, the others can make no valid award. It is not enough that all the arbitrators join in deliberations, for the concurrence of all the arbitrators in the award is essential, and an award made by some only of the arbitrators is invalid.

United Kingdom Mutual Steamship Assurance Association v. *Housten*, (1896) 1 Q. B. 567; 65 L. J. Q. B. 484, *Gurupathappa* v. *Narasingappa*, 7 M. 174; 2 Ind. Dec. (N. S.) 707, *Muhammad Abid* v. *Muhammad Asghar*, 8 A. 64; A. W. N. (1886) 2; 4 Ind. Dec. (N. S.) 1068, *Lala* v. *Abdus Samed*, 17 Ind. Cas. 320; 16 O. C. 94, *Gur Bakhsh Singh* v. *Chutta Singh*, 47 Ind. Cas. 960; 5 O. L. J. 471, *Lachhman Prasad* v. *Pran Nath*, 65 Ind. Cas. 339; 8 O. L. J. 585; (1922) A. I. R. (O.) 108, relied on.

Appeal from a decree of the District Judge, Rai Bareli, dated the 18th January 1922, confirming that of the Subordinate Judge, Partabgarh, dated 25th July 1921.

Dr. *J. N. Misra*, for the Appellant.

Mr. *Radha Krishna Srivistava*, for Respondent No. 4.

JUDGMENT.—There was a dispute between Nand Kishore and the reversionary heirs of *Musammat* Sundar in regard to certain property left by *Musammat* Sundar which was referred to arbitration. The agreement of reference was signed by Nand Kishore and one of the reversionary heirs and provided for the settlement of the dispute by four arbitrators and a *sarpunch* acting together. There was no provision that, in the case of a difference of opinion between them, the opinion of the majority was to prevail. All the five arbitrators entered into the reference but the award made was signed by only four of them. The Courts below found that the fifth man did not sign, because he did not concur in the award.

As stated by Russell, on a reference to several arbitrators together, when there is no clause providing for an award made by less than all being valid each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for, as the office is joint, if one refuse or omit to act, the others can make no valid award. (Russel on Arbitration,

9th Edition, page 168). In *United Kingdom Mutual Steamship Assurance Association* v. *Houston Co.* (1) it was held that where a matter in dispute was referred to the decision of three arbitrators it was necessary that all the three must concur in the making of the award and that the award made by two of them only was bad. In *Gurupathappa* v. *Narasingappa* (2) and *Muhammad Abid* v. *Muhammad Asghar* (3) it was similarly held that in the absence of a provision that a decision by a majority of the arbitrators should be binding or that an umpire could be appointed in case of a difference of opinion between the arbitrators, an award made by some of the arbitrators could not be upheld. In *Lala* v. *Abdus Samed* (4), *Gur Bakhsh Singh* v. *Chutta Singh* (5) and *Lachman Prasad* v. *Pran Nath* (6) a similar view was taken.

The agreement in the present instance provided that whatever decision was given by the arbitrators, *punchas* and *sarpunch* included, about the property in dispute shall be acceptable to and be binding on the parties. An agreement must be taken for what it is worth, and if it does not mention that an award by a majority would be valid, the award should be made by all the arbitrators unanimously. It is not enough that all the arbitrators join in the deliberations for the concurrence of all the arbitrators in the award is in such a case essential. It is unnecessary to consider the effect of the award on the persons who did not join in the reference.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) (1896) 1 Q. B. 567; 65 L. J. Q. B. 484.
(2) 7 M. 174; 2 Ind. Dec. (N. S.) 707.
(3) 8 A. 64; A. W. N. (1886) 2; 4 Ind. Dec. (N. S.) 1068.
(4) 17 Ind. Cas. 320; 16 O. C. 94.
(5) 47 Ind. Cas. 969; 5 O. L. J. 471.
(6) 65 Ind. Cas. 339; 8 O. L. J. 585; (1922) A. I. R. (O.) 108.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 144 OF 1922.
March 8, 1923.
Present:—Mr. Justice Rafique.

FIRM KIDAR NATH RAJNARAIN —PLAINTIFF—APPELLANT
versus
THE EAST INDIAN RAILWAY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), Sch. II, cl. (k)—*Risk-Note X—Article not "excepted"—Railway Company, liability of*—Momi motis, *whether "excepted."*

If an article consigned to the Railway Company is not in fact one of the excepted articles mentioned in Sch. II to the Railways Act, the mere fact of giving the Risk Note X in respect of it does not exonerate the Railway Company from liability in case of its loss.

Momi motis, or wax pearls, are only wax with thin coverings of glass over them and as such cannot be called "articles made of glass" and cannot, therefore, be said to be articles falling under clause (*k*) of the Second Schedule to the Railways Act.

Saminadha Mudali v. *South Indian Railway Company*, 6 M. 420; 2 Ind. Dec. (N. S.) 572, relied upon.

Civil revision from an order of the Judge, Small Cause Court, Agra, dated the 3rd August 1922.

Dr. *K. N. Katju*, for the Applicant.

Mr. *L. P. Zutshi*, for the Opposite Party.

JUDGMENT.—This is an application in revision by a firm styled the firm of Kidar Nath-Raj Narain from a decree of the Small Cause Court Judge of Agra, dismissing their claim for damages against the East Indian Railway Company.

The case for the plaintiff firm was that they bought some articles at Calcutta through their agent, who consigned three boxes to them at Agra. One of the boxes was lost in transit, and hence the claim for the price of the goods contained in that box. The defence of the Railway Company was that as the consignor had given a Risk Note they were not liable for the loss. It was further pleaded that the goods consigned to Agra were glass beads which came under the excepted articles, mentioned in the Second Schedule of the Railway Act under clause (*d*). The learned Judge of the Small Cause Court held that the lost goods fell under clause (*k*); and the consignor having chosen to give the Risk Note X, the Railway Company was not liable. The claim was accordingly dis-

missed. In revision the contention for the plaintiff firm is that the lost goods do not fall under clause (*k*) of the Second Schedule of the Railway Act. If they do not fall under the said clause, the giving of the Risk Note X by the consignor does not exonerate the Railway Company from liability. The clause (*k*) mentions the articles which are described as "excepted articles". They are pearls, jewellery and all articles made of glass, china or marble.

The lost goods, though described in the Risk Note given by th consignor as glass beads, are really what are called in the vernacular as *momi motis*, that is, wax pearls.

It is contended on behalf of the Railway Company that the wax pearls would not fall under clause (*d*) of the Second Schedule but they would come under clause (*k*) because the covering of the pearl is of thin glass. Some of the wax pearls were produced in the Court below and are on the record. On examining them it appears that the major portion of the constitution of the wax pearls is wax and there is only a thin covering of glass over the wax. I do not think that these wax pearls can properly be described as articles made of glass. In a similar case where the question was whether an article was of pure silk or manufactured silk, the Madras High Court held that where a manufactured article contained only 1-8th of the silk and 7-8th of cotton the article could not be said to be made of manufactured silk (*vide Saminadha Mudali* v. *South Indian Railway Company* (1). But it is, however, contended on behalf of the Railway Company, that as the consignor has given the Risk Note X, the Company is not liable. A perusal of the Risk Note X shows that it relates to the excepted articles mentioned in Sch. II of the Railways Act. If the article in respect of which the Risk Note X was given was not one of the excepted articles, the mere giving of the Risk Note X would not take away the liability of the Railway Company. I, therefore, hold that the Railway Company is liable for the price of the lost goods. The application is allowed. The decree of the Court below is set aside, and the claim of the plaintiff firm is decreed for Rs. 250. Costs in proportion to success and failure are allowed to parties.

Z. K. & N. H. *Application allowed.*

(1) 6 M. 420; 2 Ind. Dec. (N. S.) 572.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 35 OF 1922.
December 20, 1922.

Present:—Mr. Daniels, A. J. C., and Mr. Dalal, A. J. C.

Babu LAL BAHADUR—PLAINTIFF—APPELLANT

versus

PASPAT PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 2 (d), 28 (5)—Hindu joint family—Insolvency of member—Share of insolvent, whether vests in Receiver—Partition, Receiver, whether can sue for.

The definition of the word "property" in section 2 (*d*) of the Provincial Insolvency Act is not exhaustive. It was inserted to make it clear that certain kinds of propety which do not actually belong to the insolvent are to be treated as his property for the purposes of the Insolvency Act, *e. g.*, property over which he may have a power of appointment exercisable for his own benefit. [p. 302, col. 2.]

Under section 28 (5) of the Provincial Insolvency Act, the only property which is exempted from the scope of adjudication is property of the insolvent which is exempted in execution of a decree. [p. 302, col. 2.]

The right, title and interest of a Hindu co-sharer in joint family property may be attached and sold in execution of a decree obtained against him personally. [p. 302, col. 1.]

Deendyal Lal v. *Jugdeep Narain Singh*, 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.), followed.

Therefore, such right, title and interest is "property" of the insolvent which vests in the Receiver on insolvency, and the Receiver is entitled to sue for its partition. [p. 302, col. 2.]

Anant Singh v. *Kalka Singh*, 48 Ind. Cas. 526; 5 O. L. J. 665, dissented from.

Appeal from a decree of the Subordinate Judge, Gonda, dated the 24th March 1922.

Mr. *Haider Hussain*, for the Appellant.

Mr. *L. S. Misra*, for Respondent No. 6.

DEV CHAND CHATRAJI v. JAMSEDJI SHAHPURJI.

Mr. *Ram Prasad*, for Respondents Nos. 4 and 7.

Mr. *Hari Har Saran*, for Respondents Nos. 8 to 11.

JUDGMENT.—The plaintiff who is the central Nazir of the Court of the District Judge of Gonda has been appointed Receiver of the property of an insolvent, Paspat Prasad. The defendant, Paspat Prasad, is a member of a joint Hindu family and has a share in joint family property. With the permission of the District Judge the Receiver instituted the present suit in the Court of the Subordinate Judge of Gonda for partition of the share of the insolvent. This suit was dismissed on the ground that the undivided share of a co-parcener in joint Hindu family property was not property as defined in section 2 (*d*) of the Provincial Insolvency Act, 1920. The learned Judge relied on a decision of this Court reported as *Anant Singh* v. *Kalka Singh* (1). In that case the property was not alienable but the learned Judge who decided the case went further and held that a Receiver cannot be appointed in respect of an insolvent's undivided share in the property of the joint Hindu family of which he is a member. The remarks on the point in issue in the present appeal were *obiter* because the reported case could have been decided on the other point of inalienability of the property. Referring to the definition given in section 2 we find that the word used in defining the term property is "includes" and not "means" and, therefore, the definition is not exhaustive. The definition was inserted to make it clear that certain kinds of property which do not actually belong to the insolvent are to be treated as his property for the purposes of the Insolvency Act, *e.g.*, property over which he may have a power of appointment exercisable for his own benefit. As far back as 1877 it was held by the Privy Council that the right, title and interest of one co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally under the Mitakshara Law; *Deendyal Lal* v. *Jugdeep Narain Singh* (2). It is clear, therefore, that an undivided member has an interest in ancestral property and that would amount to "property" as defined in the Insolvency Act. Under section 28 (5) of the Act the only property which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of a decree. We have seen that a share in joint family property is not saved from such attachment and sale and is, therefore, not outside the jurisdiction of the Insolvency Court. We are of opinion, that Paspat Prasad's share in joint family property did vest in the Receiver who could, therefore, sue for its partition.

In the result, we set aside the decree of the lower Court and remand the suit to it under O. XLI, r. 23 Civil Procedure Code, for trial on the merits. Costs here and heretofore shall abide the result.

Z. K. *Cause remanded.*

(1) 48 Ind. Cas. 526; 5 O. L. J. 665.

(2) 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.).

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 281 OF 1922.

January 19, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

DEV CHAND CHATRAJI—PLAINTIFF—APPLICANT

versus

JAMSEDJI SHAHPURJI—DEFENDANT No. 1—OPPONENT.

Limitation Act (IX of 1908), ss. 19, 20, 21—Joint debt—Part payment recorded by one defendant and signed by other—Acknowledgment.

Where two persons are liable on a debt embodied in a *khata* and they make payments towards satisfaction of the debt, it is not necessary that both should make entries in the creditor's books. [p. 303, col. 2.]

If one of two joint contractors has done anything which starts a new period of limitation, then that new period starts only as against him, not as against his joint contractor. [p. 303, col. 2.]

In a suit for recovery of money due on an entry made in the plaintiff's book by both the defendants it appeared that part payments had been made,

which appeared in the handwriting of one of the defendants with the signature of the other added:

Held, that the payment clearly amounted to an acknowledgment that the liability was continuing and both the defendants were jointly liable [p. 303, col. 2.]

Application praying for the reversal of the decree passed by the First Class Sub-Judge, Surat, in Small Cause Suit No. 1331 of 1921.

Mr. *M. B. Dave*, for the Applicant.

Mr. *N. K. Mehta*, for the Opponent.

JUDGMENT.

Macleod, C. J.—One Sorabji Rustomji and Jamsedji Shahpurji signed an entry in the plaintiff's book to the effect that they had borrowed Rs. 599 which they promised to pay. Payments were made on account which appeared in the handwriting of Sorabji, with the signature of Jamsedji Shahpurji added. The plaintiff relied upon these entries as saving limitation under section 20 of the Limitation Act. The learned Judge held that the claim against Jamsedji, the 1st defendant in the suit, was time barred; and that, although he was present at the time when the payments were made, still as he had not himself written the fact that he made the payment the payment could be of no use against him as part payment in his own hand. If that view were correct then it would be, in my opinion, a very startling interpretation of the law. Where two persons are liable on a debt embodied in a *khata* and they make payments towards satisfaction of the debt, then it would be absurd to suppose that the law required that it would be necessary that both persons should make entries in the creditor's book. Section 20 of the Limitation Act prescribes that when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a new period of limitation shall be computed from the time when the payment was made; provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

By section 21 (2) nothing in sections 19 and 20 renders one of several joint contractors chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them. The effect of that is that if one of two joint contractors has done anything which starts a new period of limitation then that new period starts only as against him, not as against his joint contractor.

In this case, however, Jamsedji authorised the 2nd defendant to make payments towards the reduction of the joint debt, and signified that not only by being present when the payment was made but by signing underneath. In my opinion, that clearly amounted to an acknowledgment that the liability was continuing.

Section 19 provides for an acknowledgment in writing. Section 20 provides other means by which a debt can be kept alive. But those acts which are mentioned therein, which, if done by a debtor will start a fresh period of limitation, are acts which in effect constitute an acknowledgment of the liability.

I think, therefore, that the Rule must be made absolute and there must be a decree against the 1st defendant also with costs throughout.

Crump, J.—I agree. Upon the facts of this case I have no hesitation in holding that when defendant No. 2 paid the sum of Rs. 10 on Ashad Sud the 6th, he made that payment as the agent of defendant No. 1. That defendant No. 1 authorised him in that behalf is clear from the circumstances that he himself was present at the time and that he affixed his signature below that of Sorabji. It follows, therefore, that as regards defendant No. 1, there was a payment made by an agent duly authorised by him, and further that the fact of that payment appears in the handwriting of the person making it, that is to say the agent of defendant No. 1. Therefore, a fresh period of limitation starts as against defendant No. 1 as from that date. I find nothing in section 21, which has been invoked in argument, to militate against that view. I agree, therefore, with the order proposed.

K. S. D. *Rule made absolute.*

ABDUL HAKIM *v.* SAJJAD HUSSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 53 OF 1922.

December 22, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

ABDUL HAKIM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAJJAD HUSSAIN—DEFENDANT—RESPONDENT.

Mortgage—Redemption—Clog on equity of redemption—Long term—Onerous conditions.

A mortgagee cannot be allowed to fetter redemption by terms which are unreasonable or oppressive. An agreement made at the time of the mortgage between a mortgagor and the mortgagee cannot operate to make that mortgage irredeemable. Incidental to every mortgage is the right of the mortgagor to redeem it, which is called his equity of redemption. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage shall not be redeemable or that the right shall not be exercised except in a particular manner or under certain onerous conditions. If the conditions are one-sided and designed to thwart or defeat redemption, equity will interpose in favour of the mortgagor and relieve him of the oppressive conditions which unreasonably hinder redemption without interfering with what might really be due to the mortgagee on account of the principal and interest secured by the mortgage. [p. 306, col. 1.]

A long term may not by itself operate as a clog on the equity of redemption but where such a long term is accompanied, by other conditions, rendering redemption extremely difficult and onerous without any corresponding benefit to the mortgagor, the mortgagee cannot be allowed to take advantage of those conditions to defeat the right of redemption. [p. 307, col. 1.]

Each case must, however, be decided on its own facts and circumstances. There is nothing more dangerous and misleading than to apply the inferences to be drawn from one set of facts to the facts and circumstances proved elsewhere. [p. 307, col. 1.]

A mortgage was made for a period of 101 years and it was provided that the mortgagee would remain in possession for that period and enjoy the usufruct in satisfaction of interest agreed upon between the parties and that on the expiry of the said period the mortgagor would be entitled to obtain possession of the mortgaged property on payment of three times the principal money. There was a further provision that the mortgagor would not be entitled to a rendition of accounts or the re-payment of the surplus profits, if any, but that the mortgagee would be entitled to claim any deficit from the mortgagor. The net profits of the mortgaged property were estimated and found to be sufficient to pay the interest settled to be payable:

Held, that these covenants taken together operated as a clog on the equity of redemption and that the mortgagor was entitled to claim redemption before the period fixed in the mortgage. [p. 306, cols. 1 & 2.]

Durga Singh v. *Muhammad Raza Husain Khan*, 25 Ind. Cas. 912; 17 O. C. 313, *Mathura Prasad* v. *Harakh Narain*, 53 Ind. Cas. 770; 22 O. C. 191; 6 O. L. J. 474; 1 U. P. L. R. (O.) 88, *Ram Das* v. *Swami Dayal*, 57 Ind. Cas. 553; 23 O. C. 108, *Sohan Lal* v. *Kunwar*, 61 Ind. Cas. 962; 8 O. L. J. 136, *Sarabdawan Singh* v. *Bijai Singh*, 24 Ind. Cas. 705; 36 A. 551; 12 A. L. J. 927 and *Mohammad Sher Khan* v. *Raja Seth Swami Dayal*, 66 Ind. Cas. 853; 44 A. 185; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50 (P. C.), referred to.

Saheb Bakhsh Singh v. *Mohammad Ali Mohammad Khan*, 58 Ind. Cas. 115; 7 O. L. J. 389, *Zulfiqar Ali* v. *Suraj Prasad*, 68 Ind. Cas. 998; 9 O. L. J. 365; (1922) A. I. R. (O) 221 and *Genu Tukaram Tapkir* v. *Narayan Raghu Tamhane*, 59 Ind. Cas. 258; 45 B. 117; 22 Bom. L. R. 1147, distinguished from.

Appeal from a decree of the Third Additional District Judge, Lucknow, dated the 8th December 1921, upholding a decree of the Munsif, Ramsanehighat, dated the 11th August 1920.

Messrs. *Bisheshwar Nath Srivastava* and *Hyder Hussain*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemtion, and the question for considertion is whether the covenants contained in the deed of mortgage impose a clog on the equity of redemption and, so far as they impose such a clog, are legally enforceable. The mortgage was effected by Wazir Ali and certain other persons in favour of Madho Dayal in lieu of Rs. 8,304 on the 17th January 1882. The property mortgaged was an 18-rupees 10-annas share out of 72-rupees in the village Mitai. The mortgage was made for a period of 101 years, and it was provided that the mortgagee shall remain in possession for that period and enjoy the usufruct in staisfaction of interest at Rs. 8-8-0 per cent. per annum and that on the expiry of the said period the mortgagors would be entitled to obtain possession of the mortgaged property on payment of three times the principal money. There was a provision that the mortgagors shall not be entitled to a rendition of accounts or the re-payment of the

ABDUL HAKIM v. SAJJAD HUSSAIN.

surplus profits, if any, but the mortgagee would be entitled to claim any deficit, accruing on the mortgage, from the mortgagors. The net profits of the mortgaged property were then estimated at Rs. 707-8-0 and that amount was sufficient to pay the interest settled to be payable.

The plaintiffs are the representatives-in-interest of the mortgagors and seek to redeem a portion of the mortgaged property on payment of a proportionate part of the mortgage-money. Their allegation is that the covenant postponing redemption till the expiry of the period of 101 years and requiring the plaintiffs to pay three times the principal money secured by the mortgage at the time of redemption, along with certain other conditions, hindering the plaintiffs from claiming accounts or surplus profits, were entered to clog and fetter the equity of redemption and were not legally enforceable. They also state that the net profits of the mortgaged property have been more than sufficient to satisfy the principal and interest due on the mortgage and that a surplus of Rs. 13,665-5-0 was due to them.

The suit was filed in the Court of the Subordinate Judge of Bara Banki and was valued at Rs. 1,209-5-4, being a proportionate part of the mortgage-money payable by the plaintiffs. The learned Subordinate Judge found that the plaintiffs were not entitled to claim a rendition of accounts or surplus mesne profits. The suit was subsequently transferred by an order of the District Judge to the Court of the Munsif of Ramsanehighat and by an application made on the 15th July 1920 the plaintiffs reduced the valuation of the suit from Rs. 1,209-5-4 to Rs. 1,018-10-0 and contended themselves with pressing their claim for redemption on payment of any sum that might be found due to the defendant, who represented the interest of the mortgagee in the mortgaged property. In fact, the claim for surplus profits, originally laid in the plaint, was given up by the plaintiffs in the Court of the first instance and never re-asserted either in the Court below or in this Court.

The defendant pleaded that the intention of the original mortgagors and the mortgagee, Madho Dayal, was that the latter should purchase such portion of the village at the rate of 8½ per cent. per annum profits, then current for sales, as might be sufficient to pay the prior debts due by the former, that for fear of pre-emption the mortgagee agreed to take a mortgage for 101 years at the rate provided for the sale, and that the covenants contained in the deed of mortgage were not secured by undue influence and were valid and enforceable.

The learned Munsif who tried the suit came to the conclusion that the mortgage was taken in preference to a sale to avoid pre-emption and that no undue influence was exercised in obtaining the terms specified in the deed of mortgage. He accordingly held that the suit was premature and dismissed the claim. The lower Appellate Court upheld that decree.

The terms of the mortgage were clearly intended to impose obstacles in the way of redemption. It is not asserted that the mortgage was really intended to operate as a sale. On the other hand, a mortgage is said to have been preferred in order to obviate a claim for pre-emption, but certain terms and conditions were devised which were to render redemption difficult, if not practically impossible. In the first place, the mortgage provided for the payment of interest on the mortgage-money at the rate specified therein, but the mortgagors were deprived of the right to claim accounts or surplus mesne profits if the profits realised from the mortgaged property exceeded at any time the interest payable on the mortgage-money. On the other hand, the mortgagee was empowered to claim any deficit that might accrue and add the same to the mortgage-money at the time of redemption. In the second place, the mortgagee was to keep possession of the mortgaged property on terms, so advantageous to himself and disadvantageous to the mortgagors, for a period of 101 years. In the third place, he was to get in addition to his interest any excess profits, which he might be able to realize during the subsistence of the mortgage and three times the amount of the principal money, if redemption was claimed after the expiry of the above period. It is stated on behalf of the mortgagee that the market-value of the mortgaged property would still leave a consider-

able margin for the mortgagors to have redeemed the mortgage after the expiry of the above period in spite of the disadvantageous terms which were imposed by the mortgage, but at this distance of time it is not possible to say what the price would be in 1983.

A mortgagee cannot be allowed to fetter redemption by terms which are unreasonable or oprcssive. An agreement made at the time of the mortgage between a mortgagor and the mortgagee cannot operate to make that mortgage irredeemable. Incidental to every mortgage is the right of the mortgagor to redeem it, which is called his equity of redemption. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage shall not be redeemable or that the right shall not be exercised except in a particular manner or under certain onerous conditions. If the conditions are one-sided and designed to thwart or defeat redemption, equity will interpose in favour of the mortgagor and relieve him of the oppressive conditions which unreasonably hinder redemption without interfering with what might really be due to the mortgagee on account of the principal and interest secured by the mortgage. There could have been no object in fixing such a long term for redemption and requiring the mortgagors to pay three times the principal sum secured by the mortgage in addition to any deficiency in the interest, which was to be paid out of the profits, unless the intention was to hinder redemption by rendering the same extremely onerous to the mortgagors. A long term may not by itself operate as a clog on the equity of redemption, but where such a long term is accompanied by other conditions, such as exist in this case, rendering redemption extremely difficult and onerous without any corresponding benefit to the mortgagors, the mortgagee cannot be allowed to take advantage of those conditions to defeat the right of redemption. As observed in *Durga Singh* v. *Muhammad Raza Husain Khan* (1) a mortgagor cannot compel the mortgagee to accept payment of the mortgage-money before the date fixed for redemption where there is a covenant in the mortgage-deed that redemption shall not take place before that date, but where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may deem fit. In *Mathura Prasad* v. *Harakh Narain* (2) where a mortgage-deed provided that redemption shall take place after 90 years on payment of double the amount of the principal sum secured, it was held that the covenants taken together practically clogged the equity of redemption and could not be enforced except in so far as to allow the mortgagee reasonable interest to make up for the deficiency in the profits. In *Ram Das* v. *Swami Dayal* (3) a covenant precluding the mortgagor from redeeming the mortgage for a period of 70 years, where the profits from the mortgaged property were disproportionately large, was similarly held to be oppressive and unreasonable and to operate as a clog on the equity of redemption. In *Sohan Lal* v. *Kunwar* (4) and *Sarabdawan Singh* v. *Bijai Singh* (5) a covenant postponing redemption for a long term with a condition that the mortgagor would not be entitled to redeem out of the borrowed money was similarly held to be unenforceable. The decisions in *Saheb Bakhsh Singh* v. *Mohammad Ali Mohammad Khan* (6) and *Zulfiqar Ali* v. *Suraj Prasad* (7) do not help the defendants, because in the former case the mortgage was made for a period of thirty years and the interest secured exceeded the profits recoverable from the mortgaged property and in the latter case a long term was agreed upon in consideration of the

(1) 25 Ind. Cas. 912; 17 O. C. 313.

(2) 53 Ind. Cas. 770; 22 O. C. 191; 6 O. L. J. 474; 1 U. P. L. R. (O.) 88.
(3) 57 Ind. Cas. 553; 23 O. C. 108.
(4) 61 Ind. Cas. 962; 8 O. L. J. 136.
(5) 24 Ind. Cas. 705; 36 A. 551; 12 A. L. J. 927.
(6) 58 Ind. Cas. 115; 7 O. L. J. 389.
(7) 68 Ind. Cas. 998; 9 O. L. J. 365; (1922) A. I. R. (O.) 221.

mortgagee releasing a portion of the mortgaged property held by him under a prior mortgage and agreeing to make a further advance and to accept the profits of the remaining property towards the interest payable to him on the mortgage and the further advance he had undertaken to give.

A reference has also been made to the decision in *Genu Tukaram Tapkir* v. *Narayan Raghu Tamhane* (8) but in that case the mortgagee was allowed after the expiry of the stipulated term for payment to develop the mortgaged land by planting fruit-bearing trees thereon, in consideration of which he was to be allowed to remain in possession of the land so long as those trees continued to bear fruit, and that covenant was held to be fair and not inequitable. If the terms are inequitable and oppressive, that consideration does not arise and equity can step in to grant relief. The value of that decision is, moreover, somewhat discounted by the decision of their Lordships of the Privy Council in *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (9) as to the effect to be given to covenants restraining redemption after the mortgage-money has become payable. Each case has to be decided on its own facts and circumstances. There is nothing more dangerous and misleading than to apply the inferences to be drawn from one set of facts to the facts and circumstances proved elsewhere.

The mortgagee did not in the present instance like to take a sale, because he was afraid of a claim for pre-emption. He preferred to take a morgage but contrived to reduce the risk of losing the property by imposing oppressive and unreasonable fetters on the equity of redemption to render redemption practically impossible or difficult.

The learned Counsel for the defendant-respondent relies on section 16A of the Indian Contract Act (IX of 1872) and section 60 of the Transfer of Property Act (IV of 1882) in support of his contention that, so long as no undue influence is established, a contract is binding and a mortgage cannot be redeemed before the expiry of its term. But it is an essential ingredient of every mortgage, if it is a mortgage, that it should be redeemable, until the right of redemption is extinguished or lost in the manner provided by law, and any fetters intended to render redemption practically difficult or impossible cannot be recognised, unless there are circumstances indicating that they were intended to compensate for the advantages allowed to the mortgagor and were not unreasonable or oppressive.

The claim for surplus mesne profits has already been given up by the plaintiffs. The question of the amount of the mortgage-money, if any, payable by the plaintiffs, still requires to be determined.

The appeal is, therefore, allowed and the suit remanded to the Court of the first instance with direction to re-instate it under its original number and to dispose of it in the manner required by law. The costs here and hitherto will abide the event.

Z. K. *Appeal allowed.*

(8) 59 Ind. Cas. 258; 45 B. 117; 22 Bom. L. R. 1147.

(9) 66 Ind. Cas. 853; 44 A. 185; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50 (P. C.).

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 169 OF 1922.

April 9, 1923.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

MUL RAJ AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FAZL IMAM—PLAINTIFF—RESPONDENT.

Pleadings—Appeal, second—Transfer of Property Act (IV of 1882), s. 41, applicability of—Question of fact or law.

The question whether to a set of facts section 41 of the Transfer of Property Act applies or not is a question of law and not of fact, and can be raised in second appeal. [p. 309, col. 1.]

MUL RAJ *v.* FAZL IMAM.

Khwaja Muhammad Khan v. *Muhammad Ibrahim*, 26 A. 490; A. W. N. (1904) 99, followed.
Jamna Das v. *Uma Shanker*, 25 Ind. Cas. 158; 36 A. 308; 12 A. L. J. 411, distinguished.

First appeal from an order of the Additional District Judge, Saharanpur, dated the 16th of September 1922.

Mr. *Damodar Dass*, for the Appellants.

Mr. *S. A. Haider*, for the Respondent.

JUDGMENT.—The property in suit belonged originally to one *Musammat* Munir-un-nissa. She died apparently in the early nineties, leaving a son Habib Hasan and a daughter *Musammat* Roshni. The name of Habib Hasan alone was entered in the revenue papers on the death of *Musammat* Munir-un-nissa and Habib Hasan has remained in physical possession of the property ever since then. In 1896 he mortgaged this property to the father of Mulraj. That mortgage was paid off in due course. Habib Hasan made another mortgage in 1908 and a third mortgage in favour of Mulraj in 1911. Subsequently, Mulraj brought a suit on this mortgage and having got a decree for sale put the property up for sale and bought it himself. Thereupon, the suit out of which this appeal arises was brought by *Musammat* Roshni for a declaration that she was entitled as owner to one-third of the property in suit and asked for a declaration that the mortgage and the sale so far as her one-third share is concerned were inoperative. She pleaded that, as a matter of fact, she had been all along in possession through her brother but that if it be held that she was not in possession she asked for possession of her share. Various defences were raised by Mulraj but it is only necessary to consider the defence raised by him under section 41 of the Transfer of Property Act. The learned Munsif on the evidence of the parties came to the conclusion that Habib Hasan had been acting as ostensible owner of this property and that Mulraj was entitled to the benefit of section 41 of the Transfer of Property Act. He accordingly on this short point dismissed the suit. *Musammat* Roshni having died her heir appealed to the Court below and the learned District Judge of Saharanpur came to the conclusion that section 41 of the Transfer of Property Act did not apply. He held that, "the parties to the mortgage were residents of the same place (the town of Deoband) and the property in suit was also situated there. The defendant Mulraj admits that he took the mortgage without making any enquiry simply because Habib Hasan's name was recorded in the *khewat* and he had on a previous occasion mortgaged it to his father. He did not know how Habib Hasan had got that property and made no enquiry about it." Under these circumstances, the Court held that section 41 had no application. He, therefore, set aside the decree of the Court below and remanded the case for decision of the other points raised in the case. Mulraj appeals and urges that the question whether section 41 does or does not apply to the facts as found is a question of law and that, on the facts as found, the learned Judge was wrong in holding that section 41 did not apply. Mr. Haider very strenuously urges that a finding that section 41 of the Transfer of Property Act does not apply is a finding of fact which cannot be interfered with in second appeal and he lays stress on the case of *Jamna Das* v. *Uma Shanker* (1). In that case the lower Appellate Court held that section 41 did not apply. On second appeal to this Court a Single Judge of the Court held that section 41 of the Transfer of Property Act did apply. On the case being taken up in Letters Patent Appeal a Bench of this Court set aside that decision holding that, "whether Lal Muhammad was the ostensible owner of the property with the consent, express or implied, of the heirs of Muhammad Bakhsh, and the further question whether the plaintiff in that case *bona fide* took the transfer after taking reasonable care to ascertain the title of Lal Muhammad, were questions of fact to be decided by the lower Appellate Court" and held that "this Court is bound by the findings of fact of the lower Appellate Court in second appeal and cannot go behind them whether it

(1) 25 Ind. Cas. 158; 36 A. 308; 12 A. L. J. 411.

approves of that finding or not." If the learned Judges meant to hold that the question whether section 41 of the Transfer of Property Act applies to a given set of facts is a question of fact we cannot agree with them, but we do not think really that that is what they meant. We think that case really means this that, on the facts as found by the lower Appellate Court, which facts could not be questioned in second appeal, it was not open to this Court to say that section 41 applies. There are a number of cases to the contrary, for instance, the case relied upon by the Trial Court *viz.*, *Khwaja Muhammad Khan* v. *Muhammad Ibrahim* (2). Now, the facts in this case are not in dispute. Since the early nineties, Habib Hasan's name alone had been recorded as the owner of this property. He has been dealing with it as his own ever since. As long ago as 1896 Habib Hasan alone mortgaged this property to the father of the present mortgagee. That mortgage has been paid off. No one ever took any exception to that mortgage. Surely Mulraj was entitled to believe, under the circumstances, that that mortgage had been properly made by Habib Hasan. Twenty-one years afterwards Habib Hasan mortgages the same property to him. He satisfies himself that Habib Hasan's name is still in the *khewat* as the recognised owner of the property so far as Government is concerned. We fail to see what further enquiry Mulraj should have made. What was there to put him on to enquiry or to doubt the genuineness of the position Habib Hasan had ostensibly maintained for over 25 years. Under the circumstances, on the facts as found by the Courts below, we think as an inference of law that section 41 of the Transfer of Property Act applied and that on that ground the suit was rightly dismissed.

We, therefore, set aside the decree of the Court below and restore that of the Trial Court with costs, including in this Court fees on the higher scale.

N. H. *Decree set aside.*

(2) 26 A. 490; A. W. N. (1904) 99.

MADRAS HIGH COURT.

CIVIL APPEAL No. 251 OF 1920.

December 22, 1922.

Present :—Mr. Justice Krishnan and Mr. Justice Ramesam.

PUPPOOTH *alias* KOMAUCHERI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VAYISRAVANATH MANAKKAL RAMAN SOMAYAJIPAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 2, 4—Specific Relief Act (I of 1877), s. 42—Minor—Suit brought without next friend—Procedure—Guardian ad litem—*Certificated guardian not appointed—Failure to record reasons—Irregularity—Appointment of guardian* ad litem *procured by fraud, effect of—Guardian, whether can bind minor by onerous covenants—Mortgage by guardian held valid in part—Declaration, suit for, whether lies—Redemption—Construction of document.*

O. XXXII, r. 2 of the Code of Civil Procedure is applicable only where, on the face of a plaint, the plaintiff appears to be a minor. [p. 312, col. 2.]

Beni Ram v. *Ram Lal*, 13 C. 189; 6 Ind. Dec. (N. S.) 625, **followed.**

If on an issue raised and tried in a case the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint. [p. 313, col. 2.]

Sankaran Nambi v. *Devaki Antherjenam*, 73 Ind. Cas. 491; (1922) M. W. N. 428; 16 L. W. 26; (1922) A. I. R. (M) 259; 43 M. L. J. 572, **referred to.**

But if before the Court decides the point, the plaintiff becomes a major, he may elect to drop the suit as not properly instituted or affirm the previous proceedings and continue the suit. [p. 313, col. 1.]

Where in a suit the defendant raised the objection that on the date of suit, the plaintiff was a minor and the suit was brought without a next friend was unsustainable but before the Court decided the point, the plaintiff admittedly became a major:

Held, **that the objection that the suit was originally by a minor could no longer be urged and the suit was not liable to be dismissed. [p. 313, col. 1.]**

The mere failure by a Court to record reasons under O. XXXII, r. 4 (2) of the Civil Procedure Code for appointing a guardian of a minor defendant in supersession of the legal guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. [p. 313, col. 2.]

Sridhar Rao v. *Ram Lal*, 1 Ind. Cas. 555; 31 A. 7; A. W. N. (1908) 251; 5 A. L. J. 633, **relied on.**

Bhimaji v. *Rajabhai Hussain Sahib*, 59 Ind. Cas. 842; 43 M. 808; 12 L. W. 114; 39 M. L. J. 239; 28 M. L. T. 295, **distinguished.**

PUPPOOTH v. VAYISRAVANATH MANAKKAL RAMAN SOMAYAJIPAD.

Where the appointment of a Court Officer as guardian for a minor defendant was procured by means of an affidavit which falsely stated that there was no other next of kin for the minor except his father who was unwilling to act and whose interests in the suit were adverse to those of the minor:

Held, that the appointment was vitiated by fraud and was of no legal effect and the case must be treated as having been proceeded with without a legally appointed guardian, and that the decree in the case and a subsequent Court-sale in execution of the decree were not valid and binding on the minor. [p. 314, col. 1.]

Bhagwan Dayal v. *Param Sukh Dass*, 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179, followed.

A guardian has no power to enter into engagements on behalf of his minor ward making him liable under onerous covenants. [p. 314, col. 1.]

Indur Chunder Singh v. *Radhakishore Ghose*, 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N. S.) 782 (P.C.), *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, 13 Ind. Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1922) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 39 I. A. 1 (P. C.), *Waghela Rajsanji* v. *Shekh Masludin*, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.) and *Chodavarapu Narayana Row* v. *Chennuru Venkatasubba Row*, 55 Ind. Cas. 377; 38 M. L. J. 77; (1920) M. W. N. 129 27 M. L. T. 264, relied on.

The action of a *de facto* guardian can be binding on a minor's property only if it is for the minor's benefit or necessity. [p. 314, col. 2.]

Where a guardian executed a usufructuary mortgage of certain properties of a minor, and took them back on lease on onerous conditions, the mortgage and lease together forming parts of one and the same transaction, and the lease was held to be not binding on the minor, but the mortgage was held to be valid in part:

Held, (1) that the minor was not entitled to bring a suit for a mere declaration as to the invalidity of the lease and mortgage since it was open to him to claim further relief by way of redemption of the mortgage to the extent it was valid; [p. 314, col. 2.]

(2) that the plaintiff may be permitted even in appeal to amend the plaint by adding a prayer as to redemption on paying the necessary Court-fees on the plaint and memorandum of appeal. [p. 315, col. 1.]

Navunni v. *Ramasawmy Patter*, 52 Ind. Cas. 738; 10 L. W. 169, relied on.

Where a deed of mortgage provided that if the mortgagee wanted payment he must give notice to be paid on the day after "*Ucharal*" or the beginning of the cultivation season in any year and not at other times:

Held, that the covenant was not mutual and the mortgagor's right to redeem at any time was not affected by the covenant. [p. 314, col 2.]

Navunni v. *Ramasowmy Patter*, 52 Ind. Cas. 738; 10 L. W. 169, distinguished.

Appeal against a decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Original Suit No. 30 of 1919.

Messrs. *T. R. Ramachandra Iyer* and *A. S. Venku Iyer*, for the Appellants.—The plaintiff's suit is to declare that a mortgage and a lease executed by his guardian are not binding upon him and that a prior decree obtained against him and the Court-sale held in execution thereof, were invalid as he was not properly represented in the prior suit. The lower Court has dismissed the suit on several grounds. It held that the plaintiff was a minor on the date of the suit, that the suit was not maintainable, that the mortgage and the lease were binding on the minor, that the minor was properly represented in the prior suit, and that the Court-sale was good and binding.

The plaintiff was aged more than 18 at the date of suit but had attained 21 years of age by the time the decree was passed. No guardian had been validly appointed under the Guardians and Wards Act. The age of majority was therefore 18 and not 21. Plaintiff was thus a major on the date of suit. But assuming the age of majority was 21, he had become a major by the time the issue was decided. A suit by a minor plaintiff without a next friend cannot be dismissed. See *Beni Ram* v. *Ram Lal* (1).

The Court could only give time for a proper guardian to come on record and continue proceedings. *Sankaran Nambi* v. *Devaki Antherjenam* (2).

If he becomes a major meanwhile, he can either withdraw the suit or affirm and ratify proceedings. The Judge's finding that the suit was not maintainable is clearly wrong.

Secondly: The guardian mortgaged the properties usufructuarily and took a lease from the mortgagee on very high and onerous terms. Rent was allowed to fall in arrears and the mortgagee sued for rent and himself purchased the mortgaged property in auction. The minor defendant was represented by a Court guardian.

The father had been formerly appointed guardian under the Guardians and Wards Act. The legal guardian could not be

(1) 13 C. 189; 6 Ind. Dec. (N. S.) 625.

(2) 73 Ind. Cas. 491; (1922) M. W. N. 428; 16 L. W. 26; (1922) A. I. R. (M) 259; 43 M. L. J. 572.

PUPPOOTH *v.* VAYISRAVANATH MANAKKAL RAMAN SOMAYAJIPAD.

superseded by a Court Officer, without reasons being recorded in writing as required by O. XXXII, r. 4, Civil Procedure Code. No reasons were admittedly recorded in the present case. The appointment of the guardian was hence illegal.

Again, the appointment itself was procured by a false affidavit which stated there was no next of kin except the father. The maternal uncle was admittedly alive.

The minor must be deemed to have been unrepresented. The money-decree and the sale were void and not binding on the minor. See *Bhagwan Dayal* v. *Param Sukh Dass* (3).

Further, the Court-sale was invalid in that, the plaint claim which was for rent arose out of the mortgage and the mortgagee who was the plaintiff was not entitled to bring the mortgaged properties to sale except by instituting a suit on the mortgage itself (O. XXXIV, r. 14).

Again, the usufructuary mortgage was not binding except to the extent of the amount of the prior mortgage and the decree amount. The lease imposed onerous obligations on the minor. The father was not the legal guardian. The powers of a *de facto* guardian are limited in scope. There was no necessity or benefit for the mortgage. There was no pressure from creditors. The mortgage and lease were improvident, containing onerous covenants on the minor. The mortgage and the lease were clearly beyond the powers of the guardian and are not binding.

Kakumanu Venkatasuryanarayana v. *Akuthala Ramayya* (4), *Batchu Ramajogayya* v. *Vajjula Jagannadham* (5). See *Chodavarapu Narayana Row* v. *Chennuru Venkatasubba Row* (6), *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (7); *Indur Chunder Singh* v. *Radhakishore Ghose* (8), *Wa* *Rajsanji* v. *Sheikh Masludin* (9).

Mr. *C. V. Anantha Krishna Iyer* (with him Mr. *Kutti Krishna Menon*), for the Respondent:—The omission to record reasons for appointing a Court guardian is at best only an irregularity and does not affect the validity of the decree or of the Court-sale. *Sridhar Rao* v. *Ram Lal* (10).

The affidavit was neither false nor deliberately misleading. The father had been appointed guardian under the Guardian and Wards Act and when he refused the Court guardian had to be proposed. It

The maternal uncle had been found unfit in the guardianship proceedings. He was further on terms of enmity with the minor. The minor had been adopted away into another family and there was, therefore, no legal relationship. The maternal uncle was hence neither a suitable nor a proper guardian and it was not irregular to have omitted to mention his name.

There was no fraud or suppression of facts. The fact that a better or a more suitable person would have been appointed is not sufficient. The Court guardian acted fairly and honestly and the decree is binding. *Dammar Singh* v. *Pirbhu Singh* (11) and *Maruthamalai Gownden* v. *Palani Gownden* (12).

Again, the mortgage and lease were clearly for the benefit of the minor. There was an outstanding prior mortgage and there was also the decree-debt. To that extent at least the mortgage was good.

The present suit for a bare declaration as to invalidity of the mortgage and lease without a prayer for redemption is unsustainable.

Mr. *T. R. Ramachandra Iyer*.—If necessary, the plaint may be allowed to be amended by the inclusion of a prayer for redemption.

(3) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.

(4) 62 Ind. Cas. 802; 40 M. L. J. 153 at pp. 156, 157; (1921) M. W. N. 100; 29 M. L. T. 114; 13 L. W. 551.

(5) 49 Ind. Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.).

(6) 55 Ind. Cas. 377; 38 M. L. J. 77; (1920) M. W. N. 129; 27 M. L. T. 264.

(7) 13 Ind. Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 39 I. A. 1 (P. C.).

(8) 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N. S.) 782 (P. C.).

(9) 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.).

(10) 1 Ind. Cas. 555; 31 A. 7; A. W. N. (1908) 251; 5 A. L. J. 633.

(11) 29 A. 290; 4 A. L. J. 155; A. W. N. (1907) 70.

(12) 16 Ind. Cas. 182; 37 M. 535.

JUDGMENT.—This is an appeal against the decree of the Subordinate Judge of Calicut in Original Suit No. 30 of 1919 on his file dismissing the plaintiff's suit and the plaintiff is the appellant before us.

Plaintiff became the sole surviving member of his Kommancheri Tarwad on the death of his mother and sister in March 1907; and he was then solely entitled to the Tarwad properties. He was at the time a minor of eight years of age and his father, the second defendant, who had previously managed the affairs of his Tarwad as his mother's agent, continued in the management of his affairs as his *de facto* guardian. Being a member of a Marumakkatayam Tarwad, his father was not his legal guardian. At that time there was a mortgage-debt on the Tarwad lands in favour of one Bhattathiripad, of Rs. 9,000 which was admittedly binding. To pay off this debt and to meet other alleged necessities, the father acting as plaintiff's guardian borrowed in March 1908, a sum of Rs. 12,000 from the first defendant and executed a usufructuary mortgage to him, copy Exhibit A. Two days afterwards he also executed a Verumpattom chit or lease for himself and as plaintiff's guardian and took back the properties on lease; see copy Exhibit G. Under this arrangement plaintiff was newly made liable with his father to pay a rent of Rs. 1,200 a year. Such an obligation did not exist under the Bhattathiripad's mortgage. The rent was allowed to fall into arrears by the second defendant and he executed a pro-note, copy Exhibit I, for Rs. 3,692-12-11 to the first defendant, again acting for himself and as guardian of his son. The first defendant brought Original Suit No. 37 of 1915 on this note and got a decree against both the father and the son. In this suit the Head Clerk of the Court was appointed as the plaintiff's guardian. Subsequently, the first defendant attached the properties mortgaged to him subject to his own mortgage and got them sold and purchased them himself in Court auction.

Plaintiff brings this suit as a major and prays that the mortgage Exhibit, A, may be declared invalid to the extent of Rs. 2,200 and odd as not being supported by proper consideration except as to the amount due under the prior mortgage which had been paid off. He also prays for a delcaration that the lease Exhibit, G, is not binding on him at all, as it is not for his benefit or necessity but, on the other hand, it imposed on him an onerous liability to pay Rs. 1,200 a year as rent. He states that the decree, Exhibit IX, was obtained by fraud, that he was not represented in it by a proper guardian and that the Court guardian appointed for him acted with gross negligence in the conduct of the case and he, therefore, claims that it is not binding on him; and he further prays that the sale held in execution of that decree may be set aside as invalid.

The first point taken against the plaintiff in the lower Court was that at the date of suit he was a minor and the suit as brought without a next friend was unsustainable and must be dismissed. Plaintiff was over 18 years of age but below 21 when the suit was filed and the question whether he was a major or not turns on whether a guardian had been appointed for him under the Guardians and Wards Act. It is not very clear on the evidence whether such an appointment had been made. An application had been filed under the Act by plaintiff's uncle P. W. No. 2, and the District Judge had passed an order that the plaintiff's father, the second defendant, would be appointed guardian of the plaintiff's person and property on his furnishing security. Though security was tendered, no steps were taken by the Court to test it or get a proper security executed and no formal order of appointment was drawn up. Nevertheless, in several subsequent Court proceedings the second defendant was treated as a properly appointed guardian for the plaintiff; and it was also held that his age of majority had been extended to 21 in consequence, it is not, however, necessary to decide the point definitely, for even assuming that the 21 years' rule applied and the plaintiff was a minor at the date of suit he became a major when the suit was pending in the lower Court and is now a major; and he has before us through his learned Vakil agreed to be bound by all the proceedings that have taken place in the lower Court. O. XXXII, r. 2 of the Civil Procedure Code is applicable only when, on the face of the plaint, the plaintiff appears to be a minor; see *Beni Ram* v. *Ram Lal* (1). That case was decided under

the old Code but the new Code makes no change on the point. If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. *Beni Ram* v. *Ram Lal* (1) is an authority for this position also. In the present case before the Court decided that the plaintiff was a minor, he had become a major and there was no necessity thereafter to have a next friend for him. Plaintiff may, no doubt, have elected to drop the present suit as not properly instituted but he was not bound to do so; he could affirm the previous proceedings and continue the suit. That is the principle embodied in O. XXXII, r. 12. A somewhat similar case was considered [*Sankaran Nambi* v. *Devaki Antherjenam* (2)] and it was ruled there that when a next friend has been appointed, the objection that the suit was originally by a minor without a next friend can no longer be urged.

The next point for consideration is, whether the Court-sale was valid, for if it was, the property has passed to the first defendant and the plaintiff has no more interest in it and cannot maintain this suit. The purchaser in Court-auction was the decree-holder himself and not any third party and we have not, therefore, to consider any rights or equities of *bona fide* purchasers in Court-auction. The validity of the sale in this case thus depends on the question whether the decree, Exhibit IX, was binding on the plaintiff or not. The plaintiff contends that the appointment of a Court guardian for him was null and void as it was obtained by the first defendant by means of a false affidavit and that the second defendant being a guardian appointed under the Guardians and Wards Act there was no reason and none is recorded why he should not have been appointed; and further that the Court guardian was guilty of gross negligence. It will lead to a clearness to consider these points separately.

Taking the second point first, it wil lbe observed that the second defendant was proposed by the first defendant as plaintiff's guardian *ad litem* in the first instance. Four notices were taken out to him; the last of them, Exhibit XIII (*c*), was tendered to him personally but he refused to receive it and sign the copy and it was thereupon affixed to his door. That was rightly accepted as good service by the Court under O. V, rr. 16 and 17. The way in which he behaved when the notice was tendered to him showed clearly that he was not willing to act as guardian and the petition to appoint him guardian was, therefore, dismissed. The reasons, no doubt, are not stated in the order but it is apparent what they were. Considering that he was the person who had executed the promissory-note on which the suit was brought against the minor he would have been an unsustainable guardian in any event as his interests would clash with the minor's interests. It was, however, argued that as he was a guardian appointed by a competent authority under the Guardians and Wards Act, the Court acted improperly in superseding him and appointing a Court guardian without recodrding proper reasons under O. XXXII, r. 4, clause (2). Now in the first place as I have already said it is not very clear that he was so appointed, plaintiff's own case being that he was not so appointed. But if we take it that he had been so appointed the failure to record reasons under r. 4, clause (2) is only an irregualrity in my opinion and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. The Allahabad High Court has held that the absence of a formal order removing the certificated guardian will not vitiate proceedings if another next friend is allowed to sue and the suit will not be defeated solely upon the ground that no formal permission had been granted. See *Sridhar Rao* v. *Ram Lal* (10). The case in *Bhimaji* v. *Rajabhai Hussain Sahib* (13) is easily distinguishable as there was no attempt at all made there to have the certificated guardian appointed as guardian *ad litem* as here.

But the more serious objection to the appointment of the Court guardian is, that his appointment was procured by means of a false affidavit. The affidavit filed on first defendant's behalf by his brother, D. W. No.

(13) 59 Ind. Cas. 842; 43 M. 808; 12 L. W. 114; 39 M. L. J 239; 28 M. L. T. 295.

5, Exhibit X (*a*), contains a statement that besides the second defendant plaintiff had no next of kin. This statement is false as there was at least one person known to first defendant and his brother, namely, plaintiff's maternal uncle Ravunni Nair, P. W. No. 2, who though he belonged to a different Tarwad as plaintiff's mother had been adopted from his Tarwad to plaintiff's Komancheri Tarwad, was certainly plaintiff's next of kin just like his father, yet this information was suppressed. The only explanation D. W. No. 5 gave for his action in cross-examination is that Ravunni Nair was "not proposed as guardian because the Court held that the second defendant was the proper person to act as guardian;" this apparently refers to Exhibit F. The explanation, however, is worthless and we must hold that the first defendant was guilty of fraud in law in making a false statement and thereby getting a Court Officer appointed as guardian. The appointment is thus vitiated by fraud and is of no legal effect. This brings the case within the principle of the ruling in Privy Council in *Bhagwan Daval* v. *Param Sukh Dass* (3) for here as there the case must be treated as having been proceeded with without a legally appointed guardian *ad litem*. The decree and the subsequent sale are, therefore, not binding on the plaintiff.

It was also urged that, even if we take it that the appointment of the Court guardian was regular and proper one, the decree and sale should still be set aside because there was gross negligence on his part in the conduct of the case. It is not necessary, to consider this point as I have already held that the decree against the plaintiff and the sale must be set aside, on another ground.

Plaintiff has also asked for declaration that the lease is not binding on him and that the mortgage is invalid to a certain extent. Now, clearly, the lease which imposes an onerous obligation on a minor to pay a rent of Rs. 1,200 a year is not binding on the plaintiff. A guardian has no power to enter into engagements on behalf of his minor ward making him liable under such onerous covenants. See *Indur Chundar Singh* v. *Radhakishore Ghose* (8), *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (7), *Waghela Rajsanji* v. *Shekh Masludin* (9) and *Chodavarapu Narayana Row* v. *Chennuru Venkatasubba Row* (6). It was, however, argued that the lease and the mortgage were one and the same transaction and that, as the creditor the first defendant was not prepared to lend except on condition that such a lease should be taken, it was justified by necessity in the same manner as the mortgage. This argument cannot be supported for even if the two be parts of the same transaction, there is no proof that there was any necessity to borrow at all. There was no pressure from the previous mortgagee. The action of a *de facto* guardian, as second defendant was, will be binding on the minor's property only if it is for the minor's benefit or necessity. That is not proved in this case and the lease, so far as the plaintiff is included in it, is, therefore, not valid.

As regards the mortgage the plaintiff has conceded in this Court that it is valid not only to the extent of Bhattachiripad's mortgage paid off but also to the extent of the decree-debt in Original Suit No. 364 of 1905 and for the amount due to Unnith Amma, *i.e.*, in all for about Rs. 11,000, the objection being confined to about Rs. 1,000 not properly accounted for. There is, however, a preliminary difficulty in plaintiff's way in getting any declaration as regards the lease and the mortgage inasmuch as no declaration can be given to him under section 42 of the Specific Relief Act if he can claim further relief. In this case, on my view, it is clearly open to him to redeem the mortgage to the first defendant or such portion of it as is valid. The Subordinate Judge holds that plaintiff is entitled to redeem without a demand for payment by the first defendant and cites *Navunni* v. *Ramasawmy Patter* (14) in support of his view that section 42 will not apply in such circumstances. But this view is based on a misreading of the covenant in Exhibit A. That only provides that if the mortgagee wants payment he must give notice to be paid on the day after "Ucharal" or the beginning of the cultivation season in any year and not at other times. This provision does not affect the mortgagor's right to redeem at any time he likes. The covenant is not mutual

(14) 52 Ind. Cas. 738; 10 L. W. 169.

by its wording. As the mortgage and the lease are clearly parts of one and the same transaction, no declaration can be given regarding either without the plaintiff suing to redeem. The case cited in *Navunni* v. *Ramasawmy Patter* (14) itself recognises this position. Plaintiff's Vakil then asks that his client may be permitted to amend his plaint by adding a prayer for redemption and paying the necessary Court-fees on the plaint and memorandum of appeal. This is rightly not opposed by the first defendant's Vakil and may, I think, be granted. Plaintiff is allowed to amend his plaint and pay the necessary Court-fees for it and for the appeal in this Court in two weeks from this date. The appeal is adjourned for the purpose.

JUDGMENT.—Further Court-fee has now been paid and the plaint amended to convert the suit into one for redemption. The objection as to non-maintainability of the suit for a mere declaration thus ceases. As the result of the amendment, the case must be sent back to the lower Court for fresh disposal as a suit for redemption subject to the rulings we have given on the points already dealt with. The respondent will be allowed to file a supplemental written statement on the amended plaint and the case will be disposed of according to law.

Each party will bear costs up to the date except as to the Court-fees now paid by the appellant which would be disposed of by the lower Court in its final order.

V. N. V. *Appeal adjourned.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1441 OF 1921.
March 23, 1923.
Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

SITA RAM TEWARI—DEFENDANT—APPELLANT
versus
FOUJDAR RAI—PLAINTIFF—RESPONDENT.

Wajib-ul-arz, *construction of—Record of custom—Contractual matters, record of, effect of—Presumption—Partition—Record of Rights, preparation of—Collector, duty of.*

Where a *wajib-ul-arz* which is relied upon for the purpose of showing a custom, contains a number of extraneous matters some of which could only have relation to a contract entered into between the parties and which could not possibly be based upon custom, it ought to be taken that the whole *wajib-ul-arz* is not properly a record of custom. [p. 316, col. 1.]

Surajbali Singh v. *Mohammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J. 879, followed.

When partition is made, it is the duty of the Collector or Assistant Collector to prepare a fresh Record of Rights. [p. 315, col. 2.]

Dalganjan Singh v. *Kalka Singh*, 22 A. 1; A. W. N. (1899) 111; 9 Ind. Dec. (N. S.) 1035 (F. B.), followed.

Second appeal against a decree of the District Judge, Ghazipur, dated the 30th June 1921.

Mr. *U. S. Bajpai*, for the Appellant.
Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—The question raised in this second appeal is whether the custom of pre-emption upon which the plaintiff relied was proved.

The only document put forward in proof of this custom was a *wajib-ul-arz* which was prepared in the year 1909 after a partition had taken place in the village. It seems to be the case that when partition is made it is the duty of the Collector or Assistant Collector to prepare a fresh Record of Rights. This, as is pointed by the learned Counsel for the respondent, was laid down in the case reported as *Dalganjan Singh* v. *Kalka Singh* (1).

We take it, therefore, that this *wajib-ul-arz* prepared in the year 1909 can be looked at for the purpose of ascertaining whether it records a custom.

The argument on behalf of the defendant-appellant is that on the language of this document the Courts ought not to hold that there is a record of custom but merely a record of contract and in this connection reference is made to what was laid down in the case reported as *Surajbali Singh* v. *Mohammad Nasir* (2).

There can, we think, be no doubt that if the principles laid down in this case are to be followed then we ought certainly

(1) 22 A. 1; A. W. N. (1899) 111; 9 Ind. Dec. (N. S.) 1035 (F. B.)
(2) 48 Ind. Cas. 220; 16 A. L. J. 879.

to hold that his document now before us is not a record of custom. In that case it was pointed out that where the record which is relied upon for the purpose of showing custom, contains a number of extraneous matters some of which could only have relation to a contract entered into between the parties and which could not possibly be based upon custom then it ought to be taken that the whole *wajib-ul-arz* is not properly a record of custom at all. We have followed this case in many other cases recently decided.

Turning to the document now before us we find that Chapter II of this *wajib-ul-arz* is headed as follows:—

"*Hissadaran ke apas ke huquq ya jo rasm muahida khass par mabni hon.*"

The 16th paragraph of this Chapter relates to pre-emption. It also deals with other matters including the procedure to be observed when mortgages are to be redeemed and it distinctly gives a right to a co-sharer to redeem a mortgage made by another co-sharer who is unwilling or unable to ask for redemption at the time when redemption becomes due. It is set out there that another co-sharer may redeem and hold the property under charge until it is redeemed by the co-sharer who made the mortgage.

We cannot in principle distinguish this case from the case to which we have referred, *viz., Surajbali Singh* v. *Mohammad Nasir* (2) and we consequently hold that the record relied on in this case is not a record of custom. It has been argued before us that this point cannot be debated in second appeal inasmuch as the question was not raised before the learned Judge of the lower Appellate Court. In the grounds of appeal which were taken in that Court the first ground was that the custom of pre-emption on the basis whereof the plaintiff sues is not proved from any reasonable evidence. The judgment of the learned Judge seems to indicate, however, that this point was not debated before him and his judgment shows that the only point which was argued before him was with regard to the interpretation of the preferential right of the co-sharers *inter se*. Be that as it may, it seems to us that the defendant-appellant is not precluded from asking us to hold on the basis of the decisions of the Pre-emption Bench that the language of this document does not show that what was recorded was a true record of custom. We, therefore, allow the appeal, set aside the decree of the Court below and direct that the claim of the paintiff be dismissed. The defendant-appellant will be entitled to his costs in all three Courts including fees in this Court on the higher scale.

M. A. A. *Appeal allowed.*
N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 100 OF 1922.
December 13, 1922.

Present:—Mr. Daniels, A. J. C.

Syed MOHAMMAD JAFAR, DEAD, AND ON HIS DEATH *Musammat* ABIDA BEGAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM CHARAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pro-note, suit on—Pro-note executed in renewal of prior pro-note—Consideration—Forbearance to sue.

Defendant executed a pro-note in favour of one *K*. After the latter's death the defendant renewed the pro-note in favour of one *R*, who was not entitled to sue on the old pro-note, at the request of the plaintiff who was entitled to sue on it. *R*, subsequently assigned the renewed pro-note in favour of the plaintiff who sued on it. Defendant objected that the renewel in favour of *R* was without consideration as the latter was not entitled to sue on the old pro-note;

Held, that the renewal having been made at the request of the plaintiff, who was entitled to sue on the old pro-note, the forbearance of the plaintiff to sue on the old pro-note was sufficient consideration for the renewed pro-note. [p. 317, col. 1.]

Second appeal from a decree of the Subordinate Judge, Unao, dated the 31st December 1921, upholding that of the Munsif, Safipur, Unao, dated the 2nd May 1921.

Mr. *H. K. Ghosh*, for the Appellants.
Mr. *Ram Chandra*, for the Respondents.

JUDGMENT.—This was a suit on a pro-note. The defendant seeks to escape liability on what the Court below describes as a technical and not altogether honest plea. The pro-note was executed by the original defendant, Syed Mohammad Jafar, who has died during the pendency of this appeal, in favour of *Musammat* Suraj Kuar, wife of the second plaintiff, Raghubar Dayal, on 8th December 1917. It was in renewel of a pro-note previously executed by the defendant in favour of Raghubar Dayal's uncle Kanhai on 16th December 1914.

It was executed just before limitation on the earlier pro-note expired. Kanhai had died childless and had made a Will in favour of *Musammat* Suraj Kuar. It has been found that Kanhai was a member of a joint family with the plaintiffs so that the Will was not really valid. It appears, however, that the plaintiffs did not wish to dispute it, for it has been found that it was at the request of the second plaintiff that the pro-note was renewed in favour of *Musammat* Suraj Kuar.

Musammat Suraj Kuar subsequently transferred her interest in the pro-note to the plaintiffs who were the persons really entitled to recover the debt due to Kanhai. The defendant's case is that the renewal was without consideration as *Musammat* Suraj Kuar had no title to and could not have enforced the original pro-note in favour of Kanhai. Both the Courts below have found in favour of the plaintiffs. The lower Appellate Court rests its decision on certain sections of the Negotiable Instruments Act which do not appear to apply. It appears to me, however, that the decree can be supported on other grounds. The defendant wishes the Court to look at the question of consideration entirely from the point of view of *Musammat* Suraj Kaur and the plaintiffs as her transferees. The real question is whether the defendant himself received any consideration for renewal of the pro-note. It appears clear to me that he did. It is true that *Musammat* Suraj Kuar could not have sued on the original pro-note against him but the plaintiffs could have done so and it was at the second plaintiff's request that the pro-note was renewed in her favour instead of in the name of the plaintiffs. The plaintiffs' forbearance to sue on the original instrument is sufficient consideration for the renewal. On these grounds, I hold that the decree of the Courts below is correct and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 19 OF 1922.

February 9, 1923.

Present:—Mr. Halifax, A. J. C.

SHEONARAYAN—DEFENDANT—APPELLANT

versus

RAMPRASAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 153, O. VI, r. 17—Limitation Act (IX of 1908), s. 14—Amendment of plaint—Discretion of Court—Amendment, effect, of—Exclusion of time spent in previous suit—Same cause of action—Good faith.

An amendment of a plaint relates back to the date of the original institution of the suit provided there was nothing illegal about it. [p. 319 col. 1.]

Section 153 and O. VI, r. 17 of the Civil Procedure Code do not put any express restriction on the discretion of the Court to allow an amendment altering the entire character of the suit. [p. 312, col. 1.]

The plaintiff brought a suit in Court A on an account alleged to have been taken respecting a dissolved parternership between himself and the defendant. After inquiry the Court held that no such account had ever been taken. Instead of dismissing the suit, however, it returned the plaint, to enable the plaintiff, after amending the suit into one for taking an account of the dissolved partnership, to present the plaint in Court B, which alone was competent to try a suit of that description. The plaintiff, however, presented the plaint in Court B without any amendment, with the result that it was again returned, the Court holding that on the face of it, the suit was triable by Court A. The plaint was now presented back in Court A, which again returned it for proper presentation, after allowing it to be amended into a suit for an account and a share of the dissolved partnership. The plaint as amended was now finaly presented in Court B, but by this time the suit was time-barred, and the Court dismissed it after holding that the delay could not be condoned under section 14 of the Limitation Act. On appeal:

Held, (1) that in granting the amendment, the Court A exercised its discretion in a judicial

SHEGNARAYAN *v.* RAMPRASAD.

manner and that, as an amendment relates back to the time of the institution of the suit, the suit ultimately instituted in Court B was, for the purpose of section 14 of the Limitation Act, not only to be considered to be founded on the same cause of action as the suit at first instituted in Court A, but was in fact the same suit; [p. 319, col. 1.]

(2) that, however, as the plaintiff deliberately left the plaint unamended for a long time after the decision in Court A as to no account having been taken of the dissolved partnership, it could not be said that he was prosecuting the suit in "good faith" to enable him to take advantage of that section, and that the suit was rightly dismissed. [p. 319, col. 2.]

Appeal against an order of the District Judge, Bhandara, dated the 29th June 1922, in Civil Appeal No. 23 of 1922.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *Eracksha*, for the Respondent.

JUDGMENT.—The plaint was originally presented in the Court of the Munsif, Gondia, on the 13th of July 1920. The plaintiff alleged that a partnership between himself and the defendant had been dissolved on the 14th of November 1917, and that an account of the partnership taken between them on the 9th of October 1917 showed a sum of Rs. 508-6-6 due to him by the defendant. After enquiry, it was held by the Court that no account had ever been taken, and this is now necessarily accepted as a fact. On that finding the suit was not triable by that Court, but a suit not based on the allegation that accounts had been taken and claiming that they should be taken up to the end of the partnership would have been triable, under the standing distribution of work, by the First Munsif of Bhandara. The Munsif of Gondia, instead of dismissing the suit, returned the plaint for presentation to the proper Court and it was later presented, without amendment, in the Court of the First Munsif of Bhandara. There it was rightly held that, on the face of the unamended plaint, the suit was triable by the Munsif of Gondia, and the plaint was again returned.

2. In appeal aginst this order by the plaintiff it was held by the Court of the District Judge that the order was correct and the Munsif of Gondia was ordered to re-admit the suit under its original number in the register and to deal with it according to law. The plaint was then again presented in the Court of the Munsif of Gondia and, on the 27th of July 1921, that Court again returned it for proper presentation after allowing it to be amended into a suit for an account and a share of the profits of a partnership which had been dissolved on the 14th of November 1917. Thus amended, the plaint was again presented in the Court of the First Munsif of Bhandara on the 21st of September 1921. In that Court it was held (by the Additional Subordinate Judge to whom the suit was transferred) that section 14 of the Limitation Act did not condone the delay after the 14th of November 1920, the end of the ordinary period of limitation and the suit was, therefore, barred by time. In appeal the learned District Judge has remanded the case for a decision on its merits, holding that section 14 of the Limitation Act does apply to it, and the present appeal is against that order of remand.

3. The dates of the few orders that have not been stated above are immaterial, as the order of the District Judge's Court that the suit should be re-admitted by the Munsif of Gondia wiped out all the intermediate proceedings. It is urged for the defendant that the Munsif of Gondia was wrong in allowing the plaint to be amended, and that he can still question the correctness and legality of that order, though he never appealed against it. If we assume that contention to be correct, which is the same as assuming that the amendment was made by the plaintiff himself of his motion at some time before presenting the plaint in Bhandara, it is quite clear that section 14 of the Limitation Act does not operate to condone the delay. In that view, the case stated in its simplest terms is as follows. On the 13th of July 1920 the plaintiff instituted his suit in the Court of the Munsif of Gondia for money payable on accounts stated on the 9th of October 1917. This dragged on till the 27th of July 1921 when the Munsif returned the plaint. On the 21st of September 1921 the plaint was presented in the Court of the First Munsif of Bhandara, after amendment of the plaint so as to make the suit one for an account and a share of the profits of a partnership dissolved on the 14th of November 1917.

4. In this view of the case, it appears

that, in respect of the period between the 13th of July 1920 and the 27th of July 1921, the plaintiff satisfied all the requirements of section 14 of the Limitation Act with the possible exception of the last two, that it was in good faith that he prosecuted his suit in the wrong Court and that the two suits are founded on the same cause of action. The question of good faith does not require examination at present as it appears distinctly that the cause of action was not the same in the two suits. In the original plaint the cause of action or the set of facts to be established by the plaintiff to enable him to succeed was that an account had been stated showing a certain balance in his favour, the fact that the partnership had been dissolved was irrelevant, as he would have succeeded equally if it had not been dissolved or, indeed, if it had never existed. In the amended plaint the cause of action was the dissolution of the partnership, and that suit would have succeeded whether there had been even more than one statement of accounts during the continuance of the partnership.

5. But the making of the amendment in the Court in which the plaint was originally filed and with the leave of that Court makes all the difference, as, provided there was nothing illegal about it, the amendment undoubtedly relates back to the date of the original institution of the suit. As has been shown, the amendment alters the character if the suit entirely, and under section 53 of the old Code an amendment of that kind was expressly forbidden. But section 153 and r. 17 of O. VI of the present Code make no express restriction on the discretion of the Court, and in this case it undoubtedly was judicially exercised, and the order passed by the Court in the exercise of that discretion was never contested in appeal. What puts the correctness of the order and the rightness of the exercise of its discretion by the Court beyond all doubt is the fact that the defendant agreed to the order being passed. The record of the proceedings in the Court of the Munsif of Gondia is not now before me but the learned Pleader for the plaintiff-respondent produced certified copies of the pleadings which were admitted by the defendant-appellant to be correct, and from them it appears that when the plaintiff asked for permission to make the amendment, the defendant's Pleader raised no objection and the defendant himself said: "I have no objection to the amendment." The suit, therefore, that was instituted in the Court of the First Munsif of Bhandara was not only founded on the same cause of action as that instituted on the 13th of July 1920 in the Court of the Munsif of Gondia, but was the same suit.

6. There remains then the question of good faith. It was possibly, though not very probably, through inadvertence that the allegation that accounts had been made, which must now be admitted to be untrue, was left unamended in the plaint when it was presented for the first time in the Court of the First Munsif of Bhandara. But the matter was brought prominently to the plaintiff's notice when the plaint was again returned to him and it was practically the only matter discussed in his appeal. Even after the remand to the Court of the Munsif, Gondia, it was sometime before he could make up his mind to amend the plaint and abandon the allegation that there had been a settlement of accounts. I am unable to believe that this was due to any inadvertence or that it was done otherwise than deliberately in the hope of establishing later on an allegation of fact that had been found to be untrue and is now admitted to be untrue. Whatever may be the full extent of the meaning of the expression "good faith" in section 14 of the Limitation Act, it must be admitted that it cannot cover conduct of that sort.

7. I hold, therefore, that section 14 of the Limitation Act does not bring this suit, as filed on the 21st of September 1921 in the Court of the First Munsif of Bhandara, within time. The order of the District Judge remanding the case for hearing will accordingly be set aside and the decree of the Additional Subordinate Judge dismissing the suit as barred by time will be restored. The plaintiff-respondent must pay all the costs of all the proceedings.

N. H. *Order accordingly.*

MAKKHAN LAL *v.* KISHUN LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1517 OF 1921.

March 6, 1923.

Present:—Mr. Justice Gokul Prasad.

Lala MAKKHAN LAL—DEFENDANT—APPELLANT

versus

KISHUN LAL AND OTHERS—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Mortgage—Two mortgages on same property—Covenant to redeem together—Clog on redemption,

A person who had executed a usufructuary mortgage of his property, mortgaged it again to the same mortgagee, and it was agreed that in case interest on the amount secured by the second mortgage was not paid annually, the mortgagee could, if he so desired, sue to recover the money due on the second mortgage. It was also agreed that the first mortgage would not be redeemed without the redemption of the second mortgage being effected:

Held, that the condition was a clog on the equity of redemption and the mortgagor could redeem the first mortgage alone without redeeming the second.

Har Pershad v. *Ram Chander*, 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A) 139; 44 A. 37; (1922) A. I. R. (A) 174, distinguished.

Kesar Kunwar v. *Kashi Ram*, 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634, followed.

Second appeal against a decree of the Subordinate Judge, Mathura, dated the 8th of August 1921.

Mr. *Kumuda Prasad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are as follows. On the 15th of July 1868 the predecessors-in-title of the plaintiff and defendant second party executed a usufructuary mortgage in favour of Makkhan Lal, defendant first party. On the 19th of July 1869 the same mortgagors executed another mortgage in favour of Makkhan Lal, aforesaid, to secure a further advance of Rs. 300 on the same property. It was, however, agreed that in case interest was not paid annually the mortgagee could, if he so desired, sue to recover the money due on the second mortgage. It was also agreed that the first mortgage would not be redeemed without the redemption of the second mortgage being effected. The present suit was brought by the plaintiff-appellant for redemption of the mortgage of the 15th of July 1868. The prior mortgagee pleaded in defence that the plaintiff must redeem the second mortgage of the 19th of July 1869 also. The First Court held that the plaintiff had a right to redeem the first mortgage only. The defendant first party appealed and the plaintiff raised objections that he was to pay Rs. 34 only for redemption and not Rs. 61 as ordered by the First Court. The learned Judge of the lower Appellate Court has held that the condition entered in the second mortgage that the plaintiff was to redeem that mortgage also before he could redeem the first mortgage, operated as a clog on the equity of redemption and could not be enforced and, dismissing both the appeal and the objections, has confirmed the decree of the First Court. The defendant first party, the mortgagee, comes here in second appeal and his contention is that, on a true construction of the terms of the mortgage-deed dated the 19th of July 1869, the plaintiff is bound to redeem the second mortgage also before he could redeem the first mortgage and that the dismissal of his suit on the second mortgage is no bar to his claiming that money when the plaintiff seeks to redeem the usufructuary mortgage. The learned Vakil for the appellant has relied on the case of *Har Pershad* v. *Ram Chander* (1). It is true that in that particular case this Court held that the second bond had to be redeemed along with the first usufructuary mortgage-bond. But the difference between that case and the present one is that in that case the second bond was a purely usufructuary mortgage-bond. In the present case, however, as it would appear from the facts which I have given above, the second mortgage was not a usufructuary bond pure and simple. The money due could be realised by sale also; in other words, the money due under the second bond could be realised notwithstanding the first mortgage-bond remained unredeemed. This circumstance distinguishes the present case from the Full Bench case referred to above. The case clearly in point is that of *Kesar Kunwar* v. *Kashi Ram* (2) and the two lower Courts have taken a correct view and put a correct construction on the mortgage-deed of 1869. Under these

(1) 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A) 139; 44 A. 37; (1922) A. I. R. (A) 174.

(2) 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634.

circumstances, this appeal must fail. I dismiss it with costs including in this Court fees on the higher scale.

M. A. A. & N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 8 OF 1922.
November 30, 1922.
Present:—Mr. Daniels A. J. C.
Musammat RUQAIYA BEGAM AND OTHERS—PLAINTIFFS—APPELLANTS
versus
IMDAD ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 34 (5), scope and applicability of—Failure to make report required by section—Suit for profits under Rent Act, whether barred—Report made by Patwari, *whether sufficient—Report during pendency of suit.*

The language of sub-section (5) of section 34 of the U. P. Land Revenue Act is perfectly general, and the operation of the sub-section is not confined to suits under the Act. The sub-section prohibits a Revenue Court from entertaining a suit or application of any description by a person who is required to make a report of succession by the section, until the report is made. [p. 321, col. 2.]

Chhajmal Das v. *Sirya*, A. W. N. (1906) 254; 3 A. L. J. 625, relied on.

If mutation has taken place before the institution of a suit, the report required by section 34 becomes unnecessary and sub-section (5) of the section has no application, but if mutation has not yet taken place a report made by the *Patwari*, cannot be a substitute for the report which the section requires to be made by the proprietor. [p. 322, col. 1.]

A report made during the pendency of a suit is of no avail, as sub-section (5) of section 34, debars a Court from even admitting the plaint until the report required by the section has been made. [p. 322, col. 1.]

Appeal from a decree of the Third Additional District Judge, Lucknow, dated the 20th December 1921, modifying that of the Assistant Collector, Unao, dated the 25th November 1920.

Mr. *Haider Husain*, for the Appellants.

Mr. *Wasi Hasan*, for Respondent No. 1.

JUDGMENT.—The suit out of which this appeal arises was filed jointly for profits under section 108 (15) of the Oudh Rent Act by two plaintiffs *Musammat* Ruqaiya Begam and Allahyar Beg. The suit was for profits of the years 1324 to 1327 and the causes of action arose on different dates from 1st June 1917 to 1st June 1920. During nearly the whole of the period in suit the recorded proprietor of Allahyar Beg's share in his property was his son Hamidullah Beg who died on 4th April 1920. The suit has been dismissed by the lower Appellate Court as against Allahyar Beg on two grounds, one of which was that, at the time of the institution of the suit, he had not made the report of succession required by section 34 of the U. P. Land Revenue Act, 1901, and that, therefore, his suit was barred by sub-section (5) of the same section. Both plaintiffs appealed but the appeal has been argued solely from the point of view of Allahyar Beg.

It is admitted that, on the date of the insititution of the suit, no report with a view to mutation had been made by Allahyar Beg. He contests the finding of the Court below on three grounds:—

(1) that section 34 (5) only applies to proceedings under the Land Revenue Act;

(2) that prior to the institution of the suit, namely, on 19th April 1920, the *Patwari* had made a report of Hamidullah Beg's death and Allahyar Beg's succession to the property as his heir;

(3) that the report required by section 34 was made by the plaintiff during the pendency of the suit and this should have been treated as sufficient.

Neither of these has any force. The language of sub-section (5) of section 34 is perfectly general: "No Revenue Court shall entertain a suit, or application by the person so succeeding.....until such person has made the report required by this section." It is impossible to read into this language the limitation suggested by the appellants, and indeed in the only case on the section which I have been able to find, *Chhajmal Das* v. *Sirya* (1), the section was treated as applicable to a suit under section 142 of the Agra Tenancy Act. In this particular case the transfer of right had taken place prior to the passing of the Act and on this ground alone it was held that section 34 was not a bar to the suit. The report made by the *Patwari* is made under the rules

(1) A. W. N. (1906) 254; 3 A. L. J. 625.

framed in accordance with the Land Revenue Act, and is not a substitute for the report which the Act itself requires to be made by the proprietor. No doubt, as suggested by Mr. Agarwala in his commentary on the section, if mutation had already taken place at the time of the institution of the suit the report required by section 34 would have become unnecessary, but this is not the case here. Mutation was not ordered till after the institution of the suit. The suggestion that a report subsequently made is sufficient is untenable in view of the language of the Act. The Court is debarred from entertaining the suit at all, that is to say, from even admitting the plaint, until the report required by the section has been made.

Out of several defendants to the suit only the first defendant Imdad Ali Khan appealed. It is argued that the Court below ought not to have dismissed the plaintiff's claim altogether. I do not see how it could have done otherwise, in view of the fact that it was precluded from entertaining a suit by the plaintiff at all.

It is further urged that if this appeal is dismissed the result may be that a fresh suit for profits against defendants will be time-barred. I notice, however, that as against the defendants who have not appealed the Court below has given a decree for the full amount due in favour of the co-plaintiff, *Musammat* Ruqaiya Begam. It is difficult to see, therefore, how Allahyar Beg could recover these profits from the defendants over again. His remedy would appear to be against *Musammat* Ruqaiya Begam if she declines to hand over to her co-plaintiff his share of the profits which she has recovered. She did not profess in her plaint to be entitled to recover the whole profits herself but only jointly with Alllayhar Beg. In view of the fact that the plea on which the suit was ultimately dismissed was not clearly taken in the written statement, I allow no costs to the respondents.

The result is that the appeal is dismissed but the parties will bear their own costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1695 OF 1921.
May 3, 1923.
Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

BALWANT SINGH—DEFENDANT—APPELLANT
versus
MARE SINGH—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Wajib-ul-arz, *construction of—Record of right of pre-emption—Custom or contract—Presumption—Non-customary matters, inclusion of, effect of.*

An entry in a *wajib-ul-arz* as to a right of pre-emption is good *prima facie* evidence of the existence of the custom, unless there is internal evidence in the *wajib-u-larz* itself or some other evidence or circumstance to rebut it. [p. 323, col. 1.]

Where in the very clause of a *wajib-ul-arz* in which reference is made to pre-emption, reference is also made to a number of other matters which cannot possibly be matters of custom, the presumption is rebutted. [p. 323, col. 1.]

Fazal Husein v *Muhammad Sharif*, 24 Ind. Cas. 464; 36 A. 471; 12 A. L. J. 800 and *Surajbali Singh* v. *Muhammod Nasir*, 48 Ind. Cas. 220, 16 A. L. J. 879, followed.

Where the pre-emption clause in a *wajib-ul-arz* contained, amongst other matters, the statement that an issueless co-sharer shall have no right to make a gift of his property in favour of a person not entitled (*gair mustahaq*) and that if such a transfer takes place, then on the death of the co-sharer his legal heirs would be the owners of the property:

Held, that the presumption which would ordinarily arise from an entry of a right of pre-emption in the *wajib-ul-arz* had been sufficiently rebutted and there was internal evidence in the clause itself to show that the recitals contained therein were not at all records of custom. [p. 323, col. 2.]

Second appeal from a decree of the District Judge, Meerut, dated the 10th August 1921.

Mr. *N. C. Valsh*, for the Appellant.

Mr. *K. C. Mital*, for the Respondents.

JUDGMENT.—This is a defendant-vendee's appeal arising out of a suit for pre-emption. The defendant had denied the existence of any custom and the Court of first instance dismissed the suit. On appeal the learned District Judge set aside the decree of the First Court and decreed the suit, holding that the custom of pre-emption alleged by the plaintiff had been established. The evidence as to the existence of the custom produced by the plaintiff consists of an entry in the *wajib-ul-arz* of 1870 as well as decrees of

the years 1885 and 1916. As against that the defendant relied on the judgment and decree of the year 1913.

An entry as to the right of pre-emption recorded in a *wajib-ul-arz* is certainly good *prima facie* evidence of the existence of the custom unless there is internal evidence in the *wajib-ul-arz* itself or some other evidence or circumstance to rebut it. In the present case, although it appears that there was an earlier *wajib-ul-arz* of 1860 in existence, none was filed. We have only the entry in the *wajib-ul-arz* of 1870 which in the early portion of it does contain an express statement as to the existence of a right of pre-emption in favour of *bhai haqiqi* and then *qaribi*, then *pattidars* and then co-sharers in other *pattis* as against strangers. The clause in the *wajib-ul-arz* containing this recital, however, contains a large number of other matters over a dozen in number.

It has been contended very strongly on behalf of the defendant-appellant that, reading the clause as a whole, this entry cannot be a record of custom. The test to be applied in such cases was laid down by the Special Bench in *Fazal Hussain* v. *Muhammad Sharif* (1) where it was pointed out that if a *wajib-ul-arz* was of an unusual nature and in the very same clause in which reference was made to pre-emption, reference was also made to a number of other matters which could not *possibly* have been matters of custom, the presumption would be rebutted. This case has been followed in a number of other cases, *vide* the case in *Surajbali Singh* v. *Mohammad Nasir* (2) where the right of one co-sharer to redeem a mortgage made by another co-sharer, was held not to be a possible record of custom.

In the present case as it is not necessary for us to give in detail all the matters recited in the clause which may or may not be the record of custom, we need only to refer in particular to that portion of it which says that an issuless co-sharer shall have no right to make a gift of his property in favour of a person not entitled (*gair mustahiq*), and if such a transfer takes place, then on the death of the co-sharer his legal heirs would be the owners of the property.

It is obvious that this is an unreasonable restraint on an owner's power of alienation, and, even though intended for the benefit of his relations, it cannot possibly be enforced in a Court of Law. An entry which lays down that a right exists which cannot be based on a custom having the force of law, is valueless as evidence to prove such custom. This being so, we are of opinion that the presumption which would ordinarily arise from an entry of a right of pre-emption in the *wajib-ul-arz* has in this case been sufficiently rebutted, and that there is internal evidence in the clause itself to show that the recitals contained therein are not all records of custom.

In addition to this *wajib-ul-arz*, the plaintiff relied on a decree for pre-emption of the year 1885. It is, however, to be noted that the Settlement of 1870 had not expired by that year and that the right of pre-emption, even if based on contract, was then enforceable. In that judgment the question of custom was neither raised nor decided. The decree of the year 1916 is a mere compromise decree. Although it is certainly evidence of an assertion of the right of pre-emption on the part of the co-sharers, it cannot be conclusive inasmuch as the question of the existence of any custom was not gone into by the Court and decided. As against this we have the Munsif's judgment of the year 1913 where the plaintiff's case that a custom existed had been found not to have been established. Our conclusion, therefore, is that in this case the plaintiff has failed to establish that there is a custom of pre-emption under which he is entitled to pre-empt the property. The result is that this appeal must be allowed. We accordingly set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs including in this Court fees on the higher scale.

M. A. A. & N. H. *Appeal allowed.*

(1) 24 Ind. 464; 36 A. 471; 12 A. L. J. 800.
(2) 48 Ind. Cas. 220; 16 A. L. J. 879.

JANKI PERSHAD *v.* SOMESHAR PERSHAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 136 OF 1922.
October 16, 1922.

Present:—Mr. Wazir Hasan, A. J. C.

JANKI PERSHAD AND ANOHTER—DEFENDNATS—APPELLANTS

versus

Pandit SOMESHAR PERSHAD—PLAINTIFF—RESPONDENT.

Partnership, dissolution of—Accounts not settled—Goods purchased before but received after dissolution of partnership—Profits, whether to be accounted for—Contract Act (IX of 1872), s. 263.

Plaintiff and defendant entered into a partnership for carrying on a business. The partnership was subsequently dissolved, but all that was done at this dissolution was the division of the stock in the shop between the parties. No accounts were settled on that date. Before the dissolution of the partnership orders had been placed for the purchase of certain goods on behalf of the firm and the payment of the price was also made on behalf of the firm; but the goods were received after the dissolution of the partnership. The defendant sold those goods. The plaintiff filed a suit for settlement of accounts and claimed his share of the profits arising out of the sale of the said goods:

Held, that, although the terms of s. 263 of the Contract Act did not cover the case in its entirety, yet on principles of equity the plaintiff was entitled to his share of the profits made by the defendant in selling the goods in question. [p. 325, col. 1.]

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 29th March 1922, upholding that of the Munsif, Sultanpur, dated the 30th July 1921.

Messrs. *A. P. Sen* and *Haider Husain*, for the Appellants.

Messrs. *Niamat Ullah* and *Har Gobind Dayal*, for the Respondent.

JUDGMENT.—The plaintiff and the defendants were separately carrying on the business of selling salt in Sultanpur early in the year 1919. On the 1st of July of that year the plaintiff, on the one hand, and the defendants, on the other hand, entered into a partnership for carrying on the same business, to which was also added the selling of Kerosene Oil. There was a written agreement of partnership drawn but so much of the terms of it as were admitted in the pleadings of the case were as follows:—

(*a*) that the plaintiff and the defendants shall each have a half share in the profits of the business and bear losses in the same proportion:

(*b*) that for any advances which one or the other of the parties may make towards the capital of the firm he or they, as the case may be, shall receive interest on the sum advanced at the rate of 8 annas per cent. per mensem;

(*c*) that the plaintiff will work without any remuneration at the shop at which the salt and the oil would be sold.

It is common ground now in appeal that the partnership was dissolved on the 4th March 1920 but all that was done at this dissolution was the division of the stock in the shop between the partners of the firm. No accounts were settled on that date. About the middle of November 1919, that is, before the partnership was technically dissolved, orders were placed for the purchase of 7 wagons of salt, the price of which was paid in two instalments of Rs. 905-10-0 on the 13th November 1919 and Rs. 2,264-1-0 on the 17th November 1919. This salt so indented for was not received until after the dissolution of the partnership, the first instalment of it was received on the 26th October 1920.

The suit out of which this appeal arises was to obtain a settlement of accounts as between the parties relating to the business of the firm and within the claim were included the profits made by the defendants over this sale of 7 wagons of salt. The Court of first instance decreed the plaintiff's suit in respect of his claim of the sums of money other than the one which represented the profits made by the defendants by selling 7 wagons of salt. The sum of money representing the plaintiff's share of profits in the sale mentioned above was put at the figure of Rs. 402 odd and its accuracy is no longer a matter in controversy between the parties. Both the parties appealed from the decision of the Court of first instance to the Court of the Subordinate Judge of Sultanpur. The result was that the defendants' appeal was dismissed and the plaintiff's appeal in respect of his claim of Rs. 402 odd was allowed. The defendants have filed two appeals in this Court against two decrees of the lower Appellate Court.

These are Appeals No. 136 of 1922 and 197 of 1922. Appeal No. 137 is withdrawn by the learned Counsel who appears on behalf of the defendants-appellants and is consequently dismissed with costs.

As regards Appeal No. 136 of 1922, I am of opinion that the decree of the lower Appellate Court is correct. The account-books produced in the case immediately prove that order for the purchase of the 7 wagons of salt was made on behalf of the firm and further that the payment of the price in two instalments was also made on behalf of the firm; but by mere accident the goods were received after the dissolution of the partnership. There is no doubt, in my mind, that on principles of equity the plaintiff is entitled to his share of the profits made by the defendants in selling the salt in question. It may be that the terms of section 263 of the Indian Contract Act (IX of 1872) do not cover the case in its entirety to deliver to the plaintiff his share of the profits made in the sale of the goods, the price of which went out of the funds of the firm.

The appeals fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NOS. 136 AND 137 OF 1921.

June 6, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

INAYAT ILAHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARDEO SAHAI—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Mortgage of family property—Legal necessity—Burden of proof—Series of renewals of mortgage—Presumption—Transferee of mortgaged property—Right to question validity of mortgage—Admission of validity of mortgage by family, effect of—Voidable transaction—Transferee of rights—Option, exercise of.

Where a person wishes to enforce a mortgage against Hindu joint family property, the burden lies on him to satisfy the Court that the transaction was entered into for family necessity, or in lieu of antecedent debt, or with the consent, express or implied, of all the members of the family. [p. 328, col. 2; p. 329, col. 1.]

As regards legal necessity, all that a transferee of Hindu joint family property is required to show is that like an ordinary person he was reasonably satisfied as to its existence. [p. 329, col. 1.]

A long series of renewals of mortgage transactions concerning Hindu joint family property extending over a generation without any protest from any member of the family would show its acquiescence and raise a fair presumption that if there had not been a valid necessity for them, some objection would have been raised. [p. 329, col. 1.]

It is open to a transferee of Hindu joint family property to plead that a prior mortgage on the property was without legal necessity. [p. 327, col. 1.]

Muhammad Muzamilullah Khan v. *Mithulal*, 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 901 (F. B.), followed.

The members of a Hindu joint family transferred certain property subject to some mortgages, expressly admitting that they were binding on them, and actually left with the vendee the whole sum due in order that the same may be paid to the prior mortgagees. The vendee, however, refused to pay the money alleging that the mortgages were not binding on the family:

Held, that, though the admission by the members of the family that the mortgages were binding on them could not operate as an estoppel against the vendee inasmuch as there was no privity of contract between the mortgagees and him, the admission was a very strong piece of evidence in favour of the view that the transactions were valid and binding on the family. [p. 327, col. 2.]

A transaction which is voidable remains good so long as it is not challenged by the person who has the option to have it set aside. It is for him to exercise or not to exercise the option. If without exercising the option and in fact admitting the validity of the transaction, he transfers his rights, the transferee cannot be allowed to say that he has acquired that option by the transfer. [p. 326, col. 2.]

Quaere:—Whether a mortgage of Hindu joint family property without legal necessity and not in lieu of any antecedent debt and without the consent, express or implied, of all members of the family, is void or only voidable. [p. 326, col. 1.]

First appeal from a decree of the Subordinate Judge, Mainpur.

Mr. *Iqbal Ahmad*, for the Appellants.

Mr. *Jang Bahadur Lal*, Dr. *Surendro Nath Sen* and Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENT.—First Appeals Nos. 136 and 137 of 1921 are connected appeals by certain defendants arising out of two suits for sale on the basis of two mortgage-deeds of the same date, namely, the 2nd of June 1914.

The first of the two mortgage-deeds was executed by Bhawani Prasad and others

In favour of Hardeo Sahai, and the second by the same mortgagors in favour of Hukam Chand and Gauri Shankar. Under these two deeds amounts due under to prior mortgage-deeds dated 16th of June 1894, and the first of March 1897 were paid off and only a sum or Rs. 500 was paid in cash which was said to have been required for the pruchase of corn for daily consumption and for the completion of the mortgage-deeds in question.

In the one case the only contesting defendant was a subsequent transferee Inayat Ilahi and in the other Maharaj Singh, one of the members of the mortgagor's family, also contested the suit. The other defendants did not put in any appearance. On behalf of the contesting defendants the execution of the documents as well as the passing of consideration were denied. It was further pleaded that there had been no legal necessity for the transfers, and that the mortgage-deeds were, therefore, not binding on the family.

The learned Subordinate Judge was of opinion that it was not open to Inayat Ilahi, he being a transferee only, to raise such a plea and he further held that the other contesting defendant, Maharaj Singh, not having been born at the time when the two prior mortgage-deeds were executed, was not competent to challegnge the transactions. He accordingly decreed both the suits in full. Inayat Ilahi and some of the defendants, other than Maharaj Singh, have preferred two appeals, and on their behalf, although the findings as to the execution and the passing of consideration are not challenged, it has been strongly contended that there was in fact no legal necessity for these transfers.

The first question which arises is as to whether it is open to the transferee, Inayat Ilahi, to raise the question of want of legal necessity. This question we would have thought depended on the further question whether a mortgage of joint property by a Hindu father without any legal necessity and not in lieu of any antecedent debt and without the consent, express or implied, of the other members of the family, was void or only voidable. If such a transfer were void there can be no doubt whatsoever that any subsequent transferee who comes into possession of the property would be entitled to raise the point that the transaction was not binding on the property.

On the other hand, if the mortgage transaction were merely voidable at the option of the non-consenting members of the family, then it is difficult to see how a subsequent transferee of the property itself could be allowed to question it. A transaction which is voidable remains good so long as it is not challenged by the members who have the option to have it set aside. It is for them to exercise or not to exercise the option. If without exercising that option and in fact admitting the validity of the mortgage they transfer the property, the transferee cannot be allowed to say that he has acquired that option by the transfer.

Undoubtedly, it has been held in a number of cases that a transfer by a Hindu widow, who represents the whole estate for the time being and who certainly has power to transfer the property for her life-time is only voidable at the option of the reversioners and not absolutely void. But as to a Hindu father, the whole estate does not vest exclusively in him but in the family of which he is the head. He may also, as the manager, be the agent of the family in relation to the outside world. The question whether a transfer by him without legal necessity is void or voidable is another matter. There are certainly observations in some old cases which go to show that such a transfer is not absolutely void but only voidable. In the case of *Hanuman Kamat* v. *Hanuman Mandur* (1) their Lordships of the Privy Council observed at page 126 that the sale by a Hindu father "was not necessarily void but only voidable if objection were taken to it by the other members of the joint family." And the same view was expressed by a single Judge of this Court in the case of *Bishumbhar Dayal* v. *Parshadi Lal* (2). On the other hand, the learned Advocate for the appellants relies on the observations in the cases reported as *Balgobind Das* v.

(1) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 911; 9 Ind. Dec. (N. S.) 527 (P. C.).
(2) 16 Ind. Cas. 629; 10 A. L. J. 112.

INAYAT ILAHI v. HARDEO SAHAI.

Narain Lal (3) and *Muhammad Muzamilullah Khan* v. *Mithlulal* (4) where it was distinctly held that such a transfer without the consent of the other members of the family was 'invalid'.

Their Lordships in the leading case of *Sahu Ram Chandra* v. *Bhup Singh* (5) observed: "any deed of gift, sale or mortgage granted by one co-parcener *on his own account* of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirety stands free of it." It may be that the word "invalid" is not necessarily the same thing as void. We do not, however, think it necessary to go any further into this question as we feel ourselves bound by the ruling of the Full Bench in *Muhammad Muzamilullah Khan* v. *Mithulal* (4) which laid down that it is open to a subsequent transferee to take the plea that the prior mortgage was without legal necessity.

The question still remains how far the present transferee, Inayat Ilahi, is bound by his undertaking to pay off the prior debts. In the sale-deed which was executed on the 6th January 1919 in his favour it was admitted by the vendors in the clearest terms that the prior debts contracted by their ancestors were binding on them. They purported to transfer only the equity of redemption (*i. e.*, property subject to those mortgages) and actually left in deposit with the vendee the whole sum due in order that the same may be paid to the representatives of the prior mortgagees. Having undertaken to pay off these debts the vendee now turns round and says that he is not bound to pay them, though his sale-deed contains a very clear admission on behalf of all the members of the family who were parties to it that the prior mortgage-debts had been incurred for legal necessity and were binding on the family.

It is to be noted that 12 years have not yet expired since the execution of the sale-deed. The vendee's title as against the whole family, therefore, rests on this document alone, that is to say, he must admit that it is under this document that he has acquired the property from the whole family. This, in our opinion, means that the persons who executed the document in his favour were acting on behalf of the whole family. It follows, therefore, that the admission contained in this document must, so far as the vendee is concerned, be taken to be an admission made on behalf of the whole family and that admission is that the prior mortgage-deeds were binding on the family.

And, therefore, even though it is true that such an admission cannot operate as an estoppel against the defendant inasmuch as there was no privity of contract between the mortgagees and him, and further because the plaintiffs' position has in no way been compromised, there can be no doubt that this admission is a very strong piece of evidence in favour of the view that the transactions must have been for valid necessity, otherwise they would not have been accepted as such by all the members.

Coming to the facts, we find that the dealings really go back to a very early period. The earliest document that was executed was dated the 22nd January 1873 by Har Deo, the grandfather of the present mortgagors, in favour of one Ajit Singh, for a sum of Rs. 98 the whole of which had been paid in cash. It is true that this amount being secured on the family property cannot be treated as an antecedent debt in the strict sense of the term. But it having been borrowed as early as 1873 and evidence as to the actual necessity having disappeared, subsequent admission of its validity would be a very strong piece of evidence to be considered. This deed was followed by a mortgage-deed of the 19th May 1873 by the same mortgagor, in favour of the same person for a further sum of Rs. 200 the whole of which was either acknowledged to have been received before-hand or was paid in cash before the Sub-Registrar. The third document was of the 26th January 1874 for a sum of Rs. 250 out of which Rs. 113-8 were given credit for on account

(3) 15 A. 339; 20 I. A. 116; 6 Sar. P. C. J. 313; 17 Ind. Ju. 425; 7 Ind. Dec. (N. S.) 934 (P. C.).

(4) 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 190 (F. B.).

(5) 39 Ind. Cas. 280; 39 A. 437 at p. 442; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 44 I. A. 126 (P. C.).

of the amount due on the first mentioned document and Rs. 136-8 were received in cash. The 4th mortgage was for a sum of Rs. 400 under which Rs. 229 were paid off on account of the amount due under the deed of the 19th May 1873 and a sum of Rs. 171 was received in cash. There is a recital in this document that this sum of Rs. 171 was required for the purpose of paying Government Revenue for the June instalment and for meeting certain personal expenses.

The 5th document was dated the 5th January 1875 for a sum of Rs. 400 under which the earlier document of the 26th January 1874 was paid off and a further sum of Rs. 118 was advanced. Then we have the document of the 5th August 1875 under which the 4th and 5th mortgage-deeds were paid off and the balance was received in cash. All these transactions are transactions entered into by Hardeo, the grandfather of the mortgagors, as early as the seventies.

On the 31st January 1887 a mortgage by conditional sale for a sum of Rs. 3,100 was executed in favour of the same mortgagee, Ajit Singh, under which he was put in possession of the mortgaged properties and the amounts due on the earlier document of the 5th August 1875 was paid off. There is a further recital in this document that Rs. 505-7-3 were due on account of a Munsif's Court decree and Rs. 64-8-9 were due on account of prior debts. Rupees 150 were paid in cash. There can be no doubt that this mortgage by conditional sale was fully acted upon and the mortgagee entered into possession soon after. He and his representative have been in possession of the property since then, which means that during the whole of a period of over thirty years the mortgagors' family has allowed this property to remain out of its possession.

On the 16th June 1894 another mortgage-deed was executed by Durga Prasad, Munna Lal and Bhawani Prasad, the sons of Hardeo, in favour of one *Musammat* Lachmi Bai, for a sum of Rs. 6,400. Under this document Rs. 6,100 were left with the mortgagee to pay off the mortgage by conditional sale the validity of which was of course accepted and Rs. 300 were acknowledged to have been received in cash. There can be no doubt that, subsequently, *Musammat* Lachmi Bai, the mortgagee, paid off the prior mortgage and entered into possession of the property in place of the previous mortgagee. On the 1st of March 1897 another mortgage-deed by the same three persons was executed for a sum of Rs. 900 and the recital is to the effect that the money was required to pay off a decree for arrears of rent held by Choudhuri Sunder Singh and another and to meet certain personal expenses. The property hypothecated under this bond was the same as covered by the mortgage by conditional sale.

Up to the year 1914 no attempt was made by any member of the mortgagor's family to challenge any of these mortgage-deeds or to recover the property from the possession of the mortgagees. The family seems to have acquiesced in these transfers. A third party would, therefore, be quite justified in presuming that the debts must have been incurred for family necessity. On the second June 1914 six members of the family, namely, Bhawani Prasad, acting in his own right and as guardian of his sons Bansi Dhar and Raghubar Singh. (2) Gaya Prasad, (3) Kalka Prasad for self and as guardian of his minor son Sarup Singh, (4) Murlidhar, (5) Sheo Narain for self and as guardian of his minor sons, Sughar Singh, Babu Ram and Chute Tua and (6) Sanet Singh in his own right and as guardian of Maharaj Singh executed the documents in suit under which the amounts due under the previous mortgage-deeds of 1894 and 1897 mentioned above were left with the mortgagees to be paid of and the balance of Rs. 500 was said to have been required for purchasing corn for daily consumption and meeting the expenses of the execution and the registration of the deeds.

It was some years after these mortgage-deeds that Inayat Ilahi obtained a sale-deed on the 6th January 1919 in which there was a fresh admission on behalf of the mortgagors that the two mortgage-debts in question had been validly incurred and were binding on the family.

It is true that in a case where a mortgagee whishes to enforce a charge against the

family property the burden lies on him to satisfy the Court that the mortgage transaction has been entered into for family necessity or in lieu of antecedent debt or with the consent, express or implied, of all the members of the family. In the present case we are of opinion that this burden has been sufficiently discharged. In the first place, the transactions extend back to the year 1873 and for all this long period there never has been any protest made by any member of the family. Furthermore, there is nothing to show that in the years 1894 and 1897 there were any major members of the family alive who were not parties to the transactions and whose consent ought to have been obtained and was not obtained. In fact, the ages of the various defendants as given in the plaint would rather go to show that all of them or at least most of them were not even born in those years. A long series of renewals of mortgage transactions extending for over a generation without any protest by any member of the family would show its acquiescence and raise a fair presumption that if there had not been a valid necessity for them, some objection would have been raised. The present mortgagees were not the mortgagees in the years 1894 and 1897 and so it is not a matter whithin their sepecial means of knowledge as to whether the amounts borrowed on these dates had been incurred for legal necessity. In view of the long continued acquiescence of all the members of the family, at any rate by all the adult members of the family, and the express admission contained in the sale-deed of 6th January 1919, we are of opinion that it must be held that in this case the burden of proof of legal necessity has been completely discharged. It is not now possible after the lapse of so many years to produce evidence to show for what purpose the money was borrowed or how it was actually spent by the mortgagors. All that the mortgagees are required to show is that like ordinary men they were reasonably satisfied that legal necessity must have existed. In view of the conduct of all the members of the family in allowing the property to remain out of their possession for such a long time we think that this must be taken to have been so. Even though all these sums were borrowed on the security of the family property and although there is no direct evidence to show the actual necessity to meet which all the sums were borrowed, we are of opinion that the burden of proving the existence of legal necessity must be held to have been discharged. It was to pay off these debts, and in that way to recover the property from the mortgagees, that the mortgage-deeds in suit were executed. The family cannot now be allowed to retain the benefit and repudiate the liability.

We think it right to note that in the Court below, with the exception of the transferee, only one defendant, Maharaj Singh, contested one of the suits. All the other defendants did not put in any appearance nor file any written statement. The question of want of legal necessity was a mixed question of law and fact and none of these defendants ever attempted to raise it. None of them went into the witness-box to explain away their own admissions. The plaintiffs produced some oral evidence also, which, under the circumstances, we do not propose to discuss. After the decrees in the two suits were passed, Maharaj Singh, the only defendant, who was a member of the family, submitted to the decrees and has not appealed. The persons who now appeal are the transferee, Sheikh Inayat Ilahi, and certain other defendants who did not put in an appearance in the Court below and who did not raise the question at all. Their reluctance to submit themselves to the cross-examination suggests to some extent that they did not feel confident that they would be able to explain their previous admissions. The evidence of Jhau Lal and Hardeo Sahai is to the effect that Rs. 500 were taken to meet private expenses and the expenses of registration. The recital in the deed is to the same effect. The defendants have given no oral evidence to rebut it. Their own evidence would at least have shown for what purpose Rs. 500 were required. Neither the transferee nor these other defendants, who never contested the claim, can, therefore, succeed. The result is that both these appeals fail and are hereby dismissed with costs.

N. H. *Appeal dismissed.*

RAMDEO SINGH *v.* MUKHAN SINGH.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 143 OF 1921.
December 8, 1921.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

RAMDEO SINGH AND OTHERS—APPELLANTS

versus

MUKHAN SINGH AND OTHERS—RESPONDENTS.

Civil Pocedure Code (Act V of 1908), *ss.* 122, 123, *O. XLI r.* 1—*Patna High Court Rules, Chapter VII, r.* 6—*Appeal, second—Copy of judgment of Trial Court not filed within limitation—Appeal, whether barred.*

Section 122 of the Civil Procedure Code gives power to the High Courts to make rules regulating their own procedure and the procedure of the Civil Courts subordinate to their superintendence, and by such rules to annul, alter or add to all or any of the rules of the First Schedule to the Code. But in order to have the effect of varying the rules contained in the First Schedule, the rules made under section 122 must first have been considered and submitted by a Rule Committee appointed under section 123 of the Code. [p. 331, col. 1.]

Rule 6 of Chapter VII of the Patna High Court Rules requiring a copy of the judgment of the Trial Court to be filed along wth the Memorandum of Appeal in a second appeal has not been made under section 122 of the Civil Procedure Code and has not, therefore, the effect of adding to r. 1 of O. XLI of the Code. [p. 331, col. 1.]

A second appeal filed within limitation cannot be rejected as barred by limitation merely because a copy of the judgment of the Trial Court was not filed within limitation, as required by r. 6 of Chapter VII of the Patna High Court Rules. [p. 331, col. 1.]

Narsingh Sahai v *Sheo Prasad*, 42 Ind. Cas. 855; 40 A. 1; 15 A. L. J. 835 (F. B.), distingusished.

Chunilal Jethabhai v. *Barot Dahyabhai Amulakh*, 32 B. 14; 9 Bom. L. R. 1138, relied on.

Mr. *Sivanandan Ray*, for the Appellants.

ORDER.—This second appeal was originally filed on the 25th November 1921 within time. The Memorandum of Appeal was accompanied by copies of the decree and the judgment of the lower Appellate Court. The copy of the judgment of the Trial Court was not filed as is required by rule 6 of Chapter VII of the High Court Rules. Accordingly, the Memorandum of Appeal was returned. It was filed on the 30th November after the time for filing it had expired. It was suggested that in accordance with the order passed in a similar case in M. J. C. No. 176 of 1921 on the 29th November 1921 by the learned Chief Justice and Mr. Justice Coutts, the appeal is out of time and should be rejected.

The learned Vakil on behalf of the appellant says that the appeal filed on the 25th November 1921 was competent under O. XLI, r. 1, which requires that only a copy of the judgment on which the decree of the lower Appellate Court sought to be set aside is founded to be filed, and does not require the filing of the judgment of the Trial Court. He further contends that the rule of this Court referred to above, No. 6, Chap. VII, cannot affect the rule of limitation and the non-compliance with that rule will not necessarily subject the appellant's appeal to be dismissed.

Reference was made to a Full Bench decision in the case of *Narsingh Sahai* v *Sheo Prasad* (1) but the question in the present case did not arise in that case except that the observation made at page 7* of the report might throw some light as to the power of the High Court to make rules so as to alter the Rules of Limitation prescribed by the Limitation Act.

However, the decision of the Full Bench of the Bombay High Court in the case of *Chunilal Jethabhai* v *Barot Dahyabhai Amulakh* (2) is on all fours with the present one and fully supports the contention of the learned Vakil for the appellant.

Rule 6, Chapter VII, of this Court's Rules was based upon the old Code of Civil Procedure, section 652 of that Code was held not to give power to the High Court to frame a rule modifiying any rule or mode as to computation of limitation prescribed expressly or by necessary implication in the Limitation Act; and that the rules framed by the High Court must be "consistent with the Code"; in other words, the rule was held not to annul, modify or add to section 541 of the old Code requiring the appellant to file a copy of the judgment of the Trial Court failing which the presentation of the appeal would be deemed to be incompetent. The pre-

(1) 42 Ind. Cas. 855; 40 A. 1; 15 A. L. J. 835 (F. B.).

(2) 32 B. 14; 9 Bom. L. R. 1138.

*Page of 40 A.—[*Ed.*].

sent r. 1 of O. XLI, has not made any change in regard to section 652 of the old Code and, therefore, will be governed by the above cited Bombay case. No doubt, under the present Code, section 122 gives power to the High Court to make rules regulating their own procedure and the procedure of the Civil Courts subordinate to their superintendence and by such rules "to annul, alter or add to all or any of the rules of the First Schedule". Accordingly, this High Court has power to make rules under section 122 so as to annul, alter or add to r. 1 of O. XLI of the First Schedule to the Code. Rule 6 of Chapter VII of this Court has not, however, been made under section 122 for which a special provision has been made in rules 123 to 128. In fact, the rules under section 122 in order to have the effect of varying the rules in the First Schedule to the Code must first have been considered and submitted by a Rule Committee appointed under section 123. Section 124 says that "before making any rules under section 122 the High Court shall take such report into consideration." Therefore, there is a good deal of force in the contention of the learned Vakil that r. 6 of Chapter VII cannot apply to the present case.

An exactly similar rule in the Bombay High Court was construed in the said Full Bench case empowering the Registrar to refuse to admit an appeal unless it was accompanied by the judgment of the Trial Court, but not to throw out the appeal as being time-barred.

The High Court Rule referred to was apparently framed under section 130 of the Code and the Court Rules framed under that section relate to matters "other than procedure".

We do not think that the order in M. J. C. No 176 of 1921 was intended to decide any quest on of limitation. We, therefore, hold that the appeal is not out of time.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1499 OF 1921.

March 28, 1923.

Present:—Mr. Justice Piggott.

Musammat SARJO KUAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Sheikh ENAIT AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Declaratory suit—Alternative prayer for joint possession—Plaintiff, whether can claim joint possession as additional relief in appeal.

In a village owned by a number of co sharers, some of the co-sharers granted perpetual leases to the defendants. Other co-sharers sued for a declaration that these leases were improper, null and void and unenforceable. They added an alternative prayer for a decree for joint possession with the other co-sharer-defendants. The Trial Court granted the declaration asked for. In appeal, the plaintiffs prayed for joint possession by ejectment of the lessee-defendants, not by way of an alternative relief, but in addition to the declaration already granted, alleging that that their prayer for a simple declaration alone was barred by section 42 of the Specific Relief Act:

Held, that the prayer for ejectment could not be granted under the circumstances, as it had been preferred in the plaint only as an alternative, in the event of the Court's holding that a mere suit for declaration did not lie. [p. 335, col. 1.]

Second appeal against a decree of the Subordinate Judge, Jaunpore, dated the 14th July 1921.

FACTS.—The village in question is owned by a number of co-sharers, but there is no *Lambardar*. The plaintiff and defendants Nos. 3 to 20 are co-sharers. The waste land in the village is undivided, and co-sharers are entitled by custom to take possession of pieces of this waste land and bring them into their exclusive use, by planting trees thereon or bringing them under cultivation. One co-sharer, defendant No. 19, on 19th November 1917 gave a perpetual lease of a portion of this *parti* land to defendants Nos. 1 and 2, claiming to be in exclusive possession of the same. On 27th February 1919 the said lessees further obtained a perpetual lease of the same land from some other co-sharer-defendants. Thereupon the plaintiffs sued for a declaration that the perpetual lease granted to defendants Nos. 1 and 2 were illegal and void. They further said, that "if for any reason the passing of a declaratory decree be not thought

proper", the Court may grant them a decree for joint possession. Both the Courts granted the declaration that the perpetual leases are illegal and void, that the lessees are tenants-at-will; but have refused the relief for joint possession. Hence the appeal.

Mr. *Peary Lal Banerji*, for the Appellants—The Trial Court refused the decree for joint possession on the ground that the leases being leases of agricultural land, a Civil Court is not competent to give such a decree; and the lower Appellate Court has simply said that in view of the ruling in *Nihal Chand* v. *Rustam Ali Khan* (1) such a relief cannot be granted. It is submitted that the lower Courts have taken a wrong view of law, and a decree for joint possession not only can be given but ought to be given. The leases having been declared illegal and void, they are avoided not only from the date of the decree but from the date of their inception. This being so, the lessees are not tenants-at-will but mere trespassers from the date of their entry on the land, and they can be ejected by the Civil Court. The Trial Court appears to have based its conclusions on *Bhola Nath* v. *Buskin* (2), the decision in which case is based on the Privy Council ruling in *Watson & Co.* v. *Ramchund Dutt* (3), but this decision of their Lordships of the Privy Council has been explained in *Jagar Nath Ojha* v. *Ramphal* (4), which is an authority for the fact that joint possession can be given not only in cases where the plaintiff who was in possession has been dispossessed but also cases where he never was in possession. A decree for joint possession was also granted in *Bhairon Rai* v. *Saran Rai* (5), *Nannki Debi* v. *Daulat Singh* (6), *Bishcshar Singh* v. *Hanuman Singh* (7) and *Sarbji Singh* v. *Raj Kumar Rai* (8). The case relied on by the lower Appellate Court, *viz.*, *Nihal Chand* v. *Rustam Ali Khan* (1), gives no reasons for the view held by the learned Judges. The lessees have, by securing perpetual leases from some of the co-sharers, attempted to deprive the plaintiffs and some other defendants of the benefit they could have derived from the use of the land.

[**Piggott, J.**—But the defendant lessees have made a profitable use of the land which hitherto was lying waste.].

It is submitted that the idea of profitable use of the waste land is entirely foreign to the right of a co-sharer to demand that a trespasser must be ejected. This right is an absolute right. Section 194 of the Tenancy Act lays down that "all things required or permitted to be done by the possessors of a right, title or interest shall be done by them conjointly unless they have appointed an agent to act on behalf of them all." The section is mandatory. That is why the leases have been declared illegal. Such leases are void not only in respect of the persons who were no parties to their execution, but even in respect of those who executed them. I rely on *Jagan Nath* v. *Har Gopal* (9) *Bansidhar* v. *Dip Singh* (10), *Eyunni Raghavacharyulu* v. *Epuri Govindasari* (11). The case of such leases is analogous to that of an illegal alienation by a member of a Hindu joint family or a Hindu widow, which when avoided is invalid in respect of all members of the joint family and not only the transferor. If leases like the present were to hold good, it would open a door to fraud of co-sharers who could, by executing such leases, deprive other co-sharers of their legitimate rights.

Mr. *M. A. Aziz*, for the Respondent.—Before the case-law is discussed it is necessary to clearly grasp the facts of the case as found by the lower Courts. The constitution of the village is that the

(1) 5 A. L. J. 564; A. W. N. (1908) 77.
(2) A. W. N. (1894) 127.
(3) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.).
(4) 13 Ind. Cas. 79; 34 A. 150; 8 A. L. J. 1312.
(5) A. W. N. (1904) 106; 26 A. 588; 1 A. L. J. 183.
(6) 2 A. L. J. 256
(7) 63 Ind. Cas. 802; 19 A. L. J. 280; 3 U. P. L. R. (A) 146; 44 A. 5; (1922) A. I. R. (A) 314.
(8) 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A) 146; 44 A. 5; (1922) A. I. R. (A) 162.
(9) A. W. N. (1897) 207.
(10) 20 A 438; A. W. N. (1898) 103; 9 Ind. Dec. (N. S.) 641.
(11) 48 Ind. Cas. 198; 41 M. 1068; 35 M. L. J. 402.

co-sharers have divided the culturable land in *pattis*, but the *parti* land is common and has been lying waste. Only now and then a co-sharer has taken possession of a small piece by bringing it under cultivation or by planting trees thereon, and his exclusive possession has not been disturbed. The question, therefore, which arises is whether a co-sharer who can take possession of a piece of land and keep it exclusively to himself, can also let out that piece and remain the exclusive landlord of his tenant. It is submitted, under the circumstances of the case, he can. The defendants Nos. 1 and 2 thus are tenants of their lessors only and the plaintiffs are entitled only to a declaration as to their title, but not to a decree for joint possession. The plaintiffs can hold their lessors to account in a suit for profits; but nothing more.

It is submitted that, in any case, the plaintiffs-appellants are not entitled to a decree for joint possession, inasmuch as the principal relief they claimed was one for declaration, and the relief for joint possession was only prayed for in the alternative. The plaintiffs must be held down to their own pleadings, and the declaratory relief having been granted, the relief for joint possession must be refused. Further, it would only be equitable to refuse the prayer for joint possession inasmuch as the lessees have by bringing into cultivation a land which lay fallow, have conferred a boon not only on their lessors but on the entire proprietary body.

As a strict question of law, it is submitted that the decision in *Watson & Co* v. *Ramchund Dutt* (3) followed in *Bhola Nath* v. *Buskin* (2) and many other similar cases such as *Jagannath Singh* v. *Jainath Singh* (12) lays down the correct proposition of law. The case in *Jagar Nath Ojha* v. *Ramphal* (4) is clearly distinguishable. The facts were peculiar. The property in suit belonged to one Lachmi Ojha. On his death it passed to his widow and on her death to the appellant, to respondent and to some others. As the plaintiff did not obtain possession, he sued for it, and he was entitled to a decree for joint possession. It is are that this was a proper case for such a decree, *Bhairon Rai* v. *Saran Rai* (5) is a case in which plaintiff was in actual possession and had been dispossessed. It was, therefore, held that he was entitled to joint possession. *Nannhi Debi* v. *Daulat Singh* (6) has been overruled in *Phani Singh* v. *Nawab Singh* (13). *Bisheshar Singh* v. *Hanuman Singh* (7) and *Sarabjit Singh* v. *Raj Kumar Rai* (8) are again cases in which the plaintiffs, who jointly with defendants, were in actual physical possession and were dispossessed. The case in *Raja Ram Misra* v. *Lalji Misra* (14) is also a similar case. Thus, a review of the entire case-law establishes the following propositions, *viz*: (*a*) if the plaintiff was in actual physical possession jointly with the defendant, and was illegally ousted by the defendant, he is entitled to be restored to his former position, and the Court will grant a decree for joint possession. But (*b*) if the plaintiff was never in actual physical possession, he will be entitled to a declaratory decree only and not one for joint physical possession. The present case evidently falls under the second category, and the decree for joint possession was rightly refused.

It is further submitted that defendants Nos. 1 and 2 can by no means be called trespassers. A trespasser is a person who enters upon the land in a manner contrary to law, *i.e.*, the essential ingredient of trespass is the illegality of his act at the time of his entry. Any subsequent declaration would not make the entry illegal The effect of the perpetual leases being declared invalid is to make the defendants tenants-at-will, liable to ejectment in accordance with provisions of law Further, after the declaration of the invalidity of the leases the position of the parties is this, that, so far as the plaintiffs are concerned, the

(12) 1 A. L. J. 488; 27 A. 88; A. W. N. (1904) 194.

(13) 28 A. 161; A. W. N. (1905) 233.
(14) 2 A. L. J. 481.

leases are totally void, but so far as the defendant-lessors are concerned, they could not be heard in a Court of Law if they were to come as plaintiffs and try to eject the lessees, *i. e.*, the lessees could successfully put the leases in defence against the lessors, though not against the lessors The defendant-lessees could not, therefore, be treated as trespassers. The analogy of alienation by a member of a Hindu joint family or a Hindu widow is quite inapplicable to the circumstances of this case inasmuch as a joint Hindu or a Hindu widow has no right to treat a particular piece of property as his or her own to the exclusion of the rest; whereas, on the facts found in this case, a co-sharer who takes possession of a piece of *patti* land is entitled to exclusive possession of the same.

Upon the above observations, it is clear that the principle of law applied by the lower Court, *viz*, that contained in *Nihal Chand* v *Rustam Ali Khan* (1), holds good, and a decree for joint physical possession and ejectment of defendants-lessees cannot be passed. A prayer for such a relief means asking the Civil Courts to pass an order which is exclusively within the jurisdiction of the Revenue Courts. And it has been established by a series of rulings of this Court the Civil Courts will refuse to pass such an order.

Mr. *Peary Lal Banerji*, in reply, referred to *Eyunni Raghavacharyulu* v. *Epuri Govindasari*. (11).

JUDGMENT.—This is a second appeal which could never have come into Court if the plaintiffs had been definitely held to their own pleadings, as they certainly ought to have been. It appears that in the village in suit there was a certain area of waste land, appertaining to a *sahamilat patti* the proprietary rights in which vested jointly in twenty or more co-sharers. One of these determined to bring a number of plots of this waste land under cultivation; but instead of occupying them himself he granted a perpetual lease of the same to two lessees. About a year and a quarter later the lessees, finding that their rights were being questioned, induced seven more of the co-sharers in the *patti* to grant them another perpetual lease. The present suit was brought by two co-sharers (subsequently joined by three others) who were dissatisfied with this arrangement They impleaded as defendants the two lessees, the lessors, and all the remaining co-sharers who had not joined in the suit. The principal relief sought was a declaration that the two leases above referred to "are improper, null and void, and are not fit to be enforced." There was an alternative prayer for a decree for joint possession, in favour of the plaintiffs and all the co-sharer defendants, "if, for any reason, the passing of a declaratory decree be not thought proper by the Court."

The suit was effectively contested by the lessees-defendants alone. They set up a plea which has been found to be unsustainable, alleging a complete partition of the waste lands amongst the co-sharers. They neglected to set up any alternative case, in the event of the Court's holding that the lessors-defendants had exceeded their rights in granting leases in perpetuity; and it seems to me that this was directly due to the frame of the plaint, in which the prayer for joint possession by actual ejectment of the lessees was preferred in the alternative only, and not as a relief consequential on the declaration of the invalidity of the leases.

The fourth issue fixed by the Trial Court was:—"To what relief, if any, are the plaintiffs entitled?" The Court found the plaintiffs entitled to the declaration sought for and framed its decree accordingly. Incidentally, it remarked that the actual ejectment of the lessees-defendants could only be carried out by the Revenue Court.

The latter appealed, and tried to raise the plea that the entire suit as framed was not cognizable by the Civil Court: this plea was repelled and their appeal dismissed. The plaintiffs also appealed. They very coolly alleged that their own prayer for relief by way of a simple declaration was barred by section 42 of the Specific Relief Act, and now prayed for joint possession by actual ejectment of

the lessees-defendants in addition to the declaration already granted, and not by way of alternative,

The learned Subordinate Judge devoted almost the whole of his judgment to the appeal of the lessees, he disposed of the plaintiffs' appeal in a few lines, quoting authority for the proposition that the ejectment of the lessees could not be ordered in a suit like the present, but neglecting to point out that the prayer for ejectment had only been preferred in the plaint as an alternative, in the event of the Court's holding that a mere suit for a declaration would not lie.

In appeal to this Court the plaintiffs rely mainly on the case of *Jagar Nath Ojha* v. *Ramphal* (4). There were no lessees concerned in that case and no question arose as to the existence of an agricultural tenancy, I should not myself have ordered the actual ejectment of the lessees-defendants, because I do not regard them as "mere trespassers;" but I do not think this is a proper case for a general examination of the question of the right of one co-sharer in joint lands to appropriate to his personal use a portion of the area constructively in the possession of all the joint owners, where they are none of them making any particular use of it. In this litigation such questions could only arise in the event of the Courts holding that the plaintiffs were not entitled to a mere declaration without consequential relief, this contingency has not arisen, and the plaintiffs cannot complain of the fact. I dismiss their appeal with costs.

M. A. A. & N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 147 OF 1922.

January 31, 1923.

Present:—Mr. Simpson, A. J. C., and Mr. Dalal, A. J. C.

Raja BHAGWAN BAKHSH SINGH—DEFENDANT—APPLICANT

versus

SURENDRA BIKRAM SINGH—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XXXIX, O. XL—Security for mesne profits—Order not provided in Code—Inherent power of Court—Appeal—Revision—Possession—Mutation.

No Court ought to allow itself to be prevented from doing substantial justice merely because it cannot find a section of the Civil Procedure Code under which its order will fall. [p. 338, col. 1.]

Abdul Karim Abu Ahmed Khan Chaznavi v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49, relied upon.

The Civil Procedure Code does not provide for an order for the taking of security for mesne profits. But if such an order is passed by a Court in exercise of its inherent power under section 151 of the Code, the order is not appealable. [p. 337, col. 2.]

The position of a trustee in possession of the trust property is wholly different from the position of the full owner. Therefore, while it is always reasonable to take security from a person who holds property in trust, it is a different thing to call a man to account for his expenditure of his own income. [p. 338, col. 2.]

Sivaji Raja Sahib v. *Aiswariyanandaji Sahib*, 29 Ind. Cas. 485; 29 M. L. J. 209; 18 M. L. T. 155, referred to.

If in a suit for possession and mesne profits a Court, acting under section 151, Civil Procedure Code, directs security for mesne profits to be taken yearly during the pendency of the suit and in fact takes security for one year's mesne profits from the defendant, who is in possession of the property in dispute, and whose possession has been recognised by a mutation order, it does not act without jurisdiction, but if its order is not essential for the ends of justice, it acts with material irregularity in inventing a form of relief not expressly mentioned in the Code. [p. 337, col. 2; p. 338, col. 1.]

Section 115 of the Civil Procedure Code ought to receive rather a liberal than a narrow interpretation. [p. 539, col. 1.]

Bai Atrani v. *Deepsing Barla*, 33 Ind. Cas. 358; 40 B. 86; 17 Bom. L. R. 1097, relied upon.

Therefore, where a Subordinate Court has an express jurisdiction to pass an appealable order, but goes out of its way to invent a novel form of procedure, and consequently makes an order for which no appeal is provided in the Code, the High Court should consider whether the course adopted by the Subordinate Court was really necessary, and

ought not to hold itself precluded from setting aside the order by taking a strict and narow view of the provisions of section 115, Civil Procedure Code. [p. 338, col. 2; p. 339, col. 1.]

If an order passed by a Subordinate Court under section 151, Civil Procedure Code, in exercise of its inherent power, is not open to revision under section 115, Civil Procedure Code, the High Court in dealing with such an order may exercise its own inherent power under section 151 of the Code. [p. 338, cols. 1 & 2.]

Obiter.—Possession is *prima facie* evidence of ownership, and an order of mutation is a determination of the question which of the parties is entitled to possession. [p. 337, col. 1.]

Surendra Bikram Singh v. *Empreor*, 73 Ind. Cas. 153; 25 O. C. 242; (1922) A. I. R. (O.) 300, referred to.

Application against an order of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 17th August 1922.

Messrs. *Niamatullah* and *Sheikh Ali Abbas*, for the Applicant.

Messrs. *A. P. Sen, Daya Kishan Seth, Oudh Bahadur, Hargobind Dayal Srivastava* and *Bisheshar Nath*, for the Opposite Party.

ORDER.

Simpson, A. J. C.—This is an application in revision. Raja Inder Bikram Singh, deceased, was the Taluqdar of Itaunja. He died on 22nd January 1921.

There were two claimants to his estate. The present applicant, Raja Bhagwan Bakhsh Singh, claimed as next of kin; the opposite party, Surendra Bikram Singh, minor, claimed as the adopted son of the deceased Taluqdar.

The District Authorities were disposed at first to take the adopted son under the Court of Wards, and Mr. Macleod, the Manager of the Court of Wards, was directed to take possession of the estate.

It appeared, however, that there was a flaw in the adoption, at least in so far as the Taluqa itself was concerned, arising out of the provisions of section 29 of Act I of 1869, under which the adoption must be by registered instrument. Both parties claimed to be in possession and applied for mutation. Both parties also filed applications under section 145, Criminal Procedure Code. The Magistrate was unable to decide anything on the basis of possession, Mr. Macleod having taken possession shortly after the death of the late Taluqdar. He, therefore, acted under section 146 and put Mr. Macleod in possession again as a Receiver subject to the control of the Magistrate.

The Revenue Court was in the same position and had to decide the question of mutation on the basis of title. This enquiry was keenly contested and occupied some time. The deed of the declaration of adoption dated 13th January 1921, nine days before the late Taluqdar's death, but not registered until 24th February 1921, was produced, but the learned Assistant Collector found against its genuineness.

It was held that the adoption had taken place and that the adopted son could inherit other properties but that it was invalid in respect of the Taluqa itself. Accordingly, the present applicant, Raja Bhagwan Bakhsh Singh, got mutation in respect of the Taluqa while the opposite party Surendra Bikram Singh, got mutation in respect of the non-Taluqdari estate.

Bikram Singh appealed to the Deputy Commissoner who came to the same finding as regards the genuineness of the deed of adoption and accordingly dismissed the appeal. Bikram Singh appealed to the Commissioner but on 7th March 1922 he withdrew this appeal because he had filed the present suit. The date of the institution of the present suit is 6th March 1922.

In the plaint Bikram Singh sued for possession of Taluqdari and non-Taluqdari properties but as he was already in possession of the non-Taluqdari property he afterwards cut this out of the plaint. He also asked for mense profits both past and future of the Taluqdari property.

Having got mutation in respect of the Taluqdari property, the present applicant applied to the Magistrate (who was holding it under section 146, Criminal Procedure Code) to give him possession. The Magistrate passed an order accordingly. There was an application to the Deputy Commissioner which he dismissed on 8th March 1922. and there was an application in revision to this Court which was dismissed on 19th May 1922. The result of these proceedings was that the applicant remained in possession of the Taluqdari property.

On 11th March 1922 Bikaram Singh applied to have a Receiver appointed.

The learned Subordinate Judge wrote a very lengthy order. He did appoint a Receiver for certain properties with which we are not now concerned, but as regards the Taluqa he refused to appoint a Receiver, mainly on the ground that the applicant had failed to make out a *prima facie* title to the property.

In discussing one of the grounds pressed by the plaintiff, namely, that the defendant is a poor man and his property is subject to mortgages, he said that this was not in itself a sufficient ground for the appointment of a Receiver, and added, "the plaintiff may apply for security if he thinks that the defendant would not pay the mesne profits if the plaintiff's suit would be decreed. I would have disposed of the question of security at once but the application under consideration is silent on this point. There is no prayer for security in it and the defendant cannot be taken by surprise."

On this hint the plaintiff applied to have security taken for mesne profits, and the learned Subordinate Judge passed the order which is now objected to by the defendant. The mesne profits were taken by agreement of the parties to be Rs. 75,082-5 per annum. The defendant was ordered to give security to the extent of one year's mesne profits, and it was added that if the suit would not be finished within one year, it would be open to the plaintiff to apply for additional security.

Against this order the present application has been filed. Our decision is, that the order cannot stand. It is a very harsh order. The defendant is in possession of the estate, and possession is *prima facie* evidence of ownership. It has already been decided between the parties by this Court that the order of mutation was a determination of the question which of the parties is entitled to possession [*Surendra Bikram Singh* v. *Emperor* (1).] So the defendants' position is stronger than that of a person who is merely found to be in possession. Yet the defendant is to be prevented from enjoying the income of the estate except on condition that he files security for the whole of that income, for the expression "mesne profits" covers the whole net income of the estate.

The reason for this order is the possibility that the plaintiff may win his case and obtain a decree for mesne profits and may then find himself unable to realize his decree from the defendant. But there is no reason to presume that the plaintiff will win this case.

If the Court is to presume anything before the case is decided, the presumption must be based on the possession of the defendant and the decision of the Revenue Court. If the defendant should win his case, he will not be able to recover from the plaintiff anything which he may have spent in furnishing this security.

We note that he has furnished security for the first year, and that he has had to divide the sum up among several sureties. It is quite probable that he has had to pay for it. The order contemplates the filing of fresh security, year after year, if the litigation should be protracted. It may involve serious hardship to the defendant.

Secondly, the procedure adopted by the learned Subordinate Judge is a novel one.

The Code of Civil Procedure has provided for cases of this kind.

O. XL provides for the appointment of a Receiver; O. XXXIX provides for temporary injunctions.

The Code does not provide for the taking of security for mesne profits.

The learned Subordinate Judge does not profess to act under any power expressly conferred by the Code, but falls back upon the inherent power of the Court.

It is this which raises a point of some difficulty in disposing of the present application.

If the order had been passed under O. XL, or under O. XXXIX, it would have been subject to appeal. But no appeal is provided for such an order as has been passed here, because the Code has not contemplated any such order. We have to deal with the matter, therefore, unless we also invoke our inherent powers, in revision, and our powers in revision are defined under section 115, Civil Procedure Code. We cannot act in revi-

(1) 73 Ind. Cas. 153; 25 O. C. 242; (1922) A. I. R. (O.) 300.

sion at all unless the Subordinate Court appears to have (*a*) exercised a jurisdiction not vested by law, (*b*) failed to exercise a jurisdiction so vested, or (*c*) acted in the exercise of its jurisdiction illegally or with material irregularity.

It has been strenuously argued before us that this order is without jurisdiction. But we are not prepared to go so far. We do hold, however, that the Court acted with material irregularity in inventing a form of relief not expressly mentioned in the Code, when such action was not essential in order to do justice in the case.

We desire to say as little as possible in the way of limiting the inherent powers of the Courts. Under the older Code these powers were not mentioned but it was repeatedly held that such powers existed. They are recognised in the present Procedure Code under section 151, which runs as follows:—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

This section to a certain extent codifies the inherent power itself.

The inherent power can be exercised to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

There was no question of abuse of the process of the Court. The order can only be defended if it is necessary for the ends of justice.

As we have said already, we are not prepared to say that the order lacks jurisdiction because it is dangerous to attempt definition of the inherent power of the Court.

No Court ought to allow itself to be prevented from doing substantial justice merely because that Court cannot find a section of the Civil Procedure Code under which its order will fall. *Abdul Karim Abu Ahmad Khan Ghaznavi* v. *Allahabad Bank, Limited* (2).

Whether there are, or whether there are not, any cases in which an order to file security for mesne profits would be a proper order, we are not prepared to say. But we are quite clear that in this case the order ought not to have been passed.

Suits for possession of landed property usually include a prayer for mesne profits.

Although the plaintiff has often a reasonable fear that if he gets a decree he will fail to realise mesne profits, (because the money would be spent up by the party in possession who may not possess any other property) yet the Code has made no express provisions for such an order. We are unable to find any reported case in which such an order has been passed.

The learned Subordiante Judge has founded himself upon *Sivaji Raja Sahib* v. *Aiswariyanandaji Sahib* (3).

In that case the defendants were called upon (*a*) to furnish quarterly accounts of their management to the Court, (*b*) to take permission of the Court for any lease for over a year, (*c*) to furnish security for Rs. 10,000. But that was a case of trust property. The defendants were not entitled to any beneficial interest in the property. The order of the Madras High Court obtains some support from O. XXXIX, r. 10. The position of a trustee in possession of the trust property is wholly different from the position of the full owner. It is always reasonable to take security from a person who holds property in trust. It is a different thing to call a man to account for his expenditure of his own income.

Our finding, therefore, is that the order objected to is bad because it is not an order provided for by the Civil Procedure Code, and, regarded as an exercise of the inherent power of the Court, the order was not demanded for the ends of the justice. We hold that this fact constitutes a material irregularity, sufficient to justify action under section 115 of the Code of Civil Procedure.

And, even if it were not so, this is a case in which we should ourselves be prepared to make an order based on our inherent power under the same section 151. Where a Subordinate Court has an express jurisdiction to pass an appealable order, but goes out of its way to invent a novel form of procedure, and consequently makes an order

(2) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49

(3) 29 Ind. Cas. 485; 29 M. L. J. 209; 18 M. L. T. 155

for which no appeal is provided in the Code, the High Court will be ready to consider whether this course was really necessary, and will not hold itself precluded from setting aside the order by taking a strict view of the provisions of section 115.

It was said in *Bai Atrani* v. *Deepsing Baria* (4)

"Inasmuch as section 115 is merely an empowering section granting certain jurisdiction to the High Court, and as the use or exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation."

For these reasons we set aside the order for security. The applicant will get his costs in both the Courts.

Dalal, A. J. C.—I agree.

S. D. *Order set aside.*

(4) 33 Ind. Cas. 358; 40 B. 86 at p. 92; 17 Bom. L. R. 1097.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1490 OF 1921.
April 20, 1923.
Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

ALAMA CHAND—DEFENDANT—APPELLANT
versus
CHHAJJU—PLAINTIFF—RESPONDENT.

Wajib-ul-arz, *construction of—Pre-emption, provision for—Exteraneous matters also included—Record of custom—Presumption—Pre-emption—Transfer of mortgaged property—Consideration equivalent to mortgage-money—Transaction, whether sale and pre-emptible.*

If a *wajib-ul-arz* contains matters which could not possibly be the subject of a custom then the ordinary presumption that the *wajib-ul-arz* is a record of custom is overturned. [p. 339, col. 2.]

Fazal Hussain v. *Muhammad Sharif*, 24 Ind. Cas. 464; 36 A. 471; 12 A. L. J. 800 and *Surajbali Singh* v. *Mohammad Nisar*, 48 Ind. Cas. 220; 16 A. L. J. 879, followed.

But if a *wajib-ul-arz*, besides mentioning pre-emption, refers to matters such as the manner of inheritance, the power of the widow in possession after her husband's death, the declaration of the manner in which property descends when a deceased co-sharer has left two widows and the exclusion from inheritance of daughters and daughter's sons, *i.e.*, matters which, though not usually customs, can form the subject of customs, it cannot be said that the *wajib-ul-arz* is necessarily not a record of custom. [p. 340, col. 1]

If the consideration for a transfer of property is only sufficient to pay off a prior mortgage on the property, the personal liability of the mortgagor being still alive on the date of the sale, and the market-value of the property is not higher than the amount of consideration, it cannot be said that the transfer does not amount to a sale, on the ground that the vendor gets nothing under it, for he gets rid of the liability under the mortgage. Such a transaction is a sale and is subject to pre-emption. [p. 340, cols. 1 & 2.]

Second appeal against a decree of the Additional District Judge, Meerut, dated the 1st of July 1921.

Mr. *Nehal Chand*, for the Appellant.

Mr. *S. C. Das*, for the Respondent.

JUDGMENT.—Two points have been discussed before us in this second appeal. The first point is whether the Courts below were right in holding that the *wajib-ul-arz* of 1863 was evidence of a custom.

It is contended before us that, because the *wajib-ul-arz* in question is so framed as to refer to matters other than pre-emption, it ought not to be treated as a record of custom but merely as a record of contract.

It has, no doubt, been held in a number of cases which have been consistently followed that, if a *wajib-ul-arz* contains matters which could not possibly be the subject of a custom then the ordinary presumption that the *wajib-ul-arz* is a record of custom is overturned. That principle is laid down in the case of *Fazal Hussain* v. *Muhammad Sharif* (1). It was also enunciated in another case reported as *Surajbali Singh* v. *Mohammad Nisar* (2). In this latter case, we may observe, the *wajib-ul-arz* upon which reliance was placed in addition to providing for pre-emption made provisions for other matters such as redemption of property mortgaged by a person who had no interest in the right to redeem. Clearly, in cases of this latter description the *wajib-ul-arz* does contain matters which cannot possibly be the subject of custom.

(1) 24 Ind. Cas 464; 36 A. 471; 12 A. L. J. 800.
(2) 48 Ind. Cas 220; 16 A. L. J. 879.

Coming now to the *wajib-ul-arz* with which we are concerned in this case there can be no doubt that other matters as well as pre-emption are referred to. We find a reference to the manner of inheritance. We find reference to the powers of the widow who is in possession after her husband's death. There are declarations as to how property descends when a deceased co-sharer had left two widows. There are also provisions for the exclusion of daughters and daughters' sons from inheritance. It cannot, however, be said that the matters which we have just referred to cannot be the subject of custom, for it is notorious that there is a widespread custom, for example, of the exclusion of daughters and daughters' sons from inheritance, another well-known custom is the custom of *stri-bant* or the division of property in accordance with the number of wives.

Looking at this *waj b-ul-arz* we are unable to hold that it falls within the purview of the rulings to which we have referred and we consider, therefore, that the Courts below were justified in holding that the *wajib-ul-arz* was a record of custom.

The only other point raised is with regard to certain findings of fact of the Courts below.

The sale in this case purported to be for a sum of Rs. 1,200. It was recited in the sale-deed that a sum of Rs. 550 was being left with the purchaser to redeem a prior mortgage and the balance of Rs. 650 was to be paid before the Registering Officer. Both the Courts below are agreed that the money was handed over to the vendor before the Registering Officer but they are also agreed that after it had been so made over it was returned again to the purchaser. On the findings, therefore, of the Courts below this transfer was made for a sum of Rs. 550 only.

In these circumstances it has been argued by the learned Counsel for the appellant that there was no sale at all inasmuch as the vendor got nothing. We see, however, that the learned Judge of the Court below has recorded a finding that the market-value of the property sold was not more than Rs. 500. If, therefore, by this transfer the vendor was getting rid of the liability to pay a sum of Rs. 550 it cannot be said that there was no consideration for the transfer. We may observe that the prior mortgage in respect of which Rs. 550 was left with the purchaser was of the year 1917 and that the suit to enforce the personal obligation of the mortgagor was well within time. It seems to us that the argument that this transfer does not amount to a sale cannot succeed.

The result is that we dismiss this appeal with costs including in this Court fees, if any, on the higher scale.

K. S. D. &
M. A. A. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 171 OF 1922.

October 18, 1922.

Present:—Mr. Wazir Hasan, A. J. C.

Babu MANOHAR LAL—DEFENDANT—APPELLANT

versus

ACHHUTANAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Rent suit—Ejectment proceedings—Suit for declaration of under-proprietary rights—Limitation, commencement of—Cause of action, continuation of—Shankalap koshist *—Under-proprietary tenure—Limitation Act (IX of* 1908), *Sch. I, Art.* 120.

In 1914 defendant brought a suit under the provisions of the Oudh Rent Act for the recovery of rent in respect of the land in suit against the plaintiffs. In that suit interest was also claimed on the rent due. The plaintiffs pleaded that they being under-proprietors of the land in question were not liable to pay interest. On 14th August 1914 the Court decided on the basis of entries in the Revenue papers that the plaintiffs were not under-proprietors of the land and were consequently liable to pay interest. In 1915 defendant instituted proceedings in ejectment against the plaintiffs under the provisions of the Rent Act. The basis of the proceedings was the decree in the rent-suit. Ejectment was ordered by the Rent Court on 30th April 1915. On 6th December 1920 the plaintiffs filed the present suit for a declaration that they were under-proprietors of the land. It was contended by

the defendant that the suit was barred by time:

Held, that the limitation for the suit being six years under Art. 120 of Schedule I to the Limitation Act, it was not time-barred, inasmuch as time was to be calculated from the date of the decision of the ejectment proceedings, as those proceedings were corollary to the decree in the suit for recovery of rent and were expressly founded on the decree, and as the cause of action which arose on the passing of the decree in the rent-suit continued until the order in the ejectment proceedings was pronounced. [p. 342, col. 1.]

A *shankalap koshist* may or may not be an under-proprietary tenure. The expression is not a term of art always denoting an under-proprietary tenure. [p. 342, col. 2.]

Second appeal from the decree of the Subordinate Judge, Sultanpur, dated the 10th February 1922, setting aside an order of the Munsif, Sultanpur, dated the 31st May 1921.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *Hyder Husain*, for Respondent No. 1.

JUDGMENT.—The plaintiffs brought a suit in the Court of the Munsif of Sultanputr for a declaration that they were under-proprietors of 44 *bighas* 15 *biswansis* of land specified in the list attached to the plaint situate in Mauza Shafipur, Pargana Chanda, in the District of Sultanpur. The defendant is the proprietor of the village. So much of the defence w th which I am now concerned in this appeal was that the relief as to the declaration was barred by limitation and that the plaintiffs were not under-proprietors of the land in suit. Both these points were decided in favour of the defendant by the Court of first instance with the result that the plaintiffs' suit was dismissed. On appeal by the plaintiffs to the Court of the Subordinate Judge of Sultanpur the decree of the Court of first instance was reversed and the suit was decreed.

The first question to be considered in the appeal is whether the suit is barred by time. In the year 1914 the defendant brought a suit under the provisions of the Oudh Rent Act for the recovery of rent in respect of the land in suit against the plaintiffs. In that suit interest was also claimed on the rent due. The plaintiffs pleaded that they, being under-proprietors of the land in question, were not liable to pay interest. The Court decided on the basis of entries in some of the revenue papers that the plaintiffs were not under-proprietors of this land and were consequently liable to pay interest. The decision is dated the 14th August 1914. It is not shown that the decree for the arrears of rent including the interest payable thereon was ever put into execution by the present defendant. In 1915, however, he instituted proceedings in ejectment against the present plaintiffs under the provisions of section 52 of Oudh Rent Act. The basis of the proceedings was the decree in the rent-suit. Ejectment was ordered by the Rent Court on the 30th April 1915.

The plaint in the present suit was originally filed in the Court of the Subordinate Judge of Sultanpur on 13th August 1920. The value of the property in suit for the purposes of jurisdiction was fixed at Rs. 4,000. The defendant objected to the valuation made by the plaintiffs. At the hearing of the suit in that Court on the 6th December 1920 the plaintiffs admitted the value of the property as given by the defendant to be Rs. 1,000. The plaint was accordingly returned by the Subordinate Judge for presentation to the proper Court and it was presented on the same day in the Court of the Munsif. The plaintiffs base their cause of action on the decision of the Revenue Court in the ejectment proceedings dated the 30th April 1915 and if that basis is correct the suit was well within time when it was filed in the Court of the Subordinate Judge and also when it was filed in the Court of the Munsif, the period of limitation being six years under Art. 120 of the Indian Limitation Act. The defendant, however, contends in this Court that the cause of action for the suit arose when the decision relating to the question of interest was passed adversely to the plaintiffs on the 14th August 1914. The plaintiffs in the alternative urged that if the cause of action arose on the date when the decision in the rent-suit was passed the suit as originally filed in the Court of the Subordinate Judge was within time and they are entitled in calculating the limitation to the

exclusion of the period during which the suit was pending in the Court of the Subordinate Judge under the provisions of section 14 of the Indian Limitation Act. The learned Subordinate Judge held that the ejectment proceedings gave a fresh cause of action to the plaintiffs and, therefore, the suit was within time. He did not consider the question of the applicability or otherwise of the provisions of section 14 of the Limitation Act.

I am of opinion that the time should be calculated from the date of the decision of the ejectment proceedings. These proceedings were a corollary to the decree in the suit for recovery of rent and they were expressly founded on that decree. The cause of action which arose on the passing of the decree in the rent-suit continued until the order in the ejectment proceedings was pronounced. It is common ground that, in spite of the decree in the suit for the recovery of rent and in spite of the order for ejectment in the subsequent proceedings, the plaintiffs are still in possession of the land in suit and have paid neither rent nor interest under the previous decree. On these grounds I hold that the plaintiff's suit is not barred by time.

The second point urged is that the plaintiffs are not under-proprietors of the land in suit. It appears that at the first Regular Settlement, 1877, the predecessor-in-interest of the defendant moved the Settlement Court for assessment of rent on the entire land held by the predecessors-in-interest of the plaintiffs. The land in suit is only a part of that holding. The agent of the *taluqdar* stated that, "originally there was a *shankalap koshist* of *bighas* 131-4 given by the ancestors of my client to Har Nandan Goshain" and that the defendants in those proceedings "were the descendants of the three sons of Har Nandan Goshain and held the land in rent-free possession up to date but the *taluqdar* now desires that the *shankalapdars* should pay the *muka jama*.....and that this should be formally declared as otherwise defendants won't pay." The Court in its judgment dated the 5th July 1877 held that there was no question as to the existence of the *shankalap* and all that the *taluqdar* desired was to have his right to demand rent on the *shankalap* holding declared. Finally, a decree in the following terms was passed:—

"Declaratory decree in favour of the plaintiff who is declared to have a right as *taluqdar* to demand rent from defendants *shankalapdars* on *bighas* 131-4, such rent being calculated as the incidence of the Government demand plus 10 per cent., or Rs. 197 per annum during the currency of present Regular Settlement." In the *khewat* of 1265 *Fasli* the ancestors of the plaintiffs were recorded as *shankalapdars* but in the subsequent years they were entered in the Revenue papers in respect of the land as *qabzadars*.

Now a *shankalap koshist* may or may not be an under-proprietary tenure. The expression is not a term of art always denoting an under-proprietary tenure. There is an exhaustive discussion of the nature of this tenure in the introduction of Mr. Sykes' well-known book, Compendium of the Oudh Taluqdari Law, on pages 181 to 183. I have to determine in the present case whether the admitted *shankalap koshist* was an under-proprietary tenure or not. The statement of the agent already recorded distinctly shows that the land was held as *shankalap koshist* rent-free by the ancestors of the plaintiffs from a time long before the year 1877 when a claim was made by the *taluqdars* for assessment of rent only. The Settlement decree, therefore, did not for the first time create, the tenure, of *shankalap koshist* but merely recognised it as a pre-existing tenure on the admission made by the *taluqdar's* agent. The assessment of rent, however, was made on the footing of the holding being an under-proprietary tenure. Rule 7, sub-rule 3, of the Rules laid down in the Schedule of Oudh Sub-Settlement Act of 1866 is as follows:—"In no case can the amount payable during the currency of the Settlement by the under-properietor to the *taluqdar* be less than the amount of the revised demand, with the addition of ten per cent." This method of assessment of rent is to my mind a clear indication of the holding having been treated as an under-proprietary tenure. I am,

therefore, of opinion that the decree of the Lower Appellate Court is not incorrect and should be affirmed.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 66 OF 1921.

May 14, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

MUHAMMAD AFZAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD MAHMOOD AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Muhammadan Law—Gift in favour of private individual—Gift, description of, as waqf, *effect of.*

Where in a deed of gift in favour of a private individual, the donor, in the course of the document, describes it as *waqf*, the mere use of the word *waqf* would not, in the absence of a consecration, necessarily involve a transfer of ownership in favour of the deity such as is required to constitute a valid dedication under Muhammadan Law.

First appeal from a decree of the Subordinate Judge, Muzaffarnagar at Meerut.

Messrs. *Ibn-i-Ahmad* and *Iqbal Ahmad*, for the Appellants.

Mr. *Bhagwati Shankar* (with him Dr. *Surendra Nath Sen*), for the Respondents.

JUDGMENT.—The question raised by this appeal is whether a certain deed of the 27th of March 1880 was a *waqf* under Muhammadan Law, that is to say, a dedication of property for charitable and religious purposes, or was a gift in favour of certain specified individuals. Under the terms of the deed certain named persons were to take the property becoming owners thereof immediately and they and their descendants after them were to enjoy the property for ever without any power to alienate. If it was in fact a transfer by way of gift in favour of these specified donees, then, as the Court below has rightly held, the condition against alienation fails and the descendants of the donees take the property with full ownership and power of alienation. If, on the other hand, the document in question is in law a deed of *waqf* other consequences follow. It is quite true that the word "*waqf*" is used in more than one place by the executant in describing the document itself. On the other hand, there is nothing in the wording of the deed which can possibly be stretched so as to constitute a transfer of ownership in favour of the deity. It is expressly and in terms a gift to three specified persons. It has been contended before us that the use of word "*waqf*" overrides all other terms in the document, and necessarily involves a transfer of ownership in favour of the deity such as is required to constitute a valid dedication under Muhammadan Law. We are not prepared to accept this contention. It has been urged once already in this Court in connection with this very document before a Bench of which one of us was a member, and was summarily rejected. The crucial passage, quoted from Mr. Syed Ameer Ali's book on Muhammadan Law, at page 217 of the 4th Edition, is in the following words: "when the word *waqf*, or any of its synonyms in vogue, is used in making the consecration, the law fixes upon it all the legal incidents of a permanent and valid dedication." This statement of principle implies that there must be a consecration, in the making of which the word *waqf* is used. It seems to us that what we have before us here is a gift in favour of private individuals, which the donor, in the course of the document, wrongly describes as a "*waqf*." We think this is a distinction of principle on which this case must be decided. Agreeing with the decision of the Court below, we dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

SHEO NARAYAN LAL *v.* MUNAQQA.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 92 OF 1922.
September 14, 1922.

Present:—Mr. Ashworth, J. C.

SHEO NARAYAN LAL—PLAINTIFF—APPLICANT

versus

Musammat MUNAQQA AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), *s.* 115, *O. XXXIII, r.* 2—*Application for leave to sue as pauper—Schedule of immoveable property omitted—Rejection of application—Revision, whether lies.*

An application in revision against an order dismissing an application for permission to sue as a pauper is permissible inasmuch as such an application is in itself a case within the meaning of that term as used in section 115 of the Civil Procedure Code.

Shamim-ud-din v. *Amir Hussain*, 4 Ind. Cas. 777; 12 O. C. 381, followed.

Buddhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 and *Mahadeo Sahai* v. *Secretary of State for India in Council*, 65 Ind. Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1, dissented from.

Order XXXIII, r. 2, of the Civil Procedure Code specifically requires that the schedule attached to an application for leave to sue as a pauper shall be both of moveable and immoveable property. Therefore, where an applicant not merely omits to mention an item of immoveable property in the schedule but entirely fails to submit a list of such property, the application cannot be regarded as properly framed.

Kuppusawmy Aiyar v. *Muthusamy Aiyar*, 27 Ind. Cas. 891; (1915) M. W. N. 31; 1 L. W. 1068, considered.

Application against an order of the Subordinate Judge, Hardoi, dated the 11th March 1922.

Mr. *Girja Shankar*, for the Applicant.

Mr. *Ali Mohammad*, for the Opposite Party.

JUDGMENT.—This is an application in revision against an order of the Subordinate Judge of Hardoi dismissing the applicant's application for permission to sue as a pauper.

The first question that arises is whether an application in revision is permissible under section 115 of the Code of Civil Procedure. In *Shamim-ud-din* v. *Amir Hussain* (1), it was held that such an application for permission to sue as a pauper was in itself a case within the meaning of that term as used in section 115. I have been referred by the non-applicant to a ruling reported as *Mahadeo Sahai* v. *Secretary of State for India in Council* (2), where the contrary was held by Walsh, J. He based his opinion on a previous Full Bench decision of the Allahabad High Court reported as *Buddhoo Lal* v. *Mewa Ram* (3). This previous case, however, was a case where a decision on the question of the Court's jurisdiction was not held to amount to a case within the meaning of section 115. I consider that *Shamim-ud-din* v. *Amir Hussain* (1) should be followed and that application in revision will lie.

As regards the merits of the case the Subordinate Judge dismissed the application to sue as a pauper on the ground that the applicant had failed to enter in his application the fact that he owned 11/4 *biswansis* in the village of Dhakia. It is urged by the applicant that this omission would not amount to a failure to frame the application in the manner prescribed, and the ruling *Kuppusawmy Aiyar* v. *Muthusamy Aiyar* (4), is relied on as authority for the proposition that a mere omission does not constitute a failure to frame the application in the proper manner. The argument of the applicant would, I think, hold good if the omission were the omission to include amongst other items of moveable or immoveable property some single item. In the present case the applicant has entirely failed to submit a list of the immoveable property, he has only submitted a list of moveable property. Order XXXIII, r. 2, specificaly requires that the schedule shall be both of moveable and immoveable property. The application would not, therefore,

(1) 4 Ind. Cas. 777; 12 O. C. 381.

(2) 65 Ind. Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1.

(3) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558.

(4) 27 Ind. Cas. 891; (1915) M. W. N. 31; 1 L. W. 1068.

appear to be properly framed. I might have been disposed to regard the application as properly framed if there had been two lists, one of the immoveable property and another of moveable property, even if the list of immoveable property had been followed by the entry nil, provided that the omission of this particular item of property would conceivably be inadvertent. As, however, the application is framed, it appears that the applicant omitted to embody in his schedule an important category prescribed by law.

The Subordinate Judge was justified in holding the application not properly framed.

This application is, therefore, rejected with costs.

Z. K. *Revision rejected.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1661 OF 1922.
May 28, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Daniels.

AFTAB BEGAM AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MUHAMMAD AYUB AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagor deprived of portion of mortgaged property—Substituted security, doctrine of, application of.

The doctrine of substituted security only applies where possession of a particular property has been awarded to the mortgagor in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when the entire property mortgaged belonged to the mortgagor, and a person with no title subsequently obtained possession of a portion of it behind the back of the mortgagee.

Second appeal from a decree of the District Judge, Saharanpur, confirming that of the Subordinate Judge, Dehra Dun.

Dr. *Surendro Nath Sen* and Mr. *Mushtaq Ahmad*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal has been argued on one single point. It relates to a shop in Landour, which, together with other properties, was mortgaged by the first four defendants to the defendants Nos. 5 to 12. These defendants brought a suit against their mortgagors and obtained a decree. In execution of that decree they have applied for the sale of the house in suit. The present suit was instituted by the plaintiff for a declaration that the shop was liable to sale. The plaintiff has died during the course of the proceedings and the appellants are his heirs. The facts on which they based their claim are that, in 1905, the 13th defendant instituted a partiton suit against the first four defendants, and obtained a decree declaring her right over 4 *sihams* out of 84 in this shop and in 9 other houses and a grove. These partition proceedings were subsequent to the mortgage, and the mortgagees were not parties to them. The partition decree is, therefore, not binding on the mortgagees. The plaintiff's case, and the case on which the defendant No. 13 obtained partition, was that the shop originally belonged to one Ghulam Muhammad, whose heirs were admittedly the first four and the 13th defendants. It is now found as a fact by both the Courts below that this particular shop did not belong to Ghulam Muhammad. The 13th defendant, therefore, had no right to any share in it, and as regards this shop had no right to the partition decree, which she obtained. In the partition which was subsequently carried out she was allotted 6/7th of the shop in suit. Her rights have been subsequently transferred to the plaintiff. The appellant's contention is that the doctrine of substituted security should be applied, and that the mortgage instead of attaching to the properties mortgaged should be transferred to the properties which the first four defendants obtained in lieu of the 6/7th share given to the 13th defendant in this house. This contention has been repelled by the Courts below, and, in our opinion, rightly so. The doctrine of substituted security only applies where possession of a particular property has been awarded to one party in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when the entire property mortgaged

belonged to the mortgagors, and a person with no title has subsequently obtained possession of a portion of it behind the back of the mortgagees. The mortgage when executed was a perfectly valid mortgage, and the mortgagees are entitled to take out execution against any portion of the mortgaged property. Their right cannot be affected by any subsequent transfer to the plaintiff or his predecessor-in-interest. We accordingly affirm the decision of the Court below and dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 53 OF 1921

September 15, 1922.

Present:—Mr. Simpson, A. J. C., and Mr. Wazir Hasan, A. J. C.

Babu BASANT RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Lala KESHO RAM, DEAD, AND ON HIS DEATH SALIG RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by manager—Interest, excessive rate of—Necessity to borrow at particular rate—Court, power of, to reduce rate—Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit for partition of Hindu joint family property—Mortgage, validity of, decision as to—Subsequent suit on mortgage—Interest and terms of mortgage, validity of, whether res judicata.

There is no general rule of law that a rate of interest over 10 per cent. per annum must always be treated as excessive where there is ample security for the loan. [p. 347, col. 2.]

Whether a certain rate of interest is excessive or not is a question which must depend upon the particular circumstances of each case. [p. 347, col. 2.]

A rate of interest on a mortgage loan at 15 per cent. per annum compoundable yearly is not by itself sufficient to raise the presumption that undue influence was exercised in obtaining it by the mortgagee on the mortgagor. [p. 347, col. 2.]

Abdul Majid v. *Ksherode Chandra Pal*, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809, dissented from.

Poosathurai v. *Kannappa Chettiar*, 55 Ind. Cas. 447; 18 A. L. J. 344; 38 M. L. J. 349; 11 L. W. 455; (1920) M. W. N. 317; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 538; 13 Bur. L. J. 28; 43 M. 546; 47 I. A. 1; 27 M. L. T. 316 (P. C.), referred to.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show, not only that there was necessity to borrow, but that it was not unreasonable to borrow at such rate of interest and upon such terms as are contained in the mortgage, and if it is not shown that there was necessity so to borrow, that rate and those terms cannot stand. Where a Court comes to the conclusion that the rate of interest is excessive and that no necessity for borrowing at that rate existed, it is quite within its right to reduce the contract rate to a reasonable rate of interest. [p. 348, col. 1.]

Nawab Nazir Begam v. *Rao Raghunath*, 50 Ind. Cas. 434; 41 A. 571; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U.P.L. R. (P.C.) 49; 46 I. A. 145 (P.C.), referred to.

A Hindu father executed a mortgage of family property. His son brought a suit for partition to which the mortgagee was also made a party. One of the reliefs claimed in the suit was that the mortgage was not binding on the plaintiff. It was found that the entire amount of the mortgage was borrowed for legal necessity, and the relief in respect of the mortgage was refused. Subsequently, the mortgagee brought a suit for sale on the mortgage to which the mortgagor's son was made a party. He contended that there was no necessity to borrow at the rate of interest and on the terms stipulated for in the mortgage-deed:

Held, that in the previous suit the only question directly and substantially in issue was the validity of the mortgage, and that the question of the amount which the mortgagor or his son may be called upon to pay in the event of a suit for redemption being brought by him or in the event of a suit for sale being brought by the mortgagee on the basis of the mortgage-deed could not be and was not directly and substantially in issue in the previous suit, and that, therefore, the contention of the mortgagor's son in the present suit was not barred by *res judicata*. [p. 349, col. 2.]

Appeal from a decree of the Subordinate Judge, Bahraich, dated the 11th July 1921.

Messrs. *Bisheshwar Nath Srivastava*, *Bishambhar Nath Srivastava* and *Haider Husain*, for the Appellants.

Mr. *Daya Nigham Seth*, for Respondent No. 1.

JUDGMENT.—On the 30th January 1908 Lala Kesho Ram, defendant No. 1, in the suit out of which this appeal arises, executed a deed of mortgage for a sum of Rs. 6,000 in favour of Lala Sohan Lal and Sardar Shiam Singh. The property mortgaged was a two-annas share in village Mahadeo Jagdish,

BASANT RAI v. KESHO RAM.

Pargana Ikauna, in the District of Bahraich, and is admittedly the ancestral joint family property of the mortgagor, Lala Kesho Ram, and his son, Salig Ram. According to the covenant in the deed of mortgage the interest on the money borrowed was fixed at Rs. 1-4-0 per cent. per mensem with yearly rests and the time for re-payment was stipulated to be a period of two years. The mortgagor, Kesho Ram, died during the pendency of the suit but his death has brought in no fresh party to the suit. His only son, Salig Ram, who was a party to the suit from the very beginning, is now the chief defendant. There was another defendant called Maula Bakhsh but he has dropped out of the litigation altogether. Lala Sohan Lal, one of the co-mortgagees, has also died and the first three plaintiffs in the suit are his sons. The fourth plaintiff is the other mortgagee, Sardar Shiam Singh. The plaintiffs prayed for a decree against the defendants for a sum of Rs. 28,960-1-3 and for sale of the mortgaged property in the event of the defendants failing to pay the amount of the decree within the time fixed by the Court for payment. The lower Court has granted a decree to the plaintiffs for the entire principal money secured by the deed of mortgage and interest at the rate of 12 per cent. per annum simple. This appeal by the plaintiffs is against that part of the decree of the Court of first instance which reduces the interest from 15 per cent. per annum compound to 12 per cent. per annum simple. There is no other point involved in the case before us.

The grounds on which the learned Subordinate Judge has based his decision with respect to the question of interest are two:—(1) that the mortgagees obtained the consent of the mortgagor relating to the covenant of interest by undue influence; and (2) that there was no necessity for borrowing at such a high rate of interest though there was a necessity to borrow. Both these grounds are impugned in the appeal before us.

Though there is some evidence on the record that the mortgagees were in a position to dominate the will of the mortgagor yet there is no evidence whatsoever that they took advantage of that position and did, as a matter of fact, exercise influence in the settlement of the terms of the mortgage with the mortgagor: nor are the terms of the mortgage unconscionable to a degree which would justify any presumption on the part of the Court that mortgagees obtained the consent of the mortgagor by the exercise of undue influence. The decision of the learned Subordinate Judge on this part of the case seems to be wholly based on a ruling of the Calcutta High Court in the case of *Abdul Majid* v. *Ksherode Chandra Pal* (1). If that case lays down a general rule of law of the nature which the learned Subordinate Judge thinks it does, we respectfully differ from that decision. On the authority of that case the learned Subordinate Judge says: "Where there is ample security, an excessive rate of interest has been held to be anything over ten per cent." We cannot subscribe to the proposition that a rate of interest over ten per cent. must always be treated as excessive rate where there is a simple security for the loan. We have no doubt in our minds that the security in the present case was ample but whether a certain rate of interest is excessive or not is a question which must depend upon the particular circumstances of each case. We are, therefore, of opinion that the rate of interest at 15 per cent. per annum is not by itself sufficient to raise the presumption that undue influence was exercised in obtaining it by the mortgagees on the mortgagor. See the decision of the Privy Council in the case of *Poosathurai* v. *Kannappa Chettiar* (2).

As regards the second question in appeal, we are of opinion that the learned Subordinate Judge's decision rests on firmer grounds. The law on

(1) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.

(2) 55 Ind. Cas. 447; 18 A. L. J. 344; 38 M. L. J. 349; 11 L. W. 455; (1920) M. W. N. 317; 2 U. P. L. R. (P. C.) 62; 22 Bom. L. R. 535; 13 Bur. L. T. 28; 43 M. 546; 47 I. A. 1; 27 M. L. T. 316 (P. C.).

the subject may be quoted from a decision of the Privy Council in the case of *Nawab Nazir Begam* v. *Rao Raghunath* (3). In delivering the judgment of the Privy Council Lord Phillimore made the following observation in the case:— "It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show, not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand. The principle being established, the learned Subordinate Judge was right in entering upon the enquiry as to whether the rate of interest stipulated for in the mortgage in suit was a reasonable one or not: and, if not, was there necessity to borrow such an unreasonable rate of interest. On the consideration of the evidence before him and also of some of the decisions of this Court the learned Subordinate Judge came to the conclusion "that the *Mahajan* of the defendant No. 1 were ready to advance him a loan of Rs. 6,000 at 9 per cent. per annum, and I see no reason to disbelieve their evidence, because this is the usual rate of interest prevailing in these Provinces." Having come to the conclusion that the rate of interest was excessive and that no necessity for borrowing at that rate existed, the learned Subordinate Judge was quite within his right to reduce it and we think that there are no sufficient grounds for interference on our part with that view of his. In the case already referred to, the High Court had reduced the rate of interest from Rs. 3-2-0 per cent. per mensem with six-monthly rests to 12 per cent. per annum simple on the ground that it had a discretion to do so. In referring to that part of the decision of the High Court Lord Phillimore observed as follows:—"However this may be, their Lordships do not think it safe to rest their decision upon a supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family, and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived." In the present case we are of opinion that the finding of the learned Subordinate Judge amounts to this, that the authority of the mortgagor in borrowing money at a rate of interest higher than 12 per cent. per annum was exceeded. We agree with that finding.

There is one more matter to which short reference may now be made. It appears that in 1913 Salig Ram, the present respondent, brought a suit in the Court of the Subordinate Judge of Bahraich for partition of the ancestral joint family property including the property now in suit. To that suit his father, Kesho Ram, was the first defendant. Amongst other defendants were the present mortgagees.

One of the reliefs claimed was that it might be declared that the deed of mortgage, dated the 30th January 1908, now in suit, was not binding on the plaintiff. The mortgagees joined issue with the plaintiff in respect of this relief. The result was that the Court of first instance and this Court on appeal dismissed the claim of Salig Ram in respect of the declaration which he sought with rgeard to the deed of the 30th January 1908. The Courts found that the entire sum of Rs. 6,000 borrowed under the deed of mortgage was borrowed for legal necessity. One of the issues framed in the present suit in view of the pleadings in the case was, "Whether the plea as to immorality and want of family necessity is *res judicata* between the parties." This issue has been decided in favour of the plaintiffs and the de-

(3) 50 Ind. Cas. 434; 41 A. 571; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R (P. C.) 49; 46 I. A. 145 (P. C.).

cision of the learned Subordinate Judge is no longer contested in appeal before us. The defendants led evidence to show that the rate of interest stipulated for in the mortgage in suit was excessive. The plaintiffs then produced evidence to show that it was not so. After the plaintiffs had examined their first witness the defendants' Pleader filed an application on the 26th May 1921, the object of which was to give notice to the plaintiffs that the defendants wanted to argue the point that, "the rate of interest itself is so exorbitant that there was no necessity to take a loan at such a rate of interest by hypothecating the mortgaged property." The Court drew the plaintiffs' attention to this application and the plaintiffs' Pleader stated that in view of the application he wanted to examine the defendant No. 4. At the hearing of the suit following this the plaintiffs produced the defendant No. 4 as their first witness. The finding of the learned Subordinate Judge on the question thus raised in respect of the propriety of the interest charged in the deed of mortgage has already been noted, discussed and decided by us in the preceding portion of our judgment.

The appellants' learned Couusel urged before us that in view of the previous litigation the question as to the rate of interest was *res judicata* between the parties and consequently the defendants could not be permitted to challenge it in the present suit. In the memorandum of appeal presented to this Court no ground was taken with respect to this matter nor was any issue asked for to be framed by the plaintiffs in the lower Court after the petition of the 26th May 1921 was made. On the other hand, they proceeded to adduce evidence relating to that question. We think that, in the circumstances, it would not be fair to the respondents to allow this plea of *res judicata* to be now taken in the Court of Appeal: but as at the hearing of the appeal we were not disposed to decide this matter then and there we permitted arguments to be addressed to us on that question, our conclusion is that the plea of *res judicata* in respect of the interest is devoid of substance. In the previous suit the only question directly and substantially in issue was the validity of the mortgage. The question of the amount which the mortgagor or his son may be called upon to pay in the event of a suit for redemption being brought by him or in the event of a suit for sale being brought by the mortgagees on the basis of the mortgage-deed could not and was not directly and substantially in issue in the previous suit. Any decision as to the exact amount of mortgage payable in either of the two events would have been premature.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 196 OF 1922.
March 27, 1923.
Present:—Mr. Justice Lindsay and Mr. Justice Daniels.

Raja LALTA PRASAD AND ANOTHER —DEFENDANTS—APPELLANTS
versus
RAM BAHADUR—PLAINTIFF—RESPONDENT.

Jurisdiction of Courts—Suit for declaration of grove-holder's title—Civil Court, power of.

A Civil Court cannot give a declaration regarding a plaintiff's right to hold a grove as long as the grove exists. But it is perfectly competent to declare that the plaintiff is the owner of the trees in the grove.

Manna v. *Rang Lal*, 39 Ind. Cas. 859, followed.

Second appeal from a decree of the Subordinate Judge, Pilibhit, dated the 17th November 1921.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *S. C. Das*, for the Respondent

JUDGMENT.—The appellants in this case brought a suit in a Rent Court for the ejectment of the plaintiff-respondent from certain land.

The respondent put forward the plea that he was the owner of the land and that it was grove land.

LALTA PRASAD v. RAM BAHADUR.

The Rent Court took action under section 199 of the Tenancy Act and directed the respondent to file a suit in order to have the disputed question of title determined. It is out of this suit that this second appeal has arisen.

In his plaint the respondent claimed to be the owner of the land in question as also of the trees situated upon it. He further claimed that he had sunk a well and had constructed a house on the land and he asked for a declaration of his proprietary title with respect to all this property. In the second paragrapgh of his plaint he stated that, even on the assumption that he was a grove-holder, the opposite party had no right in law to eject him.

The Court of first instance dismissed the suit finding that the plaintiff was not the owner of the soil. The Munsif was of opinion, however, that the plaintiff was a grove-holder. He held that he had no power to give any declaration to that effect in proceedings which had come into his Court in accordance with the provisions of section 199 of the Tenancy Act. In appeal the Subordinate Judge has found that the plaintiff is not the owner of the land but he found him to be the owner of the trees in the grove and he has given him a decree to the effect that he is entitled to hold the grove as long as the grove exists.

The contention before us is that the Civil Court had no authority to give a declaration regarding the right of the plaintiff to hold the grove as long as the grove exists. It is said that the only question which the Civil Court could properly entertain was the question of proprietary title.

We have been referred to the judgment of a Bench of this Court, Letters Patent Appeal No. 44 of 1916, decided on the 3rd April 1917.) [*Manna* v. *Rang Lal* (1)]. That was a case somewhat similar to the present. There the lower Appellate Court found that the plaintiff had not succeeded in proving himself to be the proprietor of the land but had come to the conclusion that he was entitled to the trees and had passed a decree in the following terms :—

" The decree of the lower Court is modified and it is declared that the plaintiff is the owner of the trees in grove No. 111 as entered in the Former Settlement and No. 117 as entered in the Recent Settlement and that he is not the owner of the land."

It was held in the case that that was a perfectly good declaration which was within the competence of the Civil Court and had the decree in the present case been in that form, we could not have interfered with it. It seems to us that, following the case just mentioned, we ought to alter the form of the decree of the Court below and bring it into conformity with the decree which was passed in the case to which we have just referred.

It has been argued on behalf of the appellants that there is no finding that the plaintiff is the owner of the trees on this land but we think that this point is clearly established. The lower Appellate Court found that the grove had been transferred to the father of the present appellants in the year 1890. There is on the record a sale-deed by which this property was transferred and the sale-deed clearly makes mention of the trees in this grove being transferred by way of sale. It is impossible to doubt, therefore, that the Court below really found that the plaintiff is the owner of the trees.

We, therefore, allow the appeal to this extent that we modify the decree of the Court below and substitute for the declaration given by the learned Subordinate Judge the following declaration, namely, that it be decreed that the plaintiff though not owner of the land is owner of the trees on the plots in suit. With this modification in the lower Court's order we dismiss the appeal. We make no order as to costs.

The cross-objections have not been pressed. They are also dismissed without any order as to costs.

M. A. A. *Decree modified.*

(1) 39 Ind. Cas. 859.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 121 of 1922.
November 16, 1922.
Present:—Mr. Daniels, A. J. C.
JAG MOHAN SINGH AND OTHERS—PLAINTIFFS—APPLICANTS
versus
MATA BADAL AND OTHERS—DEFENDANTS OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. LVII, r. 7—Review, refusal to grant—Revision, whether lies.

The granting of a review is a matter peculiarly within the discretion of the Judge who passed the decree; no other Judge can hear an application for review, and if the Judge who tried the case refuses to grant a review, his order is by r. 7 of O. XLVII of the Civil Procedure Code expressly declared not to be appealable; nor is an application for revision against such order competent.

Application for revision against an order of the Subordinate Judge, Sultanpur, dated the 26th August 1922.

Mr. *Bisheshwar Nath Srivastava*, for the Applicants.

Messrs. *A. P. Sen* and *Niamat Ullah*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Sultanpur refusing to review his order. It appears that the learned Judge had made a mistake as to a Will which was before him in thinking that it was registered in the lifetime of the testator. No appeal was preferred from his decision but the applicants applied for review. The learned Subordinate Judge refused to review his decision on the ground that his decision was based not solely on the fact of registration in the testator's lifetime but also on oral evidence. This is no doubt true though certainly the fact of registration appears to have been the main point influencing his decision. My chief reason for rejecting this application, however, is that the granting of a review is a matter peculiarly within the discretion of the Judge who passed the decree. No other Judge can hear such an application and if the Judge who tried the case refuses to grant a review, his order is by r. 7 of O. XLVII expressly declared not to be appealable. If this Court is on revision to consider the sufficiency of the Subordinate Judge's grounds for not allowing a review it would be difficult to distinguish a revision from the appeal which the law expressly refuses. I accordingly reject the present application though under the circumstances without costs.

Z. K. *Revision rejected.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 39 OF 1922.
May 4, 1923.
Present:—Mr. Justice Gokul Prasad.
NARAIN SINGH—DEFENDANT—APPELLANT
versus
ZALIM SINGH AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—One decree-holder agreeing to pay others but failing to do so—Sale in execution by other decree-holder—Fraud—Suit to set aside sale, whether competent.

In a suit to recover property sold at an auction-sale in execution of a decree it appeared that one of several decree-holders had agreed, in consideration for a conveyance of certain land in his favour, to pay up his co-decree-holder but did not do so, with the result that the property was sold in execution taken out by the other decree-holder:

Held, that the sale could not be set aside by an application under section 47 of the Civil Procedure Code and that the suit was competent.

Prosunno Kumar Sanyal v. *Kali Das Sanyal*, 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 899 (P. C.), distinguished.

Second appeal against a decree of the Subordinate Judge, Agra, dated the 22nd of September 1921.

Mr. *M. L. Sandal*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is a defendant appeal arising out of the following circumstances. It appears that there were two decrees outstanding against the plaintiff, one No. 1653, and the other No. 1307. The defendant Lal Hans was a decree-holder in both these de-

crees but in decree No. 1653 there were other decree-holders also. A contract was entered into between the present plaintiff and Lal Hans, the decree-holder aforesaid, that the latter would pay off both the decrees and the plaintiff would transfer 14½ *bighas* to him out of 16 *bighas* and odd share which the plaintiff had purchased at auction on the 20th of July 1905. The plaintiff carried out his part of the contract and executed a sale-deed of the property in favour of Lal Hans. Lal Hans satisfied the decree No. 1307 only but did not pay off the other decree-holders in decree No. 1653. Lal Hans, however, got mutation of names effected in his favour of only 4 *bighas* and odd out of 14 *bighas* and odd share sold to him. The decree-holders, other than Lal Hans, of the decree No. 1653 executed the decree and put up to sale the 11 *bighas* and odd share which stood in the name of the plaintff because Lal Hans had obtained mutation of names in only 4 *bighas* and odd out of the 14 *bighas* and odd sold to him by the plaintiff. These 11 *bighas* and odd were sold, the decree was satisfied and a surplus amount was left over. This surplus amount of Rs. 55 was withdrawn by the plaintiff Zalim Singh. This was in the year 1914. On the 23rd March 1920 the plaintiff brought the present suit to recover from Narain Singh who had purchased the property at auction-sale. The property sought to be recovered was one *bigha* and odd the difference between the 16 *bighas* and odd owned by the plaintiff originally and the 14 *bighas* and odd sold by him to Lal Hans. This Narain Singh, defendant, is the son of Lal Hans aforesaid who has also been made a defendant. The defence pleaded was that defendant Lal Hans had not committed any fraud on the plaintiff and the plaintiff had no right to sue, that he was estopped from contesting the validity of the sale because he had taken back the surplus money. It was also contended that the suit did not lie having regard to the provisions of section 47 of the Code of Civil Procedure. The Trial Court decreed the claim subject to the plaintiff paying Rs. 50 a part of the surplus amount to the defendant Lal Hans. The defendant Narain Singh the auction-purchaser went up in appeal and the learned Judge of the lower Appellate Court has confirmed the decree of the Court below except in so far as it modified the decree of the First Court by allowing Rs. 55 to the defendant Lal Hans. The defendant comes here in second appeal and the only ground urged by him is that the suit is barred by section 47 of the Code of Civil Procedure. The learned Vakil for the appellant has relied upon the case of *Prosunno Kuma Sanyal* v. *Kali Das Sanyal* (1) in support of the contention that the proceedings could have been taken under section 47 of the Code of Civil Procedure in this matter. I cannot agree to this contention. This ruling was passed under the old Code of Civil Procedure and laid down that the question of fraud also between the judgment-debtor and the auction-purchaser could be determined under section 244 of the old Code of Civil Procedure. In the present suit, however, the question of fraud has arisen in this way that the judgment-debtor pleads that one of the decree-holders who had agreed to pay up his co-decree-holder did not do so with the result that the property was sold in execution taken out by the co-decree-holder and the plaintiff was damnified and justified to sue to recover his property. This was neither fraud in publishing nor conducting the sale. I hold that an application like the present suit could not have been made under section 47 of the Civil Procedure Code. I, therefore, dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 899 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 51 OF 1923.
May 31, 1923.
Present:—Mr. Justice Ryves.
Hakim LALLU MAL—DEFENDANT—APPLICANT
versus
Pandit REOTI RAM—PLAINTIFF—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 19—Promissory-note—Admission of execution not inter partes—Acknowledgment.

The mere fact that in some other case between different parties the defendant admitted the execution of a promissory-note, the basis of the suit, is not an acknowledgment of liability within the meaning of section 19 of the Limitation Act.

Sri Ram v. *Firm Sobha Ram-Gopal Rai*, 67 Ind. Cas. 513; 20 A. L. J. 315 (1923) A. I. R. (A) 213; 4 U. P. L. R. (A) 153; 44 A. 521, distinguished.

Civil revision from an order of the Judge, Small Cause Court, Nagina, dated the 7th November 1922.

Mr. *M. N. Raina*, for the Applicant.

Mr. *Durga Prasad*, for the Opposite Party.

JUDGMENT.—This is a civil revision from a decree of the Court of Small Causes. The suit was based on a promissory-note executed by the defendant on the 15th of April 1919. The suit was filed on the 28th of April 1922. The defendant put in a written statement, the second paragraph of which runs as follows:—

"The plaintiff (who is a *Jotshi*) led the defendant to believe that he would perform adequate *puja* which would have the effect of saving the lives of his children and they would survive the age of one year, and for this the defendant agreed to pay Rs. 30 to the plaintiff out of which Rs. 8 was paid in cash and the balance was payable after the child had survived the age of one year.' It was on this understanding that the promissory-note was written. The child died within a year of its birth and hence nothing was payable. The other ground taken was that the suit was barred by limitation. It appears from the record that five witnesses on behalf of the defendant were present but, as a matter of fact, the Court took no evidence at all, holding that it was not open to the defendant who admitted the execution of the promissory-note to plead want of consideration and reliance was placed on *Sri Ram* v. *Firm Sobha Ram-Gopal Rai* (1). I do not think that, ruling is applicable in this case. I think under the 3rd proviso to section 92 of the Indian Evidence Act, the Court should have allowed evidence to be taken on this point. But it is unnecessary to decide this as I hold against the plaintiff on the second point. On the face of it, the suit is barred by limitation as it was not filed until the 28th of April 1922. In order to bring it within limitation it was pointed out that, in some other suit (not between these parties) this promissory-note had been exhibited and on that occasion, some time in 1920, the defendant had admitted its execution. The Court has held that the mere fact that on the back of the note there is in the handwriting of the defendant the words "Execution admitted," and the endorsement of the Munsif showing the date is a sufficient compliance of the provisions of section 19 of the Indian Limitation Act. It seems to me that the mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability within the meaning of the section. No evidence was taken and there is nothing but the endorsement. In my opinion it has not been shown that the suit was within limitation, it, therefore, should have been dismissed. I accordingly allow this application and set aside the decree of the Court below with costs.

M. A. A. *Application allowed.*

(1) 67 Ind. Cas. 513; 20 A. L. J. 315; (1922) A. I. R. (A) 213; 4 U. P. L. R. (A) 153; 44 A 521.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 117 OF 1922.
September 6, 1922.
Present:—Mr. Ashworth, J. C.
JAMNA PERSHAD—DEFENDANT—APPELLANT
versus
BALBHADDAR—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation by manager—Recital in deed, value of—Necessity

—Enquiry, proof of—Antecedent debt, what is —Debt whether binding on son during lifetime of father—Pre-emptor from vendee, position of—Civil Procedure Code (Act V of 1908), O. XLI, r. 2—Appeal—Issue disposed of on two grounds —Decision on one ground attacked—Appellate Court, power of, to deal with issue generally.

A recital in a deed by the manager of a joint Hindu family, which is impugned by the other members of the family, is not by itself sufficient to establish necessity, but it is clear evidence of the representation, and when proof of actual enquiry has become impossible, the recital coupled with circumstances, such as to justify a reasonable belief that an enquiry would have confirmed the truth of the recital, would be sufficient evidence to support the necessity stated. [p. 356, col. 1.]

A representation by the father, even if he is not the manager, is, for the purpose of affecting the question whether the deed was in consideration of the payment of antecedent debts, no less and no more admissible in evidence than the representation of the father as manager: for, the real value of the representation is that it indicates the scope of enquiry that has or may be presumed to have been made. [p. 356, col. 1.]

Ramman Lal v. *Ram Gopal*, 47 Ind. Cas. 987; 5 O. L. J. 629; 21 O. C. 200 and *Suraj Narain* v. *Ratan Lal*, 40 Ind. Cas. 988; 20 O. C. 211 at p. 219; 21 C. W. N. 1065; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159; 44 I. A. 201, considered and explained.

Brij Lal v. *Inda Kunwar*, 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 493; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 (P. C.) and *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.), referred to.

The definition of an antecedent debt as a debt "incurred irrespective of the credit obtainable from joint family property" is to be regarded as one to be construed in the light of the particular facts before a Court, and as not excluding from the category of antecedent debts money borrowed on a hypothecation-bond, since the personal liability for debts so secured continues to exist independently of the hypothecation. [p. 357, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.) and *Ram Dei* v. *Suraj Bakhsh*, 60 Ind. Cas. 177, 23 O. C. 204 at p. 211; 7 O. L. J. 509; 2 U. P. L. R. (O.) 156, referred to.

In the absence of any covenant to that effect, a usufructuary mortgagor, as such, is not personally liable to repay the loan. [p. 357, col. 2.]

The antecedency of a debt incurred by a father may be invoked to uphold a transfer by him as against the sons even during the father's lifetime. [p. 358, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.), interpreted.

A pre-emptor cannot stand in a better position against the sons of the vendor than the vendee from the father, except that, being in a less favourable situation than the vendee to prove proper enquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree. [p. 358, col. 2.]

Where an issue is disposed of by the Trial Court on two grounds and the decision on one of them is attacked in appeal, it may be taken that the appellant desires to impugn the decision on the issue generally, and the Appellate Court has power, under O. XLI, r. 2, of the Civil Procedure Code, to deal with the whole matter. [p. 355, col. 1.]

Appeal from a decree of the District Judge, Fyzabad, dated the 7th January 1922, upholding that of the Additional Subordinate Judge, Fyzabad, dated the 31st July 1920.

Mr. *Niamat Ullah*, for the Appellant.
Mr. *Lal Behari Singh*, for the Respondent.

JUDGMENT.—This second appeal arises out of the suit brought by respondent No. 1, Balbhaddar, in the Court of the Subordinate Judge of Fyzabad. The plaintiff in the suit, Balbhaddar, brought the suit to obtain possession of a certain *mahal* which had been alienated by his father Lachhmi Dat who was made defendant No. 1. This defendant died after the decision of the Court of first hearing and before the first appeal. The sale by Lachhmi Dat was in favour of certain persons but they lost the property by a pre-emption suit brought by one Udit. Udit again lost the property by a pre-emption suit to the defendant No. 2, Jamna Pershad, the present appellant.

Hence the suit is really one against Jamna Pershad. Both the lower Courts found that the property was to be considered ancestral property and not the self-acquired property of Lachhmi Dat. This finding is not impugned. The Court of first hearing held that the burden of proving that the deed by Lachhmi

Dat was either for legal necessity or for payment of antecedent debts was on the defendant No. 2 and found against him as he produced no evidence. An appeal was filed before the lower Appellate Court calling in question the decision that the sale was not for legal necessity. The decision that it was not on account of antecedent debts was not impugned in the Memorandum of Appeal. When, however, the case was argued in the Court the appellant did not argue on the point whether the sale was for legal necessity but only on the question whether it was on account of antecedent debts, the latter point, as stated above, not having been urged in the Memorandum of Appeal. The lower Appellate Court, however, excused this omission and decided the appeal as if the First Court's decision that the sale was not on account of antencedent debts had been impugned. The District Judge held that the only evidence tendered to prove that the sale was for antecedent debts consisted in the recital by Lachhmi Dat in the sale-deed. He held that this recital would be no evidence unless it was made by Lachhmi Dat in the capacity of manager. He held that Lachhmi Dat could not be held to be manager on the evidence. In this appeal the following questions arise:—

Was the lower Appellate Court debarred from considering the question whether the sale could be upheld on the ground of its being for the purpose of liquidating antecedent debts, in view of the fact that the decision of the First Court against the appellant on this point was not impugned in the Memorandum of Appeal?

The lower Appellate Court was not so debarred as it had power to do this under O. XLI, r. 2, Civil Procedure Code. Both questions were dealt with under one issue in the Court of first hearing and the fact that the appellant in his Memorandum of Appeal impugned one question could be taken as meaning that he wished to impugn the decision on the issue generally.

The second question is whether a recital in a deed by the manager of a Hindu family is binding on the other members of the family as an admission or otherwise. Reliance is placed by the appellant on a case heard by two Judges of this Court, *Ramman Lal* v. *Ram Gopal* (1). At the bottom of page 636* it is there stated that, as pointed out by their Lordships of the Privy Council in *Suraj Narain* v. *Ratan Lal* (2), statements made by a manager are admissible in evidence against the other members of the family, (to prove that certain debts were antecedent debts of the father at the date of transfer impugned by sons) The Privy Council ruling referred to, though in the report stated to be 19 O. C., p. 211, is really to be found at page 211 of 20 O. C. In that case the question was whether certain properties were acquired by successive managers on behalf of the estate or were their self-acquired properties. One of the parties was Ratan Lal, the son-in-law of an ex-manager, named Ram Narain. Their Lordships of the Privy Council treated as important evidence the deposition made by this Ram Narain three years after he became manager or *karta*. A study of the ruling, however, will show that this statement was treated as an admission by Ram Narain as the predecessor-in-interest of Ratan Lal and not because he happened to be manager. Moreover, in that case the suit was between members of a joint family and not against an outsider. The case is no authority for the proposition that the recital in a deed by a manager will bind other members of the family in respect of an alienation by him which they are impugning. It has been held by their Lordships of the Privy Council in *Brij Lal* v. *Inda Kunwar* (3) and *Nanda*

(1) 47 Ind. Cas. 987; 5 O. L. J. 629; 21 O. C. 200.

(2) 40 Ind. Cas. 988; 20 O. C. 211 at p. 219; 21 C. W. N. 1065; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159; 44 I. A. 201 (P. C.).

(3) 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 (P. C.).

*Page of 5 O. L. J.—[*Ed.*]

Lal Dhur Biswas v. *Jagat Kishore Acharjya* (4). that a recital by a Hindu widow in a deed is not by itself sufficient to establish necessity, but that it is clear evidence of the representation and that when proof of actual enquiry has become impossible the recital coupled with circumstances such as to justify a reasonable belief that an enquiry would have confirmed the truth of the recital; would be sufficient evidence to support the necessity stated. I do not think that a recital by a manager impugned by other members of the family is entitled to higher value than a recital by a Hindu widow impugned by reversioners.

It is, however, objected that there was a finding of fact by the lower Appellate Court which cannot be set aside in second appeal that Lachhmi Dat was not the manager when he executed the sale-deed. The representation by the father, even if he were not manager, would for the purpose of affecting the question whether the sale-deed was in consideration of the payment of antecedent debts appear to me to be no less (and no more) admissible in evidence than the representation of father as manager. It is obvious from the Privy Council ruling referred to above that the real value of the representation is that it indicates the scope of enquiry that has or may be presumed to have been made. I do not see what difference it makes as to the fact of this representation whether it was by the father acting as guardian or not. Apart from this, I can find no evidence whatever to justify the decision of the lower Appellate Court that Lachhmi Dat was not manager. The matter was not considered by the Court of first hearing. The lower Appellate Court has relied, as proof that he was not the manager, on the fact that a witness stated that some one else was manager after the death of Lachhmi Dat's father, namely a maternal uncle. Now such maternal uncle in the presence of the father could not have been the *de jure* manager. The family at the time of the sale-deed consisted of Lachhmi Dat and Balbhaddar only, Balbhaddar being a minor at the time. In the absence of evidence that the father was incapacitated from being guardian it seems an irresistible conclusion that he was guardian.

The next question is whether, treating this recital as a representation, proof of actual enquiry can be said to have become impossible to the appellant, if so, are there such circumstances as will justify a reasonable belief that enquiry would have confirmed the truth of the recital. The appellant is the pre-emptor of a pre-emptor of the vendee of the father and manager Lachhmi Dat. It may be regarded as for practical purposes impossible for him to prove actual enquiry by the vendee, as the vendee would not be likely if called as a witness by a pre-emptor to give evidence in his favour. The sale-deed recited, as debts to be paid by the vendees, various sums amounting to Rs 2,800 composed as follows:--

Rs 1,300 due on a hypothecation-deed
Rs. 900 due under a pro-note, and
Rs. 600 due on some possessory mortgages.

These sums were all to be paid off by the vendee and their payment was treated as the sale consideration. He had not paid them off before he was pre-empted by the first pre-empting person but that pre-emptor did pay them off. The appellant, as second pre-emptor, repaid the first pre-emptor the whole Rs. 2,800. Now it is not unreasonable to suppose that the first pre-emptor would have challenged any part of the consideration in the sale deed which was open to objection in his pre-emption suit. That the pre-emptor paid up all these sums is in the circumstances of this case sufficient evidence that enquiry by himself had, and consequently enquiry by the vendee would have, proved these debts to be in existence as debts against

(4) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.).

the father, even if not valid against the property; that is to say, the recital may be regarded as true as far as it goes.

Treating the recital then as evidence to this extent, it has to be seen how for it is of use to the appellant. The Rs. 900 due under the pro-note was clearly an antecedent debt of the father, and the re-payment of this sum cannot be impugned as forming consideration for the sale. As to the Rs. 1,300 due on the hypothecation-bond, it was not a debt "incurred irrespective of the credit obtainable from joint family property" and, therefore, would not appear to have been an antecedent debt as defined by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (5). It is, however, settled law of this Court to regard that definition of their Lordships, as one to be construed in the light of the particular facts before it, and as not excluding from the category of antecedent debts money borrowed on a hypothecation-bond, since the personal liability for debts so secured continues to exist independently of the hypothecation. [See *Ram Del* v. *Suraj Bakhsh* (6)]. The Rs. 1,300 must, therefore, also be regarded as consideration binding on the sons. As to the Rs. 600 secured by the possessory mortgages, it is not possible to say merely from the recital whether after execution of these mortgages the father had remained personally liable for the sums secured by them. A usufructuary mortgagor as such is not personally liable to re-pay a loan. In respect of this Ghose, in his Law of Mortgage, page 93 of the 4th Edition, says :—

"In a purely usufructuary mortgage where the mortgagee takes possession of the estate, on the understanding that he shall re-pay himself out of the rents and profits, the mortgagor undertakes no personal liability, and the mortgagee must, therefore, look exclusively to the land for re-payment of the debt. In the case of Jhanoo Bibi decided many years ago, the Sudder Dewany of Calcutta held that in the absence of any covenant, the mortgagor cannot be sued personally, and this may be taken to be the established rule on the subject."

He then quotes a list of rulings to support his statement. If Lachhmi Dat then was not personally liable for the money obtained by this bond, it was not an antecedent debt at the date of the sale. The burden of proving that the consideration of the sale-deed consisted of antecedent debts is on the appellant and the recital, therefore, fails to help him to prove this in respect of the Rs. 600. In conclusion, I find that the consideration for the sale was valid and binding on the sons to the extent of the total less Rs. 600.

It is, however, urged on behalf of the plaintiff-respondent that he is not affected by the sale-deed having liquidated antecedent debts of his father in view of the fact that the father was alive at the time of the bringing of this suit and indeed until the decree of the First Court had been passed. Reliance is placed on a passage in their Lordships' judgment in the *Sahu Ram Chandra* v. *Bhup Singh* (5), case already referred to. That passage is :—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity

(5) 39 Ind Cas. 280; 44 I. A. 126; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J 141 (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(6) 60 Ind. Cas. 177; 23 O. C. 204 at p. 211; 7 O. L. J. 509; 2 U. P. L. R. (O.) 156.

of a mortgage over the joint estate is quite another thing."

A careful study, however, of the judgment of their Lordships leads to the conclusion that to this statement their Lordships adimitted an exception, namely, that the pious obligation of the sons to defray their father's debts fortified by the necessity of protecting the right of third parties, had given rise to a rule that sons could not impeach a transfer for an antecedent debt. The passage invoked does not qualify, but is subject to, the subsequent portion of the judgment maintaining the validity of a transfer to secure an antecedent debt. In orher words, the antecedency of a debt incurred by a father may be invoked to uphold a transfer by him as against the sons even during the father's lifetime.

There is no plea in this appeal that the burden of proof was wrongly placed on the appellant, though the plea was taken in the first appeal that the sons are bound to prove the immorality of the debts rather than that the transferee should prove their antecedency. It is clear that a pre-emptor cannot stand in a better position against the sons than the vendee from the father except that being in a less favourable situation than the vendee to prove proper enquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree.

In view of the above finding, I vary the decrees of the lower Courts in favour of the plaintiff and direct that decree be framed that the plaintiff shall be put in possession of the property claimed after the expiry of two months from the date of this decree unless the defendant No. 2 within that period pays to the plaintiff the sum of Rs. 600 together with interest at 6 per cent. from the date of the sale-deed, *i.e.*, from the 2nd June 1916, (See Exhibit I), up to the date of payment, in which case the suit shall stand dismissed. The parties will get proportional costs in all Courts.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 130 OF 1920.
April 5, 1923.
Present:—Mr. Justice Ryves.
RAM DIAL,—PLAINTIFF—APPLICANT
versus
SHER SINGH AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 149, O. VII, r. 11—Plaint filed on insufficient Court-fee—Balance made good after expiry of limitation, but within time fixed by Court—Suit, whether time-barred.

A suit filed within limitation but on an insufficiently stamped paper, is not barred by time if the deficiency is made good within the time allowed by the Court even though limitation has in the meantime expired.

Jointi Prasad v. *Bechu Singh*, 15 A. 65; A. W. N. (1893) 29; 7 Ind. Dec. (N. S.) 758, dissented from.

Gaya Loan Office Limited v. *Awadh Behari Lal*, 37 Ind. Cas. 507; 1 P. L. J. 420; 3 P. L. W. 51, followed.

Civil revision from an order of the Judge, Small Cause Court, Khurja, dated the 25th August 1922.

Mr. *Panna Lal*, for the Applicant.

Mr. *P. L. Banerji*, for the Opposite Parties.

JUDGMENT.—The plaintiff, Ram Dial, sued to recover money due to him on a bond executed by the defendant. He filed his plaint on the 15th May 1922, which was the last day of limitation. The *Munsarim* made a report that although the suit had been properly valued the Court-fee paid was insufficient. Thereupon the Court gave the plaintiff time up to the 19th May to make good the deficiency. The deficiency was made good on the 17th May and the plaint was then registered. At the trial the defendant pleaded, amongst other things, that the suit was barred by limitation. The Court found on the merits for the plaintiff, but held that the suit was barred by limitation on the authority

of *Jainti Prasad* v. *Bechu Singh* (1). The plaintiff in revision urges that that decision is no longer law and that, under O. VII, r. 11, clause (*c*) of the Code of Civil Procedure, read with section 149 of the Code of Civil Pocedure, the Court had power in its discretion to allow the plaintiff further time in which to make good the deficiency of Court-fee and that if such deficiency were made good within the time prescribed the fact that in the meantime limitation had expired would not affect the suit. It seems to me that this contention is correct. The rule in *Jainti Prasad* v. *Bechu Singh* (1) was not followed in the other High Courts. It seems to me that, under O. VII, r. 11, clause (*c*), read with section 149 of the Code of Civil Procedure, the Legislature deliberately intended to supersede that decision. A similar view is taken in *Gaya Loan Office, Limited* v. *Awadh Behari Lal* (2). In my opinion, the Court below was wrong in dismissing the suit on the ground of limitation. As on all other points the Court below has found in favour of the plaintiff, I set aside the decree of the Court below and decree the plaintiff's claim with costs in both Courts.

M. A. A. *Appeal allowed.*

(1) 15 A. 65; A. W. N. (1893) 29; 7 Ind. Dec. (N. S.) 758.

(2) 37 Ind. Cas. 507; 1 P. L. J. 420; 3 P. L. W. 51.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1487 OF 1921.
March 22, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

KASHI PRASAD — DEFENDANT — APPELLANT

versus

PANNA LAL AND OTHERS—DEFENDANTS AND PLAINTIFFS—RESPONDENTS.

Creditor and debtor—Promissory-note, suit on—Independent cause of action, value of.

When a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory-note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence.

Ram Sarup v. *Jasodha Kunwar*, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72, followed.

Second appeal against a decree of the District Judge, Jhansi, dated the 14th of July 1921.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Kamuda Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Panna Lal and Shiam Lal against Kashi Prasad, Manni Lal and others for money. The suit was decreed against both. The defence of Kashi Prasad was that he and Manni Lal had been partners in a Commission Agency business and that the partnership had been dissolved, whereupon, according to an arbitration, Manni Lal undertook to pay off this account and gave two *hundis* in discharge of his share of the debt due by both of them. The decree was against both. Kashi Prasad has appealed on the ground that he was not liable but that Manni Lal alone was liable. He urged,—

(1) that the *hundis* were not given in discharge of the debt on the *gur* account, but were on entirely separate loan account;

(2) that as decided by the arbitrators, Manni Lal alone undertook to be responsible for the payment of the *hundis*.

Both the Courts have found that the *hundis* were given in satisfaction of the *gur* account and were not evidence of a separate transaction. They have also found that as the *hundis* were inadmissible in evidence under section 35 of the Indian Stamp Act because they were improperly stamped, Panna Lal was entitled to go back and prove his case on the original *gur* account in discharge of which these *hundis* had been given.

In appeal, the facts cannot be controverted but it is argued that the Court was not entitled to allow the plaintiffs to go behind the *hundis*. This point is established, at any rate so far as this Court is concerned, in a long series of rulings, of which an example may be given in *Ram Sarup* v. *Jasodha Kunwar* (1), in which it was held

(1) 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72.

that "if a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory-note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence."

The last point taken was that, inasmuch as the plaintiff had given a receipt in full satisfaction of the debt, he was not entitled to go behind it. This point was not raised in the Court below, and, therefore, we cannot allow it to be argued here. On the findings, therefore, the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

M. D. J. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 29 OF 1922.
December 7, 1922.
Present:—Mr. Daniels, A. J. C.
KALLOO SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BAKHTAWAR SINGH AND OTHERS—PLAINTIFFS, AND UMRAI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 101—Merger—Mortgagee purchasing portion of equity of redemption, effect of.

Where a mortgagee purchases a portion of the equity of redemption of the property mortgaged with him, there is a merger and the mortgage is extinguished to the extent of the share purchased by the mortgagee. [p. 361, col. 1.]

Shamshad Ali Khan v. *Mohammad Ali Khan*, 47 Ind. Cas. 200; 21 O. C. 172, followed.

A mortgagee who has purchased the equity of redemption cannot set up his own previous mortgage as still subsisting against a pre-emptor. [p. 362, col. 1.]

Bindeshuri Singh v. *Pandit Balraj Sahai*, 10 C. 49, followed.

Appeal from a decree of the Additional Subordinate Judge, Hardoi, dated the 22nd May 1922.

Messrs. *Bisheshwar Nath Srivastava* and *Munni Lal*, for the Appellants.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondents.

JUDGMENT.—The facts of this case are complicated, but the controversy in appeal is narrowed down to two points. Two brothers, Bhoja and Thamman, owned between them 2½ *biswas* share in *khata* No. 6 of Mauza Nayagaon. The two brothers were joint in estate. Thamman died first leaving a widow *Musammat* Kindar Kuar. Bhoja died subsequently leaving a widow *Musammat* Bilaso. Then *Musammat* Bilaso died and last of all *Musammat* Kindar Kuar. On Thamman's death his share should have passed to his undivided brother, but in fact it was taken possession of by *Musammat* Kindar Kuar, and on Bilaso's death Kindar Kuar succeeded to her share also and thus became the recorded owner of the whole 2½ *biswas* share. *Musammat* Bilaso has after the death of her husband mortgaged to Dirgaj Singh and Baldeo Singh the 1½ *biswas* share of which she was in possession. The date of this mortgage was 18th May 1897. Baldeo Singh is the fourth defendant in this case. On 6th October 1906 *Musammat* Kindar Kuar joined with the proprietors of other *khatas* in two sale-deeds by which they transferred a 4½-*biswas* share in Nayagaon and a 4-*biswas* share in another village Kunyan to three persons Dirgaj Singh, Baldeo Singh and Lochan in equal shares. The 4½-*biswas* share in Nayagaon included *Musammat* Kindar Kuar's 2½ *biswas* share referred to above.

The main issue in the appeal is, whether this sale deed put an end to the mortgagee right held by two of the vendees, Dirgaj Singh and Baldeo Singh, in this 2½-*biswas* share under the mortgage of 1897. The plaintiff obtained pre-emption in respect of part of the property covered by the sale-deed of 1906 and he also obtained the interest of Dirgaj Singh under that deed by direct purchase.

It is argued for the appellants on this issue, first, that section 101 of the Transfer of Property Act does not apply, and, secondly that if it does apply there was no merger because the continuance of the mortgage was for the benefit of the purchase and, therefore, there was an implied intention that mortgage should subsist.

KALLOO SINGH *v.* BAKHTAWAR SINGH.

The ground on which it is urged that section 101 is not applicable is, that the sale-deed of 6th October 1906 was in favour of three purchasers in equal shares, whereas only two of these were parties to the mortgage. This plea must be rejected for two reasons. In the first place the mortgage covered only half the share sold *i. e.*, 1¼-*biswas* while the mortgagees acquired under the sale-deed two-thirds of 2½ *biswas*. Thus, excluding the share of the third purchaser, they still became absolute owners of a share larger than that on which they held a mortgage. In the second place, it was held by this Court in *Shamshad Ali Khan* v. *Mohammad Ali Khan* (1) that where the mortgagee purchases a portion of the mortgaged property there is a merger and the mortgage is extinguished to the extent of the share purchased by the mortgagee.

The grounds on which it is urged that, even if section 101, applies there is no merger are four in number,—

1. That the purchasers continued to be recorded as mortgagees in the *khewat*.

2. That at the time of the sale-deed the title of *Musammat* Kindar Kuar had not become perfected by adverse possession and, therefore, it was to the advantage of the purchasers to keep alive the mortgage in case of a possible claim by the reversioners.

3. That there was an intermediate mortgage on the property executed by *Musammat* Kindar Kuar and others.

4. That the son of the plaintiff who is joint with him had taken a sub-mortgage of 12½ *biswas* of the property covered by this intermediate mortgage.

The difficulty in dealing with these points is, that most of them do not appear to have been pressed in this form in the Court below and there is no discussion of them in the judgment. The *khewat* entry was pressed, but it is of little importance in view of what has been said by the learned Subordinate Judge as to the state of the *khewat*. The question of the alleged sub-mortgage of 12½ *biswansis* to the plaintiff's son was put forward as a ground of estoppel on Issue No. 5 but was not pressed at the time of arguments as appears from the judgment on this issue.

(1) 47 Ind. Cas. 200; 21 O. C. 172.

The intermediate mortgage in favour of the plaintiffs or their predecessors-in-interest and the question of possible claim by the reversioners are not referred to in this connection at all.

On the construction of section 101 a recent Bombay case, not yet reported in the regular Law Reports, but reported in 24 Bombay Law Reporter page 720, [*Bai Rera* v. *Valimahomed* (2) is cited by the respondents for the proposition that the words "or such continuance would be for his benefit" are only applicable where there is a clear expression of intention in the deed. To quote from the head-note of the case, "the words 'continuance would be for his benefit' are merely a guide to the intenion of the owner." This view was accepted by the appellant for the purpose of his argument. The appellant's learned Advocate relies on the circumstances mentioned above as evidence of an implied intenton. It may be necessary at some future time to examine the correctness of this view, but it is not necessary for me to enter into a controversy which is not raised by either party to the appeal.

If the question is one of intention, there can be no doubt that the parties did definitely intend that the mortgage should be extinguished. The amount of the mortgage-money was set off as part of the sale price and the sale-deed definitely provides that the mortgagor shall have no interest left in the property. In fact, the extinction of this mortgage, on which the mortgagee had already obtained a decree, was the principal object of the execution of the first sale-deed and Rs. 1,200 out of Rs. 1, 500 which constituted the price were set aside for this purpose. On this ground it is contended by the respondents with much reason that there was more than a mere coalescence of two interests resulting in a merger. There was, a very definite contract between the parties extinguishing the mortgage, and certainly there could be no intenton to keep it alive against the plaintiffs who only acquired their title subsequently under a pre-emption decree and later purchase. By virtue of their pre-emption decree they stepped into the

(2) 70 Ind. Cas. 912; 24 Bom. L. R. 720; (1922) A. I. R. (B.) 211; 46 B. 1009.

MADHAVRAO WAMAN SAUNDALGEKAR *v.* RAGHUNATH VENKATESH DESHPANDE.

shares of the original vendees. The case is very similar to that of *Bindeshuri Singh* v. *Pandit Balraj Sahai* (2) where also it was sought to keep a mortgage alive against a pre-emptor. It was there held that the mortgagee defendant who had purchased the equity of redemption could not set up his own previous mortgage as still subsisting. The plaintiff paid full value for the property and to hold them liable for a mortgage which was explicitly redeemed out of the sale price would be compelling them to pay a large part of the price twice over.

The second issue also relates to the two sale-deeds executed by Kindar Kuar and others on 6th October 1906 which are the subject of the previous issue. One of the five persons who joined in these sale-deeds was Bhudar who was defendant No. 2 in the present suit and is one of the appellants. Bhudar and his three brothers Chitar, Tilak and Tikam owned one-*biswas* each in *Khata* No. 1 of Nayagaon. Tilak predeceased his brothers each of whom obtained on his death one-third of his one-*biswa* share. The contention of Bhudar, appellant, on this issue is that the one-third share which he obtained on Tilak's death was not included in the sale-deed of 6th October 1906. The chief ground on which this is urged is that Tilak had mortgaged this share in his lifetime and that no mention of the mortgage was made in the same deed. Further, the mortgage continued to be recorded in the *khewat* after the sale. The latter point is of little importance as the *khewat* has been found by the learned Subordinate Judge to be extremely unsatisfactory. It is admitted that it is necessary to include this one third *biswa* share which admittedly belonged to Bhudar at the time of the execution of the sale-deed, in order to complete the 4½ *biswas* share in Nayagaon conveyed by that sale-deed. This consideraton is decisive of the issue and I agree with the Court below in rejecting the appellant's contention.

The result is that the appeal fails and it is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 10 O. C. 49.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

July 16, 1923.

Present :—Lord Sumner, Lord Phillimore, Sir John Edge, Kt., and Mr. Ameer Ali.

MADHAVRAO WAMAN SAUNDALGEKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHUNATH VENKATESH DESHPANDE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bombay Regulation (XVI of 1827), ss. 19, 20—Tenant of service watan *lands—Adverse possession—Permanent tenancy, acquisition of.*

A person who has always claimed to be, and is, a tenant of service *Watan* lands cannot acquire any title to a permanent tenancy in the lands by adverse possession as against the *Watandar* from whom he holds the lands. [p. 366, col. 2.]

Appeal from the judgment of Sir Basil Scott, C. J. and Mr. Justice Hayward.

Messrs. *G. Lowndes, K.C.*, and *Kenworthy Brown*, for the Appellant.

Mr. *Raikes*, for the Respondents.

JUDGMENT.

Sir John Edge.—The suit in which this appeal has arisen was brought on 22nd October 1914 in the Court of the First Class Subordinate Judge of Belgaum by *Watandars* for the ejectment of the defendants from service *Watan* lands in Mauza Bhivashi in Taluka Chikodi in the District of Belgaum, and for mesne profits. The defendants are not *Watandars*, nor is any one of them a *Watandar*, of the *Watan*. The defendants Nos. 1 to 4 in their written statement allege that they, from before 1853, acquired adversely to the family of the plaintiffs a right to the possession of the lands in question as permanent tenants, and enjoyed that right for more than 12 years before suit in the lifetime of the father of the plaintiffs, and that "the cause of action arose in the year 1865, when the plaintiffs' grandfather died." The title, if any, of the other defendants depends on the title of the defendants Nos. 1 to 4.

The facts of the case will be briefly stated presently, but in order to see whether under those facts the defence of adverse possession is maintainable, it is necessary to bear in mind what the law as to the alienation by a *Watandar* of his service

Watan lands was, in 1853, and has been down to the institution of this suit.

Regulation XVI of 1827 was passed by the Governor of Bombay in Council on the 1st January 1827. Before that Regulation was passed, a *Watandar* could, apparently without the sanction of the Government, assign or mortgage, his service *Watan* lands and could grant to any one a permanent lease of them, but the effect of sections 19 and 20 of that Regulation was to prohibit, in the interests of the State, all such *Watandars* from alienating in any way the service *Watan* lands which they held as *Watandars*. Sections 19 and 20 of that Regulation applied to the lands in suit. Sections 19 and 20 of that Regulation continued in force until they were repealed by Bombay Act III of 1874, but the repeal of these sections by Act III of 1874 did not make valid any alienation of service *Watan* lands which had been prohibited by Regulation XVI of 1827. [*Padapa* v. *Swamirao Shriniwas* (1).] Section 5 of Bombay Act III of 1874 now applies to the lands in question. That section is as follows:—

"V. No *Watandar* shall, without the sanction of Government, sell, mortgage or otherwise alienate or assign any *Watan* or part thereof or interest therein to any person not a *Watandar* of the same *Watan*."

That section of Bombay Act III of 1874 was passed, as was section 20 of Regulation XVI of 1827, in the interests of the State and not in the interests of the *Watandars* only. The granting by a *Watandar* of a right of permanent tenancy in lands of his *Watan* would undoubtedly be an alienation within the meaning of section 20 of Regulation XVI of 1827.

The facts of the case may be briefly stated as follows. The lands in suit are service *Watan* lands, and were in the possession of Appaji, who was the grandfather of the defendants Nos. 1 and 2 and the uncle of the defendants Nos. 3 and 4. In 1853, Appaji held those lands and other service *Watan* lands of the *Watan* as a tenant of Venkatrao, the *Watandar*, at a yearly rent of Rs. 42. Venkatrao was the grandfather of the plaintiffs. Some of these lands which Appaji held as a yearly tenant were, in or before 1853, taken by the Government for the purpose of making a public road, and consequently Appaji and Venkatrao, agreed to re-adjust the rent by reducing it to Rs. 36 a year. That agreement was embodied in a document which was signed by Venkatrao on the 15th March 1853. That document, as translated, is as follows:—

"Shri,

"In the service of Rajashriya Virajit Rajmanya Rajashri Appajipant Appa Saundalgekar residing at Nipani.

"Profound salutations of *protege* Venatarao Narayan Deshpande, Pant Kagal. Special representation is as follows. Further. Our Deshpandki land measuring 15 *bighas*, situate in Mouza Bhivshi, Prant aforesaid, stands in the name of Ti. Rajeshri Bajipant Baba, and I am the owner of the same. So from before the said land has been given you for cultivation for a fixed rent of Rs. 42 forty-two in Parali coin and at the time of Survey a road is shown in the said land and in it some land was covered by the road. Therefore, Rs. 6 six out of the said amount of rent are remitted to you and the said land is given you for cultivation by fixing a rent of Rs. 36 thirty-six in Parali coin per year. So from the *Fasli* year 1262 (1852-1853) you should pay every year thirty-six rupees the amount of siad rent by four instalments, and you should cultivate the land permanently. In the interval we shall never interfere with the land (that is) with you. After you, your heirs also should pay the amount of rent according to the said agreement and permanently enjoy the land. We are entitled to receive the amount of rent of the land and we are not at all entitled to take away the land from you and you should not give it up. Neither we nor our heirs will put forth any obstructions to act according to the agreement. The agreement is duly given in writing as above. Date 15th March 1853 being Sun year

(1) 27 I. A. 86 at p. 90; 24 B. 556; 4 C. W. N. 517; 2 Bom. L. R. 548; 7 Sar. P. C. J. 710; 12 Ind. Dec. (N. S.) 901 (P. C.).

1253. *Fasli* year 1262. May you be gracious. This is the request.

Written by
Abaji Nilkant Kulkarni, Mauza Shirgopi.
Venkatrao Narayanrao Deshpande, Sadal.

ATTESTATIONS.

1 Keshawa Vithal Mutnalkar, residing at Nipani, my own handwriting.
1 Narhar Yeshwant Dahiwadkar, my own handwriting.

That document was registered, and in accordance with it, Appaji paid the yearly rent of Rs. 36 to Venkatrao until Venkatrao died in 1864 or 1865.

Venkatrao was succeeded as *Watandar* by his son, Ramchandra, who was the father of the plaintiffs. After Venkatrao had died, one Gundo, in 1869, brought a suit against Venkatrao's widow, to recover a debt which had been due to him by Venkatrao, and obtained against her a decree. In execution of that decree Gundo caused the land now in suit to be attached. Appaji intervened with an application to set aside the attachment on the ground that he held the lands as a permanent tenant, and thereupon the Court on the 20th June 1870, ordered that the landlord's interest in the lands should be sold without affecting Appaji's interest as a permanent tenant. At the sale, in execution of his decree, Gundo became the purchaser. It is not necessary to consider whether the Court had any power to order that sale.

On the 17th January 1872, it was agreed between Gundo and Appaji, by registered document, that Appaji, as the permanent tenant of the lands in suit, should pay to Gundo the Rs. 36 rent and for 20 years an additional sum of Rs. 42 a year. The Rs. 36 and Rs. 42 were paid yearly from 1872 to 1890 to Gundo by Appaji and after his death by his son Waman, who was the father of the defendants Nos. 1 and 2.

On the 16th May 1887, Ramchandra, the father of the plaintiffs, who was then the *Watandar*, executed a document, which was registered, by which he purported to grant to one Sintre a permanent lease of the lands now in suit at a rent of Rs. 50 a year, with a *nazrana* of Rs. 700, and put Sintre in possession of the lands. This led to disputes between Sintre, Waman, Gundo and one Nana Babaji Patil, who claimed to have bought the lands in execution of some decree; the disputes were referred by those persons to arbitration. Ramchandra was not a party to that arbitration. In that arbitration, Waman stated that he had been temporarily deprived of the possession of the lands. On the 1st January 1894, the arbitrators made their award and by it ordered that Waman should pay Rs. 700 to Sintre, Rs. 340 to Gundo and Rs. 1,150 to Nana Babaji, and should continue to enjoy the lands as a permanent tenant. That award was, on the 29th March 1894, made a decree of Court. The payments so ordered were made by Waman. From 1895 to 1902 Waman paid the rent of Rs. 36 a year to Ramchandra. In Ramchandra's receipts for those payments he acknowledged that Waman held the lands as a permanent tenant. In the Record of Rights of 1911-12 the defendant No. 1 was entered as the permanent tenant of the lands. Upon the death of Ramchandra the defendants tendered to the plaintiffs the rent of Rs. 36 yearly as their rent as permanent tenants, but the plaintiffs refused to receive the money so tendered. Ramchandra died on the 29th October 1902, and the plaintiffs succeeded him as the *Watandars*. Upon the facts which have briefly been stated being proved the Subordinate Judge found that the evidence in favour of the permanent tenancy alleged by the defendants Nos. 1 to 4 was overwhelming. He stated in his judgment that:—

"It is undisputed that the land sued for, is a Deshpande Vatan (*Watan*) *Inam*. There is no doubt, that the original grantor (Venkatrao) had only a life-interest in it and had no power to lease it beyond his lifetime. Plaintiffs' grandfather (Venkatrao), who passed (granted) the lease of 1853, died in 1864-5, and the plaintiffs' father (Ramchandra) had 12 years from that time for disputing the lease. Not having done so, plaintiffs' right of disputing the permanent lease and of claiming posses-

sion is barred. *Rama* v. *Shamrao* (2) and *Radhabai* v. *Anantrav* (3)."

The Subordinate Judge gave the plaintiffs a decree for six years' rent at the rate of Rs. 36 a year, amounting to Rs. 216, and otherwise dismissed the suit with costs.

From that decree the plaintiffs appealed to the High Court at Bombay. The appeal was heard by Sir Basil Scott, C. J., and Mr. Justice Hayward. Those learned Judges stated that: "The only question which really arises in this appeal is, whether the defendants can claim to have established a right to a permanent tenancy by adverse possession." They held that adverse possession commenced to run on the death of Venkatrao, but they referred to the agreement of the 17th January 1872, between Gundo and Appaji, and holding that Gundo after the purchase by him in 1870, represented, the *Watandar* so far as these lands in question are concerned, they decided that it was impossible to hold that adverse possession in favour of the person claiming to be a permanent lessee continued to run after that agreement. If that decision were correct, as to which it is not necessary for their Lordships to express any opinion, Appaji and his son Waman were not holding adversely from January 1872, until 1894. Those learned Judges also held, and their Lordships think rightly, that there had been two breaks in the alleged adverse possession within 12 years of the death of Venkatrao, but they do not base the advice which they will give to His Majesty upon that fact. Those learned Judges, in conclusion, stated in their judgment that: "It appears to us, therefore, that the defendants cannot, on a review of the occurrences during the lifetime of the plaintiffs' father (Ramchandra), contend that there has been any continuous adverse possession for 12 years until the plaintiffs' father's death in 1902, which would entitle them to claim to occupy the land in suit as permanent tenants. It is not disputed that since 1902 the plaintiffs declined to accept rent from the defendants, and that their suit has been filed within 12 years of their father's death. For these reasons we set aside the decree of the lower Court and pass a decree in favour of the plaintiffs for possession and mesne profits of the land in the occupation of the defendants," with all costs. From that decree this appeal has been brought by the defendants Nos. 1 to 4. The other defendants are nominal respondents to this appeal; they have not appeared.

One of the authorities upon which the Subordinate Judge relied for his decision that the suit of the plaintiffs was barred by limitation was *Radhabai* v. *Anantrav* (3). That was a Full Bench decision of the High Court of Bombay in which Sir Charles Sargent, C. J., delivered the leading judgment. The judgments of the late Sir Charles Sargent always deserve and receive careful consideration by the Board. The material point of that decision, so far as it has a bearing on the present case, is briefly stated in the head-note to the report of that case thus:—

"Held (1), that, in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service *Watan* lands is a bar to succeeding holders."

The lands there in question were service *Watan* lands, to which section 20 of Regulation XVI of 1827 applied. The plaintiff there sued for the possession of service *Watan* lands and for mesne profits. The defendants claimed to be in possession of the lands under a grant of 1838 to them of the lands made by the plaintiffs' grandfather, who was, at the time of the grant, the *Watandar*, and they pleaded limitation by adverse possession; the adverse possession relied upon by the defendants being apparently their having continued in undisturbed possession for a period of 12 years after the death of the grantor. The plaintiff's case was that his grandfather, the grantor, had no power to make a grant of the lands except for his lifetime and that his (the plaintiff's) father had no authority to allow the lands to continue in the possession of the defendants. Sargent, C. J., and Mr. Justice Nanabhai Haridas had referred three questions to the Full Bench. It is only necessary to refer to

(2) 7 Bom. L. R. 135.
(3) 9 B. 198 at p. 210; 5 Ind. Dec. (N. S.) 133.

the first of those questoions which was "1. Whether adverse possession for 12 years during the lifetime of one holder is a bar to succeeding holders." The Full Bench decided that, in the absence of fraud and collusion, the first question should be answered in the affirmative, leaving what is to be considered an adverse possession to be determined in each particular case. The question and answer to it of the Full Bench would, when looked at in ignorance of the facts of the case, appear to be general and not confined to a case of an absolute assignment of service *Watan* lands by a *Watandar* to a stranger, who alleged that he had obtained title by 12 years of undisturbed possession. It is necessary to see what that answer to the first question really meant. And for that purpose, it is, in their Lordships' opinion, necessary to see what the alienation then in question really was. It was not an alienation by a lease of a permanent tenancy to a tenant of the *Watan*; it was a sale and absolute assignment to a stranger to the *Watan* and to the family of the *Watandar*, followed by a period of 12 years after the death of the grantor, during which the stranger assignee was allowed by the successors of the *Watandar* grantor to continue in undisturbed possession of the *Watan* lands. In either case the grant would be beyond doubt an alienation which was prohibited by section 20 of Regulation XVI of 1827, but having regard to the facts of the case which was before Sir Charles Sargent, C. J., and Mr. Justice Nanabhai Haridas, which justified their order of reference to the Full Bench, all that the Full Bench can be taken as having decided was, that a stranger to the *Watan*, who had got possession of service *Watan* lands by an absolute assignment to him by a grantor, who was at the time of the grant the *Watandar*, could successfully defend a suit for posssession of those lands by a subsequent *Watandar* by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of 12 years. A careful consideration of Sir Charles Sargent's judgment, as given in *Radhabai* v. *Anantrav* (3), shows that he was considering the question referred to the Full Bench from the point of view of the grantee having been a stranger to the *Watan*. It is not necessary for their Lordships to decide in this case, whether the answer of the Full Bench limited as it must have been to the case of a stranger to the *Watan*, setting up as a defence, 12 years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a *Watan* can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the State, prohibited. Their Lordships may say, further, that if it was necessary for them to decide, whether the answer of the Full Bench to the first question referred to that Bench was or was not correct it would be necessary for them to consider whether the Secretary of State for India in Council, as representing the interests and rights of the Crown in service *Watan* lands, was not a necessary party to a suit in which a stranger claimed that he was entitled to those lands by a right of adverse possession.

In the present case the defence of 12 years' adverse possession as permanent tenants is set up by persons who and their predecessors-in-title, always claimed to be and were tenants of service *Watan* lands, and in the opinion of their Lordships neither the defendants not their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the *Watandars* from whom they held the lands.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

W. C. A. *Appeal dismissed.*

Solicitor for the Appellants.—Mr. *E. Dalgado.*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 140 OF 1922.

March 28, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

NANDAN PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Hafiz ABDUL AZIZ AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Guardian and ward—Hindu widow—Mortgage of minor sons' property as owner—Legal necessity—Mortgage, validity of.

Where a Hindu widow has mortgaged the property of her minor sons, who form a joint family, not as representing the family, but in the capacity of an owner claiming under a Will from her deceased husband, and the Will is found to be invalid, the mortgagee cannot enforce the charge against the family property on showing that the widow was the *de facto* guardian of her sons and the mortgage was created for legal necessity, for the widow having transferred as owner property which did not belong to her, the mortgage is void and it is quite irrelevant what was the widows' motive in executing the mortgage or what she did with the mortgage-money.

Balwant Singh v. *Rev. Rockwell Clancy*, 14 Ind. Cas. 629; 34 A. 296; 39 I. A. 109; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422 (P. C.), followed.

Second appeal from a decree of the Second Additional District Judge, Gorakhpur, dated the 4th November 1921.

Mr. *S. P. Sinha*, for the Appellants.

Mr. *Hamid Hassan*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows:—

The property in suit belonged originally to one Sheo Charan. He died leaving a son Sital. Sital had three sons, Debi now dead, Nandan and Sheo Nandan. On the 6th of August 1906 Sital made a Will in favour of his wife, *Musammat* Somari, of the property in suit and died soon after its execution. On the 16th August 1908 *Musammat* Somari mortgaged the property in favour of the wife of the plaintiff. This suit was brought by the heirs of the mortgagee to recover the amount then due under the mortgage by sale of the mortgaged property, and it was brought against *Musammat* Somari alone. In the plaint she is described as the mortgagor and there is no mention of her sons. Subsequently, on the application of Nandan Prasad for himself and as guardian of his minor brother Sheo Nandan, they were brought on the record as defendants and they alone defend the suit. They denied the execution of the deed or that there was consideration. In their written statement they said that *Musammat* Somari had no legal right to mortgage the house and that she had no claim whatever in it. In the mortgage deed the Will is recited and *Musammat* Somari claimed to be in full proprietary possession of the property under the Will and as owner she purports to mortgage the property for a sum of Rs. 250 for the payment of "miscellaneous debts and other needs." There is no mention in the deed itself that the money was required for the use of the minors.

The mortgage was executed by *Musammat* Somari claiming to be the sole owner of the property under her husband's Will. The suit also was brought on this basis against *Musammat* Somari alone. Nandan and Sheo Nandan, the two younger sons of Sital, asked to be joined in the suit on the ground that the property belonged to them and not to their mother. In other words, they claimed a title paramount to that of the mortgagor. Under these circumstances, the Trial Court might well have refused to allow them to be joined or to allow the title of the mortgagor to be brought into controversy as against third parties in a mortgage suit. This course was, however, not adopted. The Courts below have found that the Will was invalid, and that *Musammat* Somari had no title to the property. They have, nevertheless, allowed the suit on the ground that *Musammat* Somari was the *de facto* guardian of her minor sons and that the transaction was for legal necessity. That *Musammat* Somari was not the legal guardian of the minors was admitted. The family was a joint family and they had an elder brother Debi Prasad who was the head of the family.

On the facts found by the Court below, no question of legal necessity ever arose in the case at all. It is elementary law that one person cannot be bound by the act of another unless it is done in a

representative capacity either as agent or guardian or in some similar capacity. Here *Musammat* Somari purported to be dealing as of right with property which was her own. It being found that the property was not her's any dealings with it on her part are *ipso facto* void, and questions as to the motives which induced her to execute the mortgage or what she did with the purchase-money are entirely irrelevant. If any authority is needed for this proposition it may be found in the decision of their Lordships of the Privy Council in the case of *Balwant Singh* v. *Rev. Rockwell Clancy* (1). In that case a mortgage was executed by one Sheoraj Singh who declared that he was the absolute owner in possession of the mortgaged property and that there was no co-sharer therein, and on this footing purported to mortgage it to the Bank of Upper India. In fact, the property was the joint property of Sheoraj Singh and his younger brother Maharaj Singh. Maharaj Singh did not join in the mortgage nor did it appear by the mortgage-deed that he had any proprietary interest in the mortgaged property. He was, however, induced to sign the mortgage-deed to afford evidence that he had assented to the taking of the loan by Sheoraj Singh and to the granting of the mortgage. A suit was brought on the mortgage against both brothers and was resisted by Maharaj Singh on the ground that he was a minor at the time of the execution of the mortgage and that the deed was not binding on him. The question of his minority was material on the plea that though he had not joined in the mortgage he has assented to it. The Courts in India found that he was a minor and dismissed the suit. In appeal to the Privy Council it was sought to make him liable on the ground that Sheoraj Singh was his *de facto* guardian and that the mortgage was executed in lieu of antecedent-debt, and their Lordships of the Privy Council observed:

"Having found as a fact that Maharaj Singh was a minor on the 28th of October 1892 it is not necessry for their Lordships to consider any other issue. This suit has been brought on the mortgage-deed of the 28th of October 1892 by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage-deed as against him and his interest in the estate was not merely voidable; it was void and of no effect, and must be regarded as a mortgage-deed to which he was not even an assenting party and as a mortgage-deed which did not affect him or his interest in the estate."

In the same way, in the present case, the answering defendants were minors at the execution of the mortgage and there is no question of their having assented to it. The mortgage was not made by *Musammat* Somari as representing the family estate or in any respect as representing the appellants. As against them and their interests the mortgage-deed is, therefore, not merely voidable; it was void and is of no effect, and was a mortgage-deed which did not affect them or their interest in the estate. Having found that *Musammat* Somari executed the mortgage not as representing the estate of the minors, but as claiming to be absolute owner of the property, the Courts below should have dismissed the suit as against the appellants and as against the mortgaged property which belonged to them. A personal decree against *Musammat* Somari herself has not been asked for in this suit. We accordingly allow the appeal and dismiss the suit with costs in all Courts including fees on higher scale.

N. H. *Appeal allowed.*

(1) 14 Ind. Cas. 629; 34 A. 296; 39 I. A. 109; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 181 OF 1922.

October 19, 1922.

Present:—Mr. Wazir Hasan, A. J. C.

RAGHO PERSHAD—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE DEPUTY COMMISSIONER, FYZABAD, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 90 (d)—Transfer of Property Act (IV of 1882), ss. 4, 107—Assignment of grant by Secretary of State—Registration—Easements Act (V of 1882), s. 59—Grant of land for consideration for erecting ghat—Right whether runs with land—Pleadings and practice—Court, whether can make new case for parties—Appeal, second—New point, whether can be raised.

The provisions of the Transfer of Property Act relating to registration of documents must be read as merely supplementary to the provisions of the Registration Act, and the exceptions provided for by section 90 of the Registration Act must be taken to cover cases dealt with by section 107 of the Transfer of Property Act. [p. 370, col. 2.]

An assignment of a grant by the Secretary of State falls within clause (*d*) of section 90 of the Registration Act and does not, therefore, require registration. [p. 370, col. 2.]

A grant of land for consideration for the purpose of erecting a *Ghat*, which provides that the grantee would have a proprietary right in the structure put up by him but not in the soil, is a right which runs with the land and does not fall within the provisions of section 59 of the Easements Act. [p. 371, col. 1.]

An Appellate Court is not competent to set up a case which does not arise out of the pleadings of the parties. [p. 370, col. 2.]

A new plea involving questions of fact cannot be raised in second appeal. [p. 371, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated the 8th March 1922, upholding a decree of the Munsif, Fyzabad, dated the 28th June 1921.

Mr. *Nizmat Ullah*, for the Appellant.

Mr. *A. P. Sen* and Mr. *N. N. Ghoshal*, R. B., for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff in the Court of first instance, and on appeal to the Court of the Subordinate Judge of Fyzabad the decree was confirmed. The reliefs which the plaintiff asked for in his plaint were as follows:—

(1) A declaratory decree be passed to the effect that the lease, dated the 31st July 1918, in favour of the plaintiff is not fit to be cancelled nor is the plaintiff liable to be ejected from the land, and (2) an injunction be issued that till the decision of the suit the defendant or the Rup Kalan Ghat Committee should not make any interference by building the house or in any other way. The suit as originally brought was against the Secretary of State for India in Council, but at a later stage of the hearing the Rup Kalan Ghat Committee was also made a party defendant and Babu Ganesh Prasad, Secretary of Ghat Institution, was the person whose name was brought on the record as representing that institution.

On the 31st July 1918 the Secretary of State for India in Council, through the Deputy Commissioner of Fyzabad, granted a lease of certain plots of land for a period of five years to the plaintiff. Amongst these lands is included plot No. 740 which is the subject-matter of dispute in this litigation. On the 11th December 1919 the Nazul Department of Fyzabad, acting on behalf of the Secretary of State, informed the plaintiff that the lease of the 31st July 1918 was forfeited and that the plaintiff should not interfere with the proposed constructions by the Rup Kalan Ghat Committee over plot No. 740 as that plot had been given to that Committee. This notice is stated to give the cause of action for the plaintiff's suit. The defence of the Secretary of State was that the lease was rightly forfeited. The Court of first instance upheld the plea relating to the forfeiture set up by the Deputy Commissioner on behalf of the Secretary of State. The defendant No. 2 put forward several pleas in answer to the plaintiff's case. Some of them were decided against him by the Court of first instance and others in his favour. The Court of first instance held on several grounds that the declaration sought for by the plaintiff could not be granted. One of the chief grounds arising out of the defence of the defendant No. 2, on which the decision of the Court of first instance was based, was that the Secretary of State had

by a previous deed, dated the 11th November 1917, granted plot No. 740 to the defendant No. 2 and consequently he had no right left in that land which he could transfer subsequently in favour of the plaintiff. The decision of the learned Subordinate Judge from whose decree this appeal is preferred is based on the following findings:—

(1) that the lease of the 31st July 1918 in respect of plot No. 740 was due to a mutual mistake of fact in relation to the Secretary of State's act in assigning the same to the defendant No. 2 under the agreement of the 11th November 1917; (2) that the lease of the 31st July 1918 was void for want of registration; (3) that plot No. 740 is covered by the deed of the 11th November 1917 and could consequently not be assigned by the Secretary of State to the plaintiff under the lease of the 31st July 1918, and (4) that the plaintiff's lease is an unregistered document while the deed of the defendant No. 2, dated the 11th November 1917, is a registered one and the latter should, therefore, give way to the former under section 50 of the Indian Registration Act (XVI of 1908).

The appeal before me was argued by the learned Pleader for the appellant on the following lines:—

(1) that the document of the 31st July 1918 did not require registration; (2) that section 50 of the Indian Registration Act did not affect the operation of that document; (3) that the lease of the 31st July 1918 being void for mutual mistake of fact under the provisions of section 20 of the Indian Contract Act (IX of 1872) was a case set up by the learned Subordinate Judge; (4) that in any event the document of the 11th November 1917 amounted to a mere license and could consequently be revoked by the Secretary of State and that he revoked it when he executed the lease of the 31st July 1918, and (5) that the agreement set up by the defendant No. 2 of the 11th November 1917 did not include the plot in dispute and, therefore, the Secretary of State was competent to make a lease of it in favour of the plaintiff as he admittedly did under the document of the 31st July 1918.

As to point No. 1 I am of opinion that the contention of the learned Pleader for the appellant that the deed of the 31st July 1913 did not require registration is a sound one. So far as it purports to be an assignment of a grant by the Secretary of State for India in favour of the plaintiff, it clearly falls within the provision of clause (*a*) of section 90 of the Indian Registration Act, nor do the provisions of section 107 of the Transfer of Property Act (IV of 1882) invalidate the lease of the 31st July 1918 for want of registration, the reason being that the provisions of the last mentioned Act relating to registration of documents must be read as merely supplementary to the provisions of the Indian Registration Act (*vide* section 4 of the Transfer of Property Act) and when the provisions of the two Acts, that is to say, the one appearing in section 107 of the Transfer of Property Act and the other in section 90 of the Indian Registration Act are read together there is no escape from the conclusion that the exceptions provided for by section 90 of the Registration Act must also cover cases dealt with by section 107 of the Transfer of Property Act.

Point No. 2. Here again I am of opinion that the contention of the learned Pleader for the appellant must be sustained. The answer to the argument of the learned Subordinate Judge based on section 50 of the Indian Registration Act is furnished by sub-section (2) of section 90 of the Act and in view of the provision made in sub-section (2) it must be held that the lease of the 31st July 1918 was a registered document.

Point No. 3. I have gone through the pleadings in the case with the learned Counsel for both the parties and can find no trace of a case founded on mutual mistake of parties invalidating the document of the 31st July 1918. The learned Counsel for the respondent No. 2 frankly admits that there was no specific plea raised to that effect. I, therefore, hold that the learned Subordinate Judge was not right in applying the provisions of section 20 of the Indian Contract Act to this case.

Point No. 4. As regards this point the learned Counsel for the respondents points out that this is a new case introduced

by the Counsel for the appellant for the first time in the memorandum of appeal filed in this Court ; I agree with the learned Counsel in this respect. It is impossible to predicate of a plea of this nature that it could be decided without reference to questions of fact and it is merely too late to allow a plea involving questions of fact to be raised in the last Court. The learned Pleader for the appellant proceeded to contend that if he was not permitted to argue the case of revocation of license he could certainly rely on the provisions of section 59 of the Indian Easements Act (V of 1882). It may be that an argument founded on the provisons of that section raised merely a question of law and may be permitted to be raised even in second appeal but the argument is clearly founded on the assumption that the agreement of the 11th November 1917 was nothing but a grant of a license by the Secretary of State to the defendant No. 2 to do a certain act over the land granted thereby. I am of opinion that the true construction of that document is that it was a contract for consideration between the Secretary of State on the one hand and the defendant No. 2 on the other. The object of the agreement was to grant land to the defendant No.2 for the purpose of erecting a *Ghat* on the banks of the river Sarju in the town of Ajodhya. The money necessary for the masonry construction was to come out of the funds belonging to the defendant No. 2 and the Secretary of State was to obtain the benefit of all profits that may accrue therefrom. The document distinctly says that the defendant No. 2 shall have a proprietary right in the structure and it further says that the defendant No. 2 shall have no right in the soil. If, therefore, the defendant No. 2 did under this agreement acquire a right to build a *pacca* structure on the land of the Secretary of State for India that was a right which must held to run with the land. Such an interest falls within the first resolution of Spencer s case (Smith's Leading Cases, Vol. I, page 55, 11th Edition). The plaintiff, therefore, cannot be held to have been exonerated of the obligation created under the agreement of the 11th November 1917 by the mere fact that he has taken a lease afterwards of the land in suit from the Secretary of State. The point is, therefore, overruled.

Point No. 5. This part of the case occupied most of the time at the hearing of this appeal both of the Court and the learned Counsel for the parties. I am thankful to them for the exhaustive treatment of the matter underlying this point. After a careful and somewhat anxious consideration I have come to the conclusion that there are no sufficient grounds for interference with the concurrent findings of both the Courts in this behalf. The agreement of the 11th November 1917 specifies the land which is the subject-matter of the agreement in three different ways at the bottom of the document, first by the area made up of the dimensions from East to West and North to South. This area is stated to be 5 *biswas*, 4 *biswansis*, 14 *kachwansis*, the line drawn from East to West indicating a length of 82 feet while the line drawn between the North and the South points is 91 feet. This description, therefore, is made up of two parts and when either is made applicable to the local situation of the land which was the subject-matter of the agreement it would comprise plot No. 740. The third description is given by the boundaries and it is admitted that within those boundaries falls plot No. 740. It is argued on behalf of the appellant that in the body of the document the recital is that the land specified at the bottom of the deed was granted by the order of the 10th February 1917 and that when a reference is made to that order a latent ambiguity arises in respect of the subject-matter of the agreement.

In the first place, I do not think that the order of the 10th February 1917 is referred to in the agreement for the prupose of the specification of the land. In my judgment the reference to that order merely connotes the source of the original grant which was being formally confirmed by means of the agreement of the 11th November 1917, but even if we construe the agreement to mean that it incorporates the order of the 10th February 1917 as a part of the description of the property there is absolutely nothing in that order

which comes into conflict with any one of the several descriptions given at the foot of the agreement. As a matter of fact, the order of the 10th February 1917 throws back on some previous correspondence in the matter between the Deputy Commissioner and his subordinate officers who were concerned in the proposal of making a grant of some land to the defendant No. 2 for the purpose of constructing *Ghat* on the banks of the river Sarju in Ajodhya.

In this correspondence there is a reference to a plan prepared for elucidating the point on which the Deputy Commissioner had originally insisted that the land granted shall in no event extend to a point so as to encroach in any manner on *kacha* path. This plan is Exhibit B-26, and the *kacha* path is shown at the South end of plot No. 740. I am, therefore, of opinion that the boundary of the land given in the agreement of the 11th November 1917 as indicating the identity and extent of the land granted is a correct one and should be accepted. Even if we were to come to the conclusion that there is a conflict between the order of the 10th February 1917 and the agreement of the 11th November 1917 in respect of the specification of the property I should have no hesitation in holdng that the specification indicated by the boundaries should be preferred and given effect to. But at its highest the argument of the learned Pleader for the appellant comes to this, that the order of the 10th February 1917 should be treated as a part and parcel of the agreement itself. I am prepared to treat the order as such. The result is that there is discrepancy between one specification of property and another in the same document. This being the result to which I reach, the principle of the decision of their Lordships of the Privy Council in the case of *Zeenut Ali* v. *Ram Doyal Poddar* (1) applies. That principle was applied to a case decided by a Bench of this Court *Ganga Prasad* v. *Subhag Chand* (2).

There remains one more point to be considered. The Court of first instance refused to award any costs to the defendant No. 2 though the plaintiff's suit was dismissed in its entirety. The ground of the refusal was that a large number of pleas urged by that defendant were frivolous and were overruled by that Court. The defendant No. 2 objected to this order of the Court of the first instance when the appeal was heard by the learned Subordinate Judge. The learned Subordinate Judge accepted the objecton and modified the decree of the Court of first instance by awarding costs to the defendant No. 2 against the plaintiff. I am of opinion that the learned Subordinate Judge should not have done this. The reasons given by the learned Munsif for the order which he passed relating to the costs were good and the learned Subordinate Judge gives no reason whatsoever for interfering with that exercise of the discretion by the Court of first instance.

I, therefore, modify the decree of the learned Subordinate Judge only to this extent that his order in so far as it awards costs to the defendant No. 2 in the Court of first instance will be set aside. In other respects the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 18 W. R. 25.
(2) 25 Ind. Cas. 704; 17 O. C. 256; 1 O. L. J. 564.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 205 OF 1922.
April 23, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Seth MAHABIR PRASAD—OBJECTOR—APPELLANT
versus
KANHAIYA LAL AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 181—Decree, preliminary, for sale on mortgage—Confirmation on appeal—Application for decree absolute—Starting point of limitation.

In a suit for sale on a mortgage, if an appeal has been preferred against the preliminary decree, and the decree has been confirmed,

the starting point of limitation for an application for a final decree is the date of the appellate decree.

Nizamuddin Shah v. *Bohra Bhim Sen*, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85 and *Gajadhar Singh* v. *Kishen Jiwan Lal*, 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734, followed.

Gayan Singh v. *Ata Husain*, 60 Ind. Cas. 817; 19 A. L. J. 83; 43 A. 320, distinguished.

Second appeal from a decree of the District Judge, Agra, dated the 2nd December 1921.

Mr. *G. L. Agarwala*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—Gulab Singh was the mortgagor, and Gopi Ram was the mortgagee, who is now represented by the plaintiff. Mahabir Prasad was joned as a defendant in the suit by the plaintiff for sale on the mortgage executed by Gulab Singh, as a subsequent purchaser of part of the mortgaged property. He set up, among other defences, that he had a prior mortgage on the property. The plaintiff's suit was decreed subject to his paying off the prior mortgage set up by Mahabir Prasad. A preliminary decree was passed on the 14h of March 1916. From that decree the plaintiff appealed against so much of the decree as directed him to pay off the prior mortgage set up by Mahabir Prasad. That appeal was decreed by the District Judge on the 2nd of June 1916. From that decree Mahabir Prasad appealed to the High Court and his appeal was dismissed on the 1st of August 1918. Then the plaintiff applied for a final decree on the 14th of April 1920. Both Courts have allowed the application. The defendant, Mahabir Prasad, who is now represented by the appellant in this appeal, contended that the application was barred by limitation. Both Courts below have held that limitation began to run from the date of the High Court's decree, namely, the 1st of August 1918 and that, therefore, it was well within limitation. In appeal before us it is argued that inasmuch as in the appeal by the plaintiff before the District Judge against the prior mortgage set up by Mahabir Prasad some of the defendants were not made parties, that decree must be taken to be the starting point of limitation. It seems to us that, inasmuch as Mahabir Prasad himself appealed to this High Court, he cannot be heard to advance that plea. Reliance has been placed on a case reported as *Gayan Singh* v. *Ata Husain* (1) but there the objection was upheld in favour of the parties who had not appealed. It seems to us that this case is covered by the authority of *Nizamuddin Shah* v. *Bohra Bhim Sen* (2), which followed the Full Bench ruling in *Gajadhar Singh* v. *Kishen Jiwan Lal* (3). In our opinion the appeal must be dismissed with costs including in this Court fees on the higher scale.

M. A. A. *Appeal dismissed.*

(1) 60 Ind. Cas. 817; 19 A. L. J. 83; 43 A. 320.
(2) 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85.
(3) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 279 OF 1921.
May 9, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

Raja PEARY MOHUN MUKHERJEE—APPELLANT

versus

MONOHAR MUKHERJEE—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 2 (2), O. XX—Preliminary decree—Order in supplemental proceedings leading to final decree—O. XX, whether exhaustive—Trusts—*Trustee de son tort, *liability of—Accounts, nature of—Limitation Act (IX of 1908), s. 10, application of—Suit for accounts against* trustee de son tort.

In a suit relating to the administration of a *debutter* estate and for a declaration that an execution purchase of a portion of the trust estate by the trustee in the name of his son was invalid and inoperative, the Judicial Committee affirming the decree of the High Court held the sale to be invalid directed an account to be taken showing what if anything was due from the *shebait* to the estate and on the basis of this order of the Judicial Committee the Subordinate Judge made an order defining the extent and character of liability of the *shebait* to render an account

and specifying the mode, the period and the properties:

Held, that this order of the Subordinate Judge was a decree, being an order which was in essence a preliminary decree in the supplementary proceeding leading up to the final decree to be made therein. [p. 376, col. 1.]

It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in O. XX of the Civil Procedure Code in order that it may form the basis of a final decree. Those cases are illustrations of preliminary decrees. Whether an order possesses the qualities of a decree preliminary or final or partly preliminary and partly final clearly depends upon its contents. [p. 376, col. 1.]

It may be that the Legislature contemplated that, ordinarily, there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertaining what is to be done, while the final decree stating the result achieved by means of the preliminary decree, but there may be exceptions. [p. 376, col. 1.]

If a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a *trustee de son tort*, he may be called to account by the *cestui que trust* for the moneys he received under colour of the trust; such a person cannot be heard to say for his own benefit that he had no right to act as a trustee. [p. 376, col. 2.]

Under the Limitation Act a suit for accounts in respect of trust property falls within the scope of section 10 and a *trustee de son tort* stands in the same position as an express trustee. [p. 376, col. 2.]

There are two forms of account which can be claimed by a *cestui que trust* against the trustee. One is the common account being an account of all the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof as have been possessed or received by the trustee or by any person by his order. The other is an account, in addition to the former account, of the moneys or fund comprised in the trust-deed or from time to time subject to the trusts thereof which might without the wilful neglect or default of the trustee have been so possessed or received. [p. 377, col. 1.]

In taking the common account the *cestui que trust* cannot charge the trustee with anything beyond his actual receipts and is not permitted to show that there is some part of the trust funds which the trustee should have got in and has failed to get in. [p. 377, col. 1.]

But a trustee, when a common account is being taken, can properly be charged with a breach of trust which arises on the accounts themselves; he stands charged with his receipts and if he seeks to discharge himself by improper payments the discharge is disallowed. On the other hand, in order to obtain an account on the footing of wilful default against a trustee the *cestui que trust* must allege and prove at least one instance of wilful default. [p. 377, col. 1.]

An order on the footing of wilful default is a very strong one to make against an accounting party and is not made unless there has been a loss of assets received or assets which might have been received. [p. 377, col. 2.]

Appeal against the order of the Subordinate Judge, Second Court of Hooghly, dated the 5th of September 1921.

Babus *Dwarka Nath Chakravartty*, (with him Babus *Narendra Kumar Bose*, *Haradhone Chatterjee* and *Rama Prasad Mookerjee*), for the Appellants.

Babu *Sarat Chandra Rai Choudhuri* (with him Babu *Hari Lal Chakravarti*), for the Respondent.

JUDGMENT.—This is an appeal from an order for account made in a proceeding supplemental to a suit instituted by the respondent against the appellant, for the administration of a *debutter* estate, for the removal of the trustee, for the appointment of a new trustee or Receiver, for declaration that an execution sale of a portion of the trust estate when it was purchased by the trustee in the name of his son was invalid and inoperative, for proper investment of a sum of Rs. 11,500 alleged to form part of the trust estate and for other incidental reliefs. The suit was dismissed by the Trial Court. On appeal to this Court, the judgment was set aside and the suit was decreed in the following terms:—

"It is declared that the sale of Bahirgora held on the 14th January 1913 is not operative against the *debutter* estate, but the first defendant (the *shebait*) is entitled to be reimbursed, the precise amount recoverable by him to be investigated by the Court below. Steps will be taken forthwith to place the *debutter* estate in the hands of a Receiver to be appointed by this Court and the first defendant will cease to be *shebait* from the date when the Receiver takes possession:" *Manohar Mockerjee* v. *Peary Mohan Mookerjee* (1).

On appeal to the Judicial Committee this decision was affirmed: *Peary Mohan Mukerji* v. *Monohar Mukerji* (2). The judgment of the Judicial Com-

(1) 54 Ind. Cas. 6; 30 C. L. J. 177; 24 C. W. N. 478.

(2) 62 Ind. Cas. 76; 48 I. A. 258; 34 C. L. J. 86; 41 M. L. J. 68; 14 L. W. 1041 23 Bom. L. R. 913; (1921) M. W. N. 554; 19 A. L. J. 773; 2 P. L. T. 725; 26 C. W. N. 133; 30 M. L. T. 24; (1922) A. I. R. (P. C.) 235; 48 C. 1019 (P. C.).

mittee concluded as follows:—

"An order must be made declaring that the purchase by the second appellant (son of the *shebait*) was invalid and that proper and necessary steps should be taken to secure the property, and that the first appellant (the *shebait*) is entitled, subject as herein mentioned, to re-payment of the purchase-money. An account should be directed showing what, if anything, is due from the first appellant (the *shebait*) to the estate, and such money should be deducted from the purchase-moneys, the balance, if any, of the moneys in Court to be paid out and the first appellant (the *shebait*) to have a charge on the estate for such sum."

On the basis of this order of the Judicial Committee, the Subordinate Judge has made an order which defines the exte t and character of liability of the *shebait* to render an account, and specifies the mode, the period, and the properties. The *shebait* has appealed against this order.

The plaintiff-respondent has raised an objection to the competency of the appeal on the ground that the order is not one of those expressly made appealble as an order by the Code of Civil Procedure. The appellant has urged that the order is in essence a decree within the meaning of section 2 (2) of the Civil Procedure Code, 1908. The term "decree" is defined as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of; it is final when such adjudication completely disposes of the suit. A decree may be partly preliminary and partly final. There has been some diverg nce of judicial opinion as to the tests to be applied for ascertaining whether a particular decision constitutes an adjudication on the rights of the parties with regard to any of the matters in controversy in the suit. It was held at one time by the High Court of Bombay that a decision that a suit is not bad for misjoinder or that it is not barred by limitation or a decision that the Court has jurisdiction to entertain a suit was a preliminary decree; *Sidhanath Dhondev Garud* v. *Ganesh Govind Garud* (3); *Narayan Balkrishna Kulkarni* v. *Gopal Jiv Ghadi* (4). This extreme view was disapproved in this Court in the case of *Kamini Debi* v. *Promotho Nath* (5), and has subsequently been abandoned in the Bombay High Court itself; see the Full Bench decision in *Chanmalswami Rudraswami* v. *Gangadharappa Baslingappa* (6) which was applied in *Bharma Shidappa Pujari* v. *Bhamagavda Shivagavda* (7) and *Municipal Committee of Nasik* v. *Collector of Nasik* (8). According to the view now adopted in Bombay, the word "matter" in the definition means the actual subject-matter of the suit with reference to which some relief is sought, and the word "right" means substantive rights of the parties, which directly affect the relief to be granted, or which, in the words of the definition, relate to all or any of the matters in controversy. Tested from this point of view, there is really no room for dispute that the order under appeal is a decree. This view is supported by the decision of the Judicial Committee in *Bhup Indar Bahadur* v. *Bijai Bahadur Singh* (9), where Lord Hobhouse held that an adjudication that mesne profits were recoverable in respect of a defined period was in its nature a decree

(3) 17 Ind. Cas. 637; 37 B. 60; 14 Bom. L. R. 916.
(4) 23 Ind. Cas. 889; 38 B. 392; 16 Bom. L. R. 206.
(5) 27 Ind. Cas. 317; 20 C. L. J. 476; 19 C. W. N. 755.
(6) 26 Ind. Cas. 885; 39 B. 339; 16 Bom. L. R. 954 (F. B.).
(7) 28 Ind. Cas. 461; 39 B. 421; 17 Bom. L. R. 271.
(8) 28 Ind. Cas. 589; 39 B. 422; 17 Bom. L. R. 324.
(9) 27 I. A. 209; 23 A. 152; 2 Bom. L. R. 978; 5 C. W. N. 52 (P. C.).

within the meaning of the Code. This is not inconsistent with the decision in *Bhartendu* v. *Yaqub Husain* (10) and *Gulu sam Bivi* v. *Ahmadsa Rowther* (11), and is in accord with the view adopted in *Kamini Debi* v. *Promotho Nath* (5). It may be conceded that the Legislature contemplated that, ordinarily, there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. But as observed by Piggott, J., in *Yakub Husain* v. *Bharat Indo* (12) there may be exceptions, and the case before us furnishes an instance. Here the original suit was for removal of the *shebait*, for cancellation of the judicial sale, and for recovery of the trust property. The decree made in the suit has directed the removal of the *shebait* and the cancellation of the sale subject to investigation of accounts to be rendered by the *shebait* in a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein. It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in O. XX of the Code in order that it may form the basis of a final decree; those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term "decree". Whether the order made by the Judge possesses the qualities of a decree, preliminary or final or partly preliminary and partly final, clearly depends upon its contents. We are of opinion that the order now under appeal is a decree and that the objection to the competency of the appeal cannot be sustained.

The objections urged against the order made by the Subordinate Judge may be grouped, substantially, under two heads, namely, period of account and method of account. The Subordinate Judge has directed the *shebait* to render an account for the period which has elapsed since the death of his father on the 19th July 1888. As stated in the judgment of this Court, the appellant assumed the office of *shebait* immediately on the death of his father, though he did not become lawfully entitled thereto till his two uncles, Naba Krishna and Bijoy Krishna, had been removed from the scene by death, the former on the 11th September 1890 and the latter on the 29th January 1894. This plainly does not make any difference in the liability of the appellant. It is well settled that if a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a *trustee de son tort*, he may be called to account by the *cestui que trust* for the moneys he received under colour of the trust, such a person cannot be heard to say for his own benefit that he had no right to act as a trustee; see the judgment of the Earl of Selborne in *Lyell* v. *Kennedy* (13), where *Rackham* v. *Siddall* (14) and *Life Association of Scotland* v. *Siddall* (15) were approved. Nor does any question of limitation arise. No accounts have ever been demanded or rendered, and we are not called upon to consider what period of limitation would be applicable if a suit for accounts were now to be instituted. But we may observe that the decision in *Dhanpat Singh* v. *Mohesh Nath Tewari* (16) is an authority for the proposition that under the Indian Limitation Act, 1908, a suit for accounts in respect of trust property falls within the scope of section 10 and a *trustee de son tort* stands in the same position as an express trustee.

As regards the method of accounting, the Subordinate Judge has held that the Commissioner will enquire if any loss has

(10) 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120.
(11) 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284.
(12) 16 Ind. Cas. 372; 11 A. L. J. 120.
(13) (1889) 14 App. Cas. 437 59 L. J. Q. B 268; 62 L. T. 77; 38 W. R. 353.
(14) (1850) 1 Mac. & G. 607 at p. 621; 41 E. R. 1400; 2 H. & Tw. 44; 84 R. R. 194.
(15) (1861) 3 De G. F. & J. 58 at p. 69; 4 L. T. (N. S.) 311; 7 Jur. (N. S.) 785; 9 W. R. 541; 45 E. R. 800; 130 R. R. 28.
(16) 57 Ind. Cas. 805; 24 C. W. N. 752.

been occasioned to the *debutter* estate by the wilful neglect or misconduct of the appellant during the period that he was in charge thereof as *shebait, de facto* or *de jure*, and the amount will be added to his liability. The appellant has urged that this direction is erroneous. To test the validity of this contention, we may usefully recall that, as explained by Kindersley, V. C., in *Partington* v. *Reynolds* (17), there are two forms of account which can be claimed by a *cestui que trust* against the trustee. One is an account of all such of the moneys or funds comprised in the trust-deed or from time to time subject to the trust thereof as has been possessed or received by the trustee or by any person by his order or for his use. The other is an account, in addition to the former account, of the moneys or funds comprised in the trust deed or from time to time subject to the trust thereof, which might, without the wilful neglect or default of the trustee, have been so possessed or received; see the judgment of Lord Cottenham, L. C., in *Terrell* v. *Matthews* (18). The former is the common account and is given as of course when a decree is made for general administration. In taking the common account, the *cestui que trust* cannot charge the trustee with anything beyond his actual receipts and it is not permitted to show that there is some part of the trust funds which the trustee should have got in and has failed to get in; *Dowse* v. *Gorton* (19). But a trustee, where a common account is being taken, can properly be charged with a breach of trust which arises on the accounts themselves; he stands charged with his receipts and if he seeks to discharge himself by improper payments, the discharge is disallowed; *In re Stevens, Cooke* v. *Stevens* (20). On the other hand, in order to obtain an account on the footing of wilful default against a trustee, the *cestui que trust* must allege and prove at least one instance of wilful default. He must consequently prove that there is some part of the trust funds which should have been received but was not. When an account is ordered in this form he is thus liable not only for rent actually received but also for not letting the property if possible or not obtaining the full rent obtainable, *Noyes* v. *Pollock* (21), *In re Symons, Luke* v. *Tonkin* (22). An order on the footing of wilful default is a very strong one to make against an accounting party and is not made unless there has been a loss of assets received or assets which might have been received; *In re Stevens Cooke* v. *Stevens* (23), *In re Stevens, Cooke* v. *Stevens* (20), *In re Wrightson, Wrightson* v. *Cooke* (24). It is plain that wilful default is a relative term, and, in the words of Bowen, L. J., in *Noyes* v. *Pollock* (21), implies an existing duty on the part of the accounting party in which default has been made and may consist in knowingly doing what he ought not to do or knowingly omitting to do what he ought to do. *In re Owens, Jones* v. *Owens* (25) (Cotton, L. J.), *In re Young and Harston's Contract* (26) (Bowen, L. J.). Unless there is sufficient proof, it is not right to insert in a judgment any declaration of liability or even an enquiry as to liability based upon supposed breach of duty; *In re Stevens, Cooke* v. *Stevens* (20) (Lindley, L. J.) It was observed by Stirling, J., *In re Barclay, Barclay* v. *Andrew* (27), that the rule as to wilful default is not now so strict as it was before the Judicature Acts, and in a proper case, it is competent for the Court, upon the further consideration of an action to charge trustees with interest on balances although no case of wilful default has been raised

(17) (1858) 4 Drew. 253; 27 L. J. Ch. 505; 4 Jur. (N. S.) 200; 6 W. R. 388; 113 R R. 360; 62 E. R. 98.

(18) (1841) 1 Mac & G. 433 *n*; 11 L. J. Ch. 31; 5 Jur. 1074; 84 R. R. 120; 41 E. R. 1333.

(19) (1891) A. C. 190 at p. 202; 60 L. J. Ch. 745; 64 L. T. 809; 40 W. R. 17.

(20) (1898) 1 Ch. 162 at p. 172; 67 L. J. Ch. 118; 77 L. T. 508; 46 W. R. 177; 14 T. L. R. 111.

(21) (1886) 32 Ch. D. 53 at p. 61; 55 L. J. Ch. 513; 54 L. T. 473 at p. 475; 34 W. R. 383.

(22) (1882) 21 Ch D. 757 at p. 760; 52 L. J. Ch. 709; 46 L. T. 684; 30 W. R. 874.

(23) (1897) 1 Ch. 422 at p. 432; 66 L. J. Ch. 155; 76 L. T. 18; 45 W. R. 284.

(24) (1908) 1 Ch. 789 at p. 799; 77 L. J. Ch. 422; 98 L. T. 799.

(25) (1883) 47 L. T. 61 at p. 64.

(26) (1886) 31 Ch. D. 168 at p. 174; 54 L. J. Ch. 1144; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245.

(27) (1899) 1 Ch. 674 at p. 681; 68 L. J. Ch. 383; 80 L. T. 702.

by the pleadings and the question of interest was not referred to in the judgment. *Shaw* v. *Turbett* (28). Under the former practice, if the *cestui qui trust* discovered in the course of the suit that the trustee had been guilty of misconduct, his remedy was by filing, with the leave of the Court, a supplemental bill adapted to the state of circumstances. *Hodson* v. *Ball* (29), *In re Youngs, Doggett* v. *Revett* (30). Under the present practice where the *cestui que trust* has charged wilful default in his pleadings, either originally or as amended, but has not obtained a judgment on that footing, the Court can at any stage of the proceedings order an account to be taken on that footing, if evidence of wilful default is adduced. Thus, if in the prosecution of enquiries under an ordinary judgment, facts come out which, if proved at the trial, would have enabled the *cestui que trust* to have then obtained an enquiry as to wilful default that enquiry will be added. *Coope* v. *Carter* (31), *In re Fryer, Martindale* v *Picquot* (32), *Brooker* v. *Brooker* (33), *In re Symons, Luke* v. *Tonkin* (22), *In re Youngs, Doggett* v. *Revett* (30). We are of opinion that this course may be appropriately followed in the present proceedings. The suit was not expressly framed as a suit for accounts on the footing of wilful default throughout; the accounts directed unavoidably extend over a long period of time, as there has been no adjustment of accounts between the *shebait* and the *debutter* estate at any time, and the *shebait* cannot make good his claim to an indemnity unless the net balance is determined on a scrutiny of the accounts for the whole period. In these circumstances, we are of opinion that the direction for account on the footing of wilful default should be expunged and a common account taken as explained above. Liberty will, however, be reserved to the plaintiff or other party interested in the taking of the account, to apply, when the accounts have been lodged, for a direction that the Commissioner should take the account on the footing of wilful default either in respect of any particular matter or generally. It may be pointed out that an account on the footing of wilful default may be taken in two ways, first, the Court may think that the instances of wilful default brought forward are not sufficient to justify a general account upon the footing of wilful default, and in such a case the Court will direct special enquiries only with regard to the particular transactions in question, or, secondly, although only one or two cases of wilful default are proved, they may be of such a character as to induce the Court to direct an account generally on the footing of wilful default, applying to all the acts of the trustee; *Coope* v. *Carter* (31), *In re Stevens, Cooke* v. *Stevens* (23), *Sleight* v. *Lawson* (34), *Harvey* v. *Bradley* (35). It would not be right to anticipate at this stage what directions may be found necessary. But we may add that the lower Court will have to give effect to the views previously expressed by this Court upon the question of the sum of Rs. 11,500 and the costs of the previous litigation. We are further of opinion that the direction given by the Subordinate Judge that if the accounts show a balance in favour of the *debutter* estate, there will be a personal decree against the *shebait*, should be expunged. It is needless to decide this question hypothetically and in advance before the facts have been ascertained. We are further of opinion that when the accounts are taken, notice should be given to the new *shebait* or if there is a dispute as to the succession to the *shebaitship*, to the Receiver who may be appointed in a suit instituted for

(28) 13 Ir. Ch. R. 324.

(29) (1842) 1 Ph. 177; 12 L. J. Ch. 80; 7 Jur. 475; 65 R. R. 366; 41 E. R. 599.

(30) (1885) 30 Ch. D. 421 at p. 431; 53 L. T. 682; 33 W. R. 880.

(31) (1852) 2 De G. M. & G. 292; 95 R. R. 111; 21 L. J. Ch. 570; 42 E. R. 884.

(32) (1857) 3 K. & J. 317; 112 R. R. 160; 26 L. J. Ch. 398; 3 Jur. (N. S.) 485; 5 W. R. 552; 69 E. R. 1129.

(33) (1857) 3 Sm. & G. 475; 107 R. R. 155; 26 L. J. Ch. 411; 3 Jur. (N. S.) 381; 5 W. R. 382; 65 E. R. 743.

(34) (1857) 3 K. & J. 292; 26 L. J. Ch. 553; 5 W. R. 589; 112 R. R. 155; 69 E. R. 1119.

(35) (1867) 4 Eq. 13; 15 W. R. 527.

that purpose. The death of the *shebait* during the pendency of this appeal does not obviously affect the terms upon which his personal estate can claim an indemnity from the *debutter* estate, and the decision in *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (36) does not touch the matter. We may add, finally, that there is no substance in the technical objection that the order of the Subordinate Judge is *ultra vires*, because he dealt with the matter before the order of His Majesty in Council had been formally transmitted by this Court to his Court.

In view of the nature of the questions which may require consideration, we reserve liberty to the parties to apply to this Court, should any real difficulty arise in giving effect to our orders; ordinarily, however, applications should be made to the Subordinate Judge for further directions as to the accounts.

Subject to the modifications indicated above, the order of the Subordinate Judge will stand confirmed and each party will pay his costs in this Court.

S. C. M. & N. H. *Order confirmed.*

(36) 16 Ind. Cas. 742; 17 C. W. N. 5; 16 C. L. J. 282.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 991 OF 1921.
March 28, 1923.
Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

RAM CHAND KHANNA—DEFENDANT—APPELLANT
versus
GOSAWMI RAM PURI—PLAINTIFF—RESPONDENT.

Pre-emption—Muhammadan Law of pre-emption, adoption of, by Hindus—Principle, whether can be extended—Burden of proof.

There should be no extension of the Muhammadan Law of pre-emption among Hindus beyond the limits established by proof of custom. [p. 380, col. 2.]

Where it has been proved that the Muhammadan Law of pre-emption has been adopted by Hindus with respect for house property, it cannot be presumed that the right of pre-emption extends to other kinds of property also and the burden is on the plaintiff to prove such extension. [p. 380, col. 1.]

Jagjiwan Haribhai v. *Kalidas Mulji*, 60 Ind. Cas. 901; 45 B. 604; 23 Bom. L. R. 81, followed.

Second appeal from the decree of the District Judge, Benares, dated the 2nd June 1921.

Messrs. *Jang Bahadur Lal, Iqbal Ahmad* and *Shiva Prasad Sinha*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The subject-matter of the dispute in this case is a small plot of land, No. 1293, situated in Ramapura, one of the quarters of the city of Benares. According to the finding of the Court below it has been used for the cultivation of fruit trees. The parties to the suit are Hindus and the plaintiff claimed to be entitled to pre-empt a sale of the plot in question made in favour of the defendant-appellant.

It was alleged in the 4th paragraph of the plaint that a custom of pre-emption prevails in the city of Benares upon which the plaintiff relied for his right. It was further pleaded in the 6th paragraph of the plaint that the plaintiff had observed the preliminary formalities on hearing of the sale, from which it is to be understood that the plaintiff admits that pre-emption as exercised in Benares City must be sought and enforced in accordance with the procedure laid down by the Muhammadan Law.

Both Courts have decreed the plaintiff's claim. In appeal the main contention is, that as the plaintiff had failed to prove that the custom alleged extends to the purchase of lands, as distinct from houses his suit should have been dismissed. It is common ground that a custom of pre-emption relating to house property and based upon the Muhammadan Law obtained in the City of Benares. This custom has been affirmed by a long series of judicial decisions. It is argued, however, that no judicial recognition has been extended to pre-emption where the subject of sale is land as distinct from house property.

It is true that, in the course of the trial, the plaintiff was able to produce a copy of a judgment delivered in the year 1865 in which pre-emption of a plot of land within the City was decreed. It is also

shown that the judgment in question contains a somewhat obscure reference to a decree for pre-emption of land passed in the year 1853. But it is argued that this is no adequate proof of a custom of pre-emption relating to land in the City. The learned Judge of the Court below took the view that, inasmuch as it had been established that the Muhammadan Law of pre-emption had been adopted with respect to house property, it should be presumed that the right of pre-emption extended to other kinds of property which may be pre-empted under the Muhammadan Law and that consequently the land in suit, *viz.*, an orchard, was so liable to pre-emption. He says there is no proof that the custom in Benares is confined to houses. It was, however, for the plaintiff to prove that the custom he relied upon extended to property other than houses and, in our opinion, he failed to do so. The facts that a decree for pre-emption for a piece of land was passed so far back as the year 1865 and that possibly a similar decree had been passed some years earlier would not be sufficient to show that such a custom extended to lands within the City. The fact that no instance of the pre-emption of such lands could be established between the year 1865 and the year 1920 when this suit was brought, is, in our judgment, the strongest possible proof that no such custom exists. There is no more prolific source of litigation in this Province than the law of pre-emption and it is impossible that had there been such a custom there should not have been many cases brought out in the Courts during this long period during which there must have been numerous instances of sales of plots of land within the City. In the ruling reported as *Jagjivan Haribhai* v. *Kalidas Mulji* (1) the Bombay High Court in dealing with a case from the Surat District refused to extend the Muhammadan Law of pre-emption to agricultural lands although it was established that this law had been adopted generally with respect to house property in the district. The learned Judge of the Court below was, however, of opinion that the principle laid down in this judgment should not be followed here because the law of pre-emption has to a large extent been adopted in this Province in the villages and with respect to *zemindari* property. But the considerations which apply in the case of village property do not apply necessarily to property in the cities. The custom in the villages has grown up out of the desire to prevent the intrusion of strangers into the co-parcenary bodies; no such consideration would arise in the cities, where people of all classes congregate together.

We think the principle laid down in the Bombay case is the right one to follow and that there should be no extension of the Muhammadan Law of pre-emption among Hindus beyond the limits established by proof of custom.

It is here proved that the Hindus of Benares have adopted the Muhammadan Law with respect to the pre-emption of houses. It is not, however, established that this law has been adopted so as to extend to property of other descriptions. The plaintiff has failed to prove his case and, accepting the appeal, we set aside the decree of the Court below and direct that the suit of the plaintiff be dismissed with costs in all Courts including in this Court fees on the higher scale.

K. S. D. *Appeal allowed.*

(1) 60 Ind Cas. 901; 45 B. 604; 23 Bom. L. R. 81.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 126 OF 1922.
November 24, 1922.
Present :—Mr. Daniels, A. J. C.
Musammat JAMNA—PLAINTIFF—APPLICANT
versus
Musammat RAMRAJI—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 9—Application to set aside ex parte decree—Dismissal in default—Application for restoration, whether maintainable.

Where an application to set aside an *ex parte* decree is dismissed for default, an application

JAMNA *v.* RAMRAJI.

to set aside such dismissal lies under O. IX, r. 9, read with section 141, of the Civil Procedure Code.

Bhubaneswar Prasad Singh v. *Tilakdhari Lal*, 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.), *Ramgulam Singh* v. *Sheo Deonarain Singh*, 51, Ind. Cas. 152; 4 P. L. J. 287, dissented from.

Bepin Behari Saha v. *Abdul Barik*, 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446, *Gauri* v. *Hinga*, 59 Ind. Cas. 575; 23 O. C. 349, *Abdul Rahman Shah* v. *Shahana*, 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188, relied on.

Application against the order of the Subordinate Judge, Gonda, dated the 12th August 1922.

Mr. *K. P. Misra*, for the Applicant.

Messrs. *Niamat Ullah* and *Madho Prasad*, for the Opposite Party.

JUDGMENT.—The question for decision in this application is whether, when an application to have a suit decided *ex parte* restored to the file has been dismissed for default, an application to set aside that dismissal lies under O. IX, r. 9, read with section 141, Civil Procedure Code. The question is one on which the High Courts of Patna and Calcutta have come to diametrically opposite conclusions. The Patna High Court in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (1) and again in *Ramgulam Singh* v. *Sheo Deonarain Singh* (2) holds that no such application lies. The Calcutta High Court, on the other hand, in *Bepin Behari Saha* v. *Abdul Barik* (3) has held that it does lie. The facts of this case briefly are that on 26th July 1921 an *ex parte* decree was given against the defendant under O. IX, r. 6. On 29th July 1921 she applied to have that decree set aside. Her application was dismissed for default on 3rd September 1921. On the very same day she applied to have her application restored and the learned Judge was satisfied on the evidence which she produced that she had merely been temporarily absent from the Court for a necessary purpose and that it was not owing to her fault that her application was dismissed. He accordingly restored the application. The only published authority of this Court bearing on the question is a decision of Mr. Lindsay in *Gauri* v. *Hinga* (4) where he held that O. IX, r. 9 (read, of course, with section 141) is applicable to an order dismissing for default an application to set aside a sale under O. XXI, r. 90. He pointed out that O. IX has been held inapplicable to execution proceedings, as there successive applications for execution can always be brought, but that this was not the case with the order before him. It appears to me on general grounds that the view of Mr. Lindsay and of the Calcutta High Court should be followed. If an application of this kind is dismissed through error the person aggrieved ought in natural justice to have the opportunity of getting the dismissal set aside and I see no reason for so limiting the language of section 141 that it cannot cover such a case. It is suggested that there is another remedy by way of review but this is a limited remedy which is not always available. If I thought that O. IX, read with section 141, did not cover the case I would even be prepared to hold in a case such as this that the Court could restore the application under its inherent powers. As there is a provision of law applicable, however, it is not necessary to resort to section 151. It is brought to my notice by the learned Advocate for the respondent that a similar view has been taken by the High Court at Lahore in *Abdul Rahman Shah* v. *Shahana* (5).

For the above reasons I dismiss the present application with costs.

Z. K. *Revision rejected.*

(1) 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.).
(2) 51 Ind. Cas. 152; 4 P. L. J. 287.
(3) 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446.
(4) 59 Ind. Cas. 575; 23 O. C. 349.
(5) 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188.

RADHIKA RAMAN BIHARI JI MAHARAJ *v.* BOHRA SHIAM SUNDAR LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1446 OF 1921.
April 20, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Sri Thakur RADHIKA RAMAN BIHARI-JI MAHARAJ AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BOHRA SHIAM SUNDAR LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pre-emption—Three successive suits between same parties—Decrees in two suits—Dismissal of third for default—Defendant becoming co-sharer—Dismissal, whether has retrospective effect.

Plaintiff wanted to pre-empt a sale, but before the institution of his suit, the vendor made another sale of another share in the same village in favour of the same vendee. Subsequent to the suit, the vendee made a gift of the shares sold to him under the two deeds to the defendant. After this transfer a second suit to pre-empt the second sale was instituted. Subsequently, the original vendor executed a deed purporting to be a deed of gift in favour of the same defendant. The plaintiff filed a third suit to pre-empt this transfer. The Court of first instance dismissed all the three suits. On appeal, the first two suits were decreed and the third was remanded, but was ultimately dismissed for default. The defendant appealed to the High Court and urged that, on the dismissal of the third suit, he had become a co-sharer by virtue of the gift and that the dismissal must be given a retrospective effect:

Held, that the claim for pre-emption could not be defeated by virtue of the dismissal of the third suit which took place long after the date of decree of the first Court. [p. 383, col 1.]

Behari Lal v. *Mohan Singh*, 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A, 268, distinguished.

Sakina Bibi v. *Amiran*, 10 A. 472; A. W. N. (1888) 177; 13 Ind. Jur. 114; 6 Ind. Dec. (N. S.) 317, relied on.

Second appeal from a decree of the Subordinate Judge, Muthra, dated the 13th August 1921.

Mr. *G. L. Agarwala*, for the Appellants.

JUDGMENT.—These are appeals by a defendant arising out of two suits for pre-emption.

On the 11th of June 1919 defendant No. 2 executed a sale-deed in favour of Jamuna Prasad, defendant No. 1, of a certain share in Mahaban. This was followed by another sale-deed, dated the 11th of May 1920, of another share in the same village. On the 12th of June 1920 a suit for pre-emption was instituted by the plaintiffs-respondents to pre-empt the first sale. After the written statement in that suit had been filed Jamuna Prasad executed a deed of gift on the 17th of August 1920 under which he transferred the shares sold under the previous two sale-deeds in favour of the idol defendant-appellant. It was after this transfer that a second suit to pre-empt the second sale was filed on the 29th of November 1920. Subsequently, on the 14th of February 1921, Muhammad Saddiq-ul-Hussain, one of the original vendors, executed a deed which purported to be a deed of gift in favour of the defendant-appellant. The day after that a third suit was instituted to pre-empt this transfer. The Court of first instance disposed of all the three suits on the 28th of February 1921 and dismissed all the three suits. On appeal the two suits for pre-emption were decreed and the third was remanded. It is suggested before us that the third suit was ultimately dismissed for default.

On behalf of the defendant it is contended that, inasmuch as the third suit finally failed for want of prosecution the dismissal must be given a retrospective effect with the result that the defendant-appellant had become a co-sharer by virtue of the transfer of the 14th of February 1921 and, therefore, the other suits also were liable to be dismissed. We may point out that the learned District Judge in the two cases has come to a distinct finding of fact that the transfer of the 14th of February 1921 was in reality a sale and not a gift. If it had been a gift then there can be no doubt that on the 14th of February 1921 the defendant would have acquired a mature title as a co-sharer. On the finding, however, the transfer was only a sale. The result is that on the 28th of February 1921, when the first Court passed its decree, the defendant's right under the deed of transfer dated the 14th of February 1921 was still being challenged and he had not become a co-sharer in the village. We think, therefore, that there could have been no justification for the Court of first instance to dismiss the other two suits on the sole ground that the defendant had become a co-sharer. We may point out that but for this last transfer the defendant-appellant was a stranger to the *mahal*.

The learned Vakil for the appellant relied on the case of *Behari Lal* v. *Mohan Singh* (1). In that case, however, the defendant-vendee had acquired the property under a deed of gift before the decree of the first Court was passed and which deed of gift obviously could not have been challenged by a suit, for pre-emption. That case, therefore, is clearly distinguishable. In the present case we have only got to see what decree the Court of first instance should have passed. If the Court of first instance wrongly dismissed the claim, the plaintiff cannot be prejudiced by acquisition of title by the defendant, on a subsequent dismissal of the third suit. This was the principle accepted in the case of *Sakina Bibi* v. *Amiran* (2) with which we agree. The result, therefore, is that the claim for pre-emption of the two previous sales cannot be defeated by virtue of the dismissal of the third suit which took place on the 29th of November 1921 long after the date of decree of the first Court.

The appeals are, in our opinion, without force and are hereby dismissed but without costs as no one appears for the respondents.

K. S D. & N. H. *Appeals dismissed.*

(1) 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268.

(2) 10 A. 472 A W. N. (1888) 170; 13 Ind. Jur. 114; 6 Ind. Dec. (N. S.) 317.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1201, 1267, 1439, 1475, 1661, 1666, 1701, 2162 TO 2164 OF 1920.

August 30, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

TARA KUMAR GHOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUMAR ARUN CHANDRA SINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 9, 11, 34, 35—Absence of entry in document, relevancy of—Bengal Tenancy Act (VIII of 1885), s. 50, presumption under, rebuttal of—Appeal, second—Error as to admissibility of evidence—Limitation Act (IX of 1908), s. 5—Admission of appeal filed out of time.

Where a document is admissible in evidence, it can be utilised for the purpose of showing that the absence of an entry therein implies the non-existence of a matter. [p. 386, col. 1.]

The fact of absence of entry is relevant but its effect is to be determined in the light of the general evidence in the case. [p. 386, col. 1.]

The question whether a document is admissible in evidence as a public document is fundamentally distinct from the question whether its contents are binding without proof of other matters. [p. 387, col. 1.]

A sub-division of a tenure does not affect the continuity of the tenure or render inapplicable the provisions of section 50 of the Bengal Tenancy Act. [p. 388, col. 1.]

A slight variation of rent, even though not explained, does not deprive the tenant of the benefit of the presumption under section 50 of the Bengal Tenancy Act. [p. 388, col. 1.]

When the defect in the judgment of the lower Appellate Court is due to an error as to the admissibility of evidence, its findings can be impeached in second appeal. [p. 388, col. 1.]

Where certain connected appeals could not have been brought in without copies of the judgments, until after the main appeal had been lodged with complete sets of papers, the Appellate Court would without hesitation exercise in favour of the appellants its discretion under section 5 of the Limitation Act. [p. 388, col. 2.]

Appeals against the decision of the Special Judge, Noakhali, dated the 5th February 1920, reversing those of the Assistant Settlement Officers, Noakhali, dated the 3rd, 13th, 26th August and 12th September 1918.

Babu *Mahendranath Roy* (with him Babus *Dhirendra Lal Khastgir, Nagendra Nath Bose* and *Asiranjan Chatterjee*), for the Appellants.—*Batwara* papers are not public documents within the meaning of section 35 of the Evidence Act. See *Perma Roy* v. *Kishen Roy* (1). They are not admissible in evidence against tenants. See *Drobo Moyee Gosmanee* v. *Dhurmo Doss Koondoo* (2), *Gopal Chunder Shaha* v. *Madhub Chunder Saha* (3). The case of *Perma Roy* v. *Kishen Roy* (1) was followed in *Nanda Lal Pathak* v. *Chanurpat Das* (4). See also *Khetra Nath Mandal* v. *Mahomed Alla*

(1) 25 C. 90; 13 Ind. Dec. (N. S.) 61.
(2) 10 W. R. 197.
(3) 21 W. R. 29.
(4) 18 Ind. Cas. 143; 17 C. W. N. 779; 17 C. L. J. 462.

Rakha (5), *Wise* v. *Bhoobun Moyee Debia Chowdranee* (6), *In the matter of Juggun Lall* (7), *Queen-Empress* v. *Grees Chunder Banerjee* (8) *Ram Pershad Singh* v. *Lakhpati Koer* (9) and *Imrit Chamar* v. *Sridhar Panday* (10).

[MOOKERJEE, J.—The question is whether absence of an entry in a document is relevant.]

See *Imambandi* v. *Mutsaddi* (11). The judgment of the High Court is reported as *Imam Bandi* v. *Matasuddi* (12). The words used in section 35 of the Evidence Act are "entry" and "stating a fact in issue," so that, strictly speaking, absence of an entry cannot come under that section. But where section 34 of the Evidence Act applies, absence of an entry may be relevant.

In the present case if the partition papers are admitted in evidence, having regard to the language used in section 35, absence of an entry is not relevant. Refers to *Sadhu Sahu* v. *Raja Ram* (13). The omission to state a fact in a document which the party is not under any statutory liability to do, is not relevant and is not admissible in evidence.

Dr. *Dwarkanath Mitter* (with him Babus *Charu Chander Biswas* and *Narayan Chandra Kar*), for the Respondent.—The Second Appeals Nos. 1701, 2162, 2163 and 2164 were filed out of time and should not have been admitted.

As regards the other appeals, they are concluded by findings of fact which cannot be challenged in second appeal.

The *Batwara* papers were prepared under Regulation II of 1793, section 8, clause (8). It is a public document and would be admissible in evidence under sections 11 and 13 of the Evidence Act. Refers to section 26 of Regulation VIII of 1793. It is a document which is made by a public servant and is admissible in evidence under sections 9 and 13, if not under section 35 of the Evidence Act.

The cases cited by my learned friend are practically exhaustive except two cases to be found in *Sheikh Jaki Mamood* v. *Dino Bandhu Bhattacharjee* (14) and *Dinanath Chanda* v. *Nawabali* (15). The other case is *Raj Kishore Deo* v. *Bani Mahto* (16). The decision in *Nanda Lal Pathak* v. *Chanurpat Das* (4) supports my contention. Refers to *Taru Patur* v. *Abinash Chunder Dutt* (17), *Akshaya Kumar Dutt* v. *Shama Charan* (18).

With regard to the other branch of the argument regarding the relevancy of the absence of the entry I rely upon *Imambandi* v. *Matasuddi* (12) and *Imambandi* v. *Mutsaddi* (11). On this point no case except that in *Queen-Empress* v. *Grees Chunder Banerjee* (8) is against me.

Babu *Charu Chandra Biswas*, for the Respondent, in Second Appeal Nos. 1201 and 1439:—The effect of the sub-division of a parent estate is to create separate and distinct estates. See *Hem Chandra Chowdhury* v. *Kali Prasanna* (19), *Uday Chandra Karji* v. *Nripendra Narayan Bhup* (20), *Sarat Soondary Dabea* v. *Anund Mohun Surma* (21), *Adit Singha* v. *Sukhraji Rai* (22) and *Chandra Kanta Chakrabartty* v. *Ram Krishna Mahalnabis* (23). Under such circumstances, no presumption arises under section 50 of the Bengal Tenancy Act. There are also slight variations in the rent. This, if not explained,

(5) 45 Ind. Cas. 921; 23 C. W. N. 48.
(6) 10 M. I. A. 165 at p. 174; 3 W. R. P. C. 5; 1 Suth P. C. J. 563; 2 Sar. P. C. J. 91; 19 E.R. 934.
(7) 7 C. L. R. 356 at p. 358.
(8) 10 C. 1024; 5 Ind. Dec. (N. S.) 683.
(9) 30 C. 231 at p. 247 (P. C.); 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103; 8 Sar. P. C. J. 380 (P. C.).
(10) 13 Ind. Cas. 120; 17 C. W. N. 108; 15 C. L. J. 7.
(11) 47 Ind. Cas. 513; 45 I. A. 73; 45 C. 878; 28 C. L. J. 409; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518 (P. C.).
(12) 13 Ind. Cas. 678; 15 C. L. J. 621.
(13) 16 A. 40; A. W. N. (1893) 200; 8 Ind. Dec. (N. S.) 27.
(14) 2 Ind. Cas. 367.
(15) 49 Ind. Cas. 984.
(16) 47 Ind. Cas. 1; 28 C. L. J. 1; 22 C. W. N. 439; (1918) M. W. N. 305; 23 M. L. T. 382; 20 Bom. L. R. 712; 12 Bur. L. T. 88 (P. C.).
(17) 4 C. 79; 2 Shome L. R. 54; 2 Ind. Dec. (N. S.) 52.
(18) 16 C. 586; 8 Ind. Dec. (N. S.) 387.
(19) 26 C. 832; 13 Ind. Dec. (N. S.) 1133.
(20) 1 Ind. Cas. 4; 36 C. 287; 13 C. W. N. 410.
(21) 5 C. 273; 4 C. L. R. 448; 2 Ind. Dec. (N. S.) 784.
(22) 21 Ind. Cas. 385; 17 C. L. J. 435.
(23) 36 Ind. Cas. 707; 24 C. L. J. 275 at p. 278; 20 C. W. N. 1002.

is sufficient to rebut the presumption arising under section 50 of the Bengal Tenancy Act. See *Prasanna Deb Raikat* v. *Mohananda Das* (24). See also *Bissessur Chuckerbutty* v. *Wooma Churn Roy* (25). But in second appeal your Lordships ought not to interfere on this point with the judgment of the lower Appellate Court. Refers to *Rajah Makund Deb* v. *Gopi Nath Sahu* (26) and *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh* (27). On the question of the admissibility of the *Butwara* papers, refers to *Dwarkanauth Roy* v. *Huronauth Roy* (28), *Anund Chunder Roy* v. *Huronath Roy* (29) and *Bipradas Pal Choudhury* v. *Monorama Debi* (30).

Babu *Asiranjan Chatterjee* in reply:—Exhibit 2 is not a public document. On the face of it, it does not purport to be made by a public officer nor has it been proved to be so made. Neither is it purported nor proved to have been made under statutory authority.

The Regulations referred to do not apply because these Regulations refer to partition by metes and bounds. Even under the Regulations it was not necessary that the subordinate tenures should be entered. In the present cases the *Batwara* was made before the estates were permanently settled. And, moreover, there was no partition by metes and bounds and it was no part of the duty of the Collector to record the names of the subordinate *taluqs*. None of the cases cited are against me, except *Drobo Moyee Gosmanee* v. *Dhurmo Doss Koondoo* (2). As pointed out in *Sheikh Jaki Mamood* v. *Dino Bandhu Bhattacharjee* (14) and *Dinanath Chanda* v. *Nawabali* (15), those decisions are either under the Act of 1876 or of 1897.

On the question of the presumption of fixity of rent arising from uniform payment at a fixed rate, refers to *Golab Misser* v. *Kumar Kalanand Singh* (31), *Nityananda Pal* v. *Nanda Kumar* (32), and *Ram Dayal Giri* v. *Midnapur Zemindary Co., Ltd.*, (33).

JUDGMENT.—These ten appeals arise out of as many proceedings instituted by the respondent for settlement of fair and equitable rents in respect of lands comprised in tenures held under him by the appellants. The tenants contended that their rents were not liable to enhancement under section 6 of the Bengal Tenancy Act, as their tenures had been held from the time of the Permanent Settlement of 1793. The tenants proved, in support of this position, that they and their predecessors had held at a rent or rate of rent which had not been changed during the twenty years immediately before the institution of the proceedings. They accordingly claimed the benefit of the presumption formulated in section 50 (2), and maintained that, unless the presumption was rebutted, they were protected from enhancement under section 50 (1). The question thus arose, whether the landlord had or had not proved the contrary within the meaning of section 50 (2). The Assistant Settlement Officer held against the landlord and dismissed the claim for enhancement. Upon appeal the Special Judge has reversed that decision and has granted enhancement. On the present appeals, the conclusion of the Special Judge that the landlord had rebutted the statutory presumption in favour of the tenants, has been assailed as erroneous in law.

To rebut the presumption, the landlord relied upon three papers, namely, first, a writ of attachment issued in 1792; secondly, a writ of attachment issued in 1797, and, thirdly, a partition proceeding of 1800. The contention of the landlord is that, as the tenancies held by the defendants are not mentioned in these documents, there is no escape from the inference that the disputed tenures were not in existence at the time of the Permanant Settlement. This raises two questions, namely, first, whether the documents are admissible in evidence, not to show that they contain entries establishing the existence of the tenures, but to show that as they contain

(24) 40 Ind. Cas. 553.
(25) 7 W. R. 44.
(26) 25 Ind. Cas. 286; 21 C. L. J. 45.
(27) 51 Ind. Cas. 760; 46 C. 189; 23 C. W. N. 345; 9 L. W. 552; 45 I. A. 188 (P. C.).
(28) W. R. 1864, 238.
(29) 4 W. R. 26.
(30) 47 Ind. Cas. 49; 22 C. W. N. 396; 45 C. 574.
(31) 6 Ind. Cas. 217; 12 C. L. J 107; 14 C. W. N. 884.
(32) 10 Ind. Cas. 163; 13 C. L. J. 415.
(33) 7 Ind. Cas. 785; 15 C. W. N. 263.

no entries about the tenures, such absence of entry implies their non-existence; and secondly, that if the documents can be received in evidence for the purpose mentioned, whether the absence of entries necessarily justifies the conclusion that the tenures were not in fact in existence.

Upon the first question, there has been some divergence of judicial opinion. As pointed out in *Imambandi* v. *Mutsaddi* (11) and *Imrit Chamar* v. *Sridhar Panday* (10), the cases of *Queen-Empress* v. *Grees Chunder Banerjee* (8) and *In the matter of Juggun Lall* (7) assume that though entries in a book of account are relevant to the extent provided by section 35 of the Indian Evidence Act, such a book is not by itself relevant to raise an inference from the absence of any entry. The same view is supported by the observations of Lord Davey and Lord Robertson in *Ram Pershad Singh* v. *Lakhpati Koer* (9). In *Sagurmull* v. *Manraj* (34), it was ruled, however, that the cases just mentioned did not decide that the fact of absence of an entry is no evidence at all under any section of the Indian Evidence Act, and that evidence that there is no entry in the account-books, though not admissible under section 34 may be admissible under sections 9 and 11. The question arose again before a Full Bench of the Allahabad High Court in *Sadhu Sahu* v. *Raja Ram* (13), and the Judges were divided in opinion. The point may now be taken to have been set at rest by the judgment of the Judicial Committee in *Imambandi* v. *Mutsaddi* (11), where the fact of absence of entry was held relevant, its effect to be determined in the light of the general evidence in the case. This fits in with the opinion expressed by Turner, L. J., in *Wise* v. *Bhoobun Moyee Debia Chowdrainee* (6). In that case, reliance was placed on the fact that a disputed *taluk* was not mentioned in the Decennial or Quinquennial Settlement as such; the relevancy of the circumstances was not questioned, but the Judicial Committee observed that, even assuming the statements to be accurate, in the absence of particulars of the Settlements, the fact did not seem to afford any strong inference against the existence of the *taluk*; see also *Dwarkanauth Roy* v. *Huronauth Roy* (28). We hold, accordingly, that if the three documents are admissible in evidence, the landlord is entitled to utilise them for the purpose desired. This leads us to the question of the admissibility of the documents themselves.

As regards the writs of attachment issued in 1792 and 1797, it is plain that they must have been prepared when the Collector took possession of the *zemindari* upon default in payment of revenue by the proprietor. The documents may be relevant in connection with the history of the estate and may be used to show that the proprietor defaulted and the Collector went into possession. They may also be utilised to show that the Collector realised from the tenants the amounts stated during the period of his occupation; but there is nothing to indicate that the duty was cast upon the Collector to prepare a complete record of all the tenures then in existence. That the list of tenures contained in the attachment writs is incomplete has, indeed, been made out by comparison with the list in the partition paper presently to be mentioned. The Special Judge has, in our opinion, correctly held that, in view of the scope of the two attachment writs, no inference favourable to the landlord can be drawn therefrom, and they cannot be treated as relevant under section 11 of the Indian Evidence Act.

We have next to consider what has been called the partition paper dated 1st September 1800 which forms the real foundation of the judgment of the Special Judge. The original was not produced at the trial, and this has led to some controversy as to whether the certified copy filed could be received as secondary evidence of its contents. The certified copy itself was not perfectly legible, and the correctness of the statement in the judgment of the Special Judge that the document had been signed by the Collector and Deputy Collector could not be verified. In these circumstances, we called for the originals of all the three documents from the Noakhali Collectorate. The dilapidated condition of the originals makes the examination of the contents by no means easy. The production of the originals, however, removes the difficulty about the reception

(34) 4 C. W. N. cvii (207).

of secondary evidence, but the question still remains whether the partition paper is admissible in these proceedings against the tenure-holders. Our attention has been drawn to judicial decisions as to the admissibility of partition papers. But, as will be presently explained, they are not of real assistance in the absence of detailed information as to the history of the document mentioned, when it was prepared, by whom, in whose presence, and for what purpose. There is some diversity of judicial opinion, probably more apparent than real, as to the admissibility of documents of this description; this is traceable, in part at least, to an attempt to apply the same test to documents of different types. In *Taru Patur* v. *Abinash Chunder Dutt* (17), a *jamabandi* prepared by a Deputy Collector in the course of land-settlement under Regulation VII of 1822 was held admissible as a public document. This decision has, however, been doubted: *Ram Chunder Sao* v. *Bunseedhur Naik* (35), *Akshaya Kumar Dutt* v. *Shama Charan* (18). In *Saraswati Dasi* v. *Dhanpat Singh* (36), Sir Richard Garth, C. J., appears to have ruled against the admissibility of such a document under section 35, but this was not acquiesced in by Field, J. The opinion of Garth, C. J., was, on the authority of the decision of the Judicial Committee in *Lekraj Kuar* v. *Mahpal Singh* (37), repudiated in *Shoshi Bhooshun Bose* v. *Girish Chunder Mitter* (38), which was followed in *Secretary of State for India* v. *Wazed Ali Khan Pani* (39), see also *Anund Chunder Roy* v. *Huronath Roy* (29); whichever view be adopted, it must be recognised that the question whether a document is admissiable in evidence as a public document is fundamentally distinct from the question whether its contents are binding upon tenants without proof of notice on them or of their consent. The decisions in *Drobo Moyee Gosmanee* v. *Dhurmo Doss Koondoo* (2) and *Gopal Chunder Shaha* v. *Madhub Chunder Saha* (3), emphasise this distinction. The decision in *Khetra Nath Mandal* v. *Mahomed Alla Rakha* (5), which refers to the cases of *Perma Roy* v. *Kishen Roy* (1), *Nanda Lal Pathak* v. *Chanurpat Das* (4), and *Mohi Chowdhury* v. *Dhiro Missrain* (40), deals with the question whether partition *chitta* and map are admissible as public documents under section 35. The Court, however, also emphasised the distinction we have pointed out, by reference to the decision in *Gopal Chunder Shaha* v. *Madhub Chunder Saha* (3), and added the important observation that the law had been differently and more broadly laid down under the Bengal Estates Partition Act, 1897: *Janki Dobey* v. *Kirtarath Roy* (41). This had been previously explained in *Sheikh Jaki Mamood* v. *Dino Bandhu Bhattacharjee* (14), where the decisions in *Drobo Moyee Gosmanee* v. *Dhurmo Doss Koondoo* (2) and *Gopal Chunder Shaha* v. *Madhub Chunder Saha* (3) were considered. To the same effect is the decision in *Dinanath Chanda* v. *Nawabali* (15). This accords with the decision of the Judicial Committee, in *Raj Kishore Deo* v. *Bani Mahto* (16), where a register of revenue-free villages prepared by a Revenue Surveyor was held admissible under section 35 to show the nature of a tenant's holding, in the absence of evidence indicating that the public officer had acted in excess of his official duty. It is consequently necessary that the history of the partition paper dated 1st September 1800 should be fully investigated in all its aspects before the question of its admissibility is finally decided. But even if the document be received in evidence, the further question must be determined, whether it does in fact omit the lands of the disputed tenures. The mere circumstance that the names by which the tenures are known at present, cannot be traced in the list does not show conclusively that the tenures are not included therein. As the Assistant Settlement Officer pointed out, the names of *taluqs* are frequently changed as they pass from hand to hand, and very often a *taluq* is sub divided whereupon new names are given to each of the

(35) 9 C. 741; 7 Ind. Jur. 633; 4 Ind. Dec. (N. S.) 1143.
(36) 9 C. 431; 12 C. L. R. 12; 4 Ind. Dec. (N. S.) 936.
(37) 7 I. A. 63; 5 C. 744; 6 C. L. R. 593; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 407; Rafique and Jackson's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. S.) 1081 (P. C.).
(38) 20 C. 940; 10 Ind. Dec. (N. S.) 630.
(39) 65 Ind. Cas. 866; 34 C. L. J. 141.
(40) 6 C. L. R. 139.
(41) 4 Ind. Cas. 316; 13 C. W. N. 93.

fragments. Such sub-division, it has now been held, does not affect the continuity of the tenure concerned or render inapplicable the provisions of section 50 of the Bengal Tenancy Act; see *Krishna Kamini Dasi* v. *Nil Madhab Saha* (42). Consequently, it cannot be inferred from the partition paper, without further enquiry, that the disputed tenures are really not mentioned therein. One possible method of enquiry may be to trace the history of all the tenures actually mentioned in the paper, and by the application of the method of elimination or exhaustion, to establish that the disputed tenures are or are not mentioned in the document. We may add that even if it should be ultimately proved that the tenures are not mentioned, it would not necessarily follow that they were not in existence at the time; there may be cogent reasons to explain the absence, as pointed out by Teunon, J., in *Bipradas Pal Choudhury* v. *Monorama Debi* (30). Weight will obviously have to be attached to the statutory provisions for the partition of estates in operation at that time; and how far the proceedings did in fact conform to those rules, is plainly a relevant matter: *Baboo Hur Gopal Doss* v. *Ram Gopal Sahee* (43). It is we think abundantly clear that the cases require much fuller examination than they have received or than what is practicable upon the materials on the record. The defect in the judgment of the Special Judge is due to an error as to the admissibility of evidence, and, his findings can consequently be impeached in second appeal: *Rajah Makund Deb* v. *Gopi Nath Sahu* (26) and *Najar Chandra Pal Chowdhury* v. *Shukur Sheikh* (27).

Two minor points require a brief notice. It was argued, in the first place, that the partition paper indicates a variation in the rent, which, however slight, may rebut the presumption under section 50. We are of opinion that there is no force in this contention. A slight variation, even though not explained does not deprive the tenant of the benefit of the presumption: *Ramrutno Sircar* v. *Chunder Mookhee Dabea* (44), *Koroona Moyee Dossee* v. *Radha Madhub Bose* (45), *Munsoor Ali* v. *Bunoo Singh* (46), *Elahee Buksh Chowdhry* v. *Roopun Telee* (47), which are really not in conflict with *Prasanna Deb Raikat* v. *Mohananda Das* (24).

It was urged, in the second place, that four of the appeals had been lodged in this Court after the expiry of the prescribed time and should be rejected on that ground. There is no substance in this contention. This objection arises in cases where copies of the judgments were not attached to the Memorandum of Appeal, and the appellant was *prima facie* not entitled to deduction of time on that account. It must be remembered, however, that these appeals could not have been brought in without copies of the judgments, until after the main appeals had been lodged with complete sets of papers. In this view, the Court would, without hesitation, exercise in favour of the appellants its discretion under section 5 of the Limitation Act.

The result is that these appeals are allowed; the decrees made by the Special Judge set aside and the cases remanded to the Court of first instance to be re-tried in accordance with law. Each party will be at liberty to adduce fresh evidence. The papers received from the Collector will be compared with the certified copies on the record, which will be amended, if necessary; this will be carried out by an officer of this Court, and the parties will be allowed to be present. If the parties so desire, they may at their own cost, also take from this Court fresh certified copies of the papers received from the Collector. The originals will thereafter be returned to the Collector.

Costs in this Court will abide the result, the hearing fee in each appeal will be assessed at one gold *mohur*.

Appeals allowed.
Cases remanded.

B. N. & N. H.

(42) 73 Ind. Cas. 312; 36 C. L. J. 382; (1923) A. I. R. (C.) 66.
(43) 13 W. R. 381; 3 B. L. R. 138.
(44) 2 W. R. Act X, Rul. 74.
(45) 6 W. R. Act X, Rul. 50.
(46) 7 W. R. 282.
(47) 7 W. R. 284.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 190 OF 1922.
April 23, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

MUHAMMAD SIDDIQ ALI KHAN —PLAINTIFF—APPELLANT

versus

ANWARUL HASAN AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Court of Wards Act (IV of 1912), s. 54—"Property", meaning of—Suit by transferee of claim against Court of Wards—Notice, necessity of.

A transferee of a claim against the Court of Wards is bound to give notice under section 54 of the U. P. Court of Wards Act before instituting a suit; a notice given by his transferor who intended to file a similar suit will not enure for his benefit.

Bachchu Singh v. *Secretary of State for India in Council*, 25 A. 187; A. W. N. (1903) 13, relied upon.

A suit relating to the property inherited by persons in charge of the Courts of Wards is a suit relating to the property of the wards, within the meaning of section 54 of the U. P. Court of Wards Act.

Lal Singh v. *Collector of Etah*, 25 Ind. Cas. 398; 12 A. L. J. 485; 36 A. 331, distinguished.

Second appeal from a decree of the Additional District Judge, Moradabad, dated the 10th of November 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *L. M. Banerji*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows:—

Ibrahim Ali Khan owned property some of which is in suit. He died leaving three sons and three daughters one of whom was *Musammat* Batul-un-nissa who was entitled to 1-9th of the property owned by Ibrahim Ali Khan on his death. She died leaving a son, Anwarul Hasan, who become entitled to 2-3rds of the 1-9th share inherited by his mother. He sold his share to Muhib Ali who sold to Muzhar Hussain who in turn sold to the plaintiff. This is a suit by the plaintiff for declaration and for possession of the property. The defendant No. 1 is Anwarul Hasan the transferor of the property. Defendants Nos. 2 to 9 are the persons who represent the sons and daughters of Ibrahim Ali Khan.

Defendants Nos. 10 to 25 are subsequent transferees from the sons of these defendants Nos. 23 to 25 are wards under the Court of Wards. Defendants Nos. 23 to 25 alone contested the suit, on the ground that the notice required by section 54 of the Court of Wards Act (IV of 1912 of the Local Legislature) had not been duly served. This plea was upheld in both Courts and *ex parte* decree was passed against defendants Nos. 1 to 22 and the suit was dismissed as against defendants Nos. 23 to 25. The plaintiff brings this appeal on two grounds. Firstly, it is argued that inasmuch as Mazhur Husain who sold the property to the plaintiff had given notice of his intention to bring a suit similar to this one against the Court of Wards, that that notice enured for the benefit of the plaintiff.

Secondly, that in any case section 54 of the U. P. Court of Wards Act was not applicable because the suit did not relate to "the property" of the wards.

With regard to the first plea it is only necessary to say that the ruling in *Bachchu Singh* v. *Secretary of State for India in Council* (1) is conclusive.

On the second plea it seems to us that on the allegation in the plaint itself in paragraph 12 the plaintiff admits that the wards have an interest in the property. The ruling on which he relies, namely, *Lal Singh* v. *Collector of Etah* (2), has no application. There the property did not belong to the ward but to the judgment-debtor of the ward and the mere fact that the ward had attached that property did not create any right in the property in the ward. The very fact that the plaintiff has appealed from the decree of the First Court, dismissing the suit as against the wards shows clearly that the plaintiff himself realises that the suit does relate to the property of the wards. In our opinion the appeal fails and is dismissed with costs including fees on the higher scale. Costs to be in favour of the Court of Wards.

M. A. A. *Appeal dismissed.*

(1) 25 A. 187; A. W. N. (1903) 13.
(2) 25 Ind. Cas. 398; 12 A. L. J. 485; 36 A. 331.

KHALIL ULLAH SHAH *v.* EWAZ ALI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 102 OF 1922.

August 17, 1922.

Present:—Mr. Ashworth, J. C.

KHALIL ULLAH SHAH—DEFENDANT No. 1—APPELLANT

versus

EWAZ ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Gift, requisites of—Presumption from possession—Civil Procedure Code (Act V of 1908), O. VII, r. 1 (e)—Pleadings—Plaint—Ownership relied upon in plaint—Particulars.

Under the Muhammadan Law a gift can be made orally and need not be made by a registered instrument, but there must be evidence from which a declaration by the donor, acceptance by the donee and transfer of possession are proved. [p. 391, col. 1.]

A man might allow his property to be recorded and possessed by his sons without any intention that they should be owners of it, as, for instance, if he wishes to baffle his creditors, but, in the absence of a formal declaration of gift, a gift cannot, under the Muhammadan Law, be presumed from the mere fact of possession. [p. 391, col. 2.]

Ownership is a mixed question of law and fact and a plaintiff who relies on ownership should set forth in the plaint facts justifying the assertion of ownership, as required by clause (*e*) of r. 1 of Order VII of the Civil Procedure Code. [p. 390, col. 1.]

Second appeal against a decree of the Subordinate Judge, Unao, dated the 31st December 1921, upholding that of the Munsif, Safipur, dated the 4th August 1920.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Mohammad Masih-ud-din Faruqi*, for the Respondents.

JUDGMENT.—This second appeal arises out of suit brought by the plaintiffs as heirs of one *Musammat* Aliman Bibi for possession of certain property and mesne profits. The plaint in paragraph 2 merely sets forth that *Musammat* Aliman Bibi was owner of the property set forth in a list attached to the plaint. It no where stated her title to the property. I would point out that this was not in confirmity with O. VII, r. 1 (*e*), of the Code of Civil Procedure. Ownership is a mixed question of law and fact and a plaintiff who relies on ownership should set forth the facts justifying the assertion of ownership. I mention this fact as a certain amount of confusion in this case was due to this omission in the plaint. The suit was resisted by Khalil Ullah Shah, the nearest relative surviving of Amirullah Shah, the father-in-law of *Musammat* Aliman Bibi, on two alternative grounds. He admitted that the property in suit had been recorded in the name of one Amjad Ullah, the deceased husband of *Musammat* Aliman Bibi, but claimed that at the time that the entry was made the property belonged to a *Dargah* and not to Amjad Ullah's father, Amir Ullah, so that even if Amir Ullah transferred the property to Amjad Ullah the transfer created no right in Amjad Ullah. He also pleaded that, even if the property had belonged to Amir Ullah there was no valid transfer of it by Amir Ullah to Amjad Ullah.

It is plain from the evidence that the plaintiffs set up title in Aliman Bibi as the sole heir of Amjad Ullah and relied on certain facts for proving that Amir Ullah gave the property to Amjad Ullah. Amongst these facts was the continuous possession of the property by *Musammat* Aliman Bibi for more than 12 years previous to the suit. The Court of first hearing did not come to a decision as to the alleged gift by Amirullah to Amjad Ullah. What it said was: "There is no direct evidence worthy of the name on record to prove the distribution of his property by Amir Ullah. But the statements of P. W. No. 6 and P. W. No. 7 who saw the property seperate cannot be lightly rejected." It went on to find that *Musammat* Aliman Bibi had a title to the property by more than twelve years adverse possession, that is to say, adverse to her husband's brother.

In appeal, the Subordinate Judge of Unao held that the fact of *Musammat* Aliman Bibi's possession for so long, along with other facts and the oral evidence, justified the inference that she was the absolute owner of the property, which I take to mean, in view of his remarks as to what the oral witnesses said, that Amir Ullah gave this property to her husband Amjad Ullah.

The first question that arises for decision in this second appeal is—was there any evidence on which the lower Appellate Court would base a finding that *Musam-*

mat Aliman Bibi was owner of the property? There is no doubt that her husband Amjad Ullah's name was entered in the papers as owner of the property. Again, there is no doubt that mutation after Amjad Ullah's death was effected in the name of *Musammat* Aliman Bibi. The Subordinate Judge appears to be incorrect in stating that this mutation was allowed by Amir Ullah. There is no evidence that Amir Ullah was alive at the date when mutation was effected in favour of *Musammat* Aliman Bibi. On the contrary, it was stated by the defendant-appellant in his written statement that Amir Ullah died on the 31st January 1898 which was previous to the mutation, the latter taking place on the 3rd June 1898. Two witnesses for the plaintiffs-respondents who gave their evidence in 1920 said that he died 22 years ago which would not be inconsistent with the date in the written statement, so that there is nothing to justify this assertion of the Subordinate Judge. In addition to these facts the Subordinate Judge relied on the evidence of plaintiffs' witnesses Nos. 6 and 7. P. W. No. 6 Ahmad Shafi says, "Amir Ullah in his lifetime had divided his property over his two surviving sons. Half the property was given to Amjad Ullah and the remaining half to Masih Ullah." There was no cross-examination on this. P. W. No. 7, Daim, said: "In his life-time Amir Ullah divided his property into two shares and gave it to his two sons, Amjad Ullah and Masih Ullah." But in cross-examination this witness said: "Amir Ullah did not partition his property in my presence."

It appears from the judgment of the lower Appellate Court that it conceived that the mere fact of a division by the father of his property between his two sons would constitute a valid transfer. The Subordinate Judge has made no attempt to see whether there was evidence showing the necessary constituents of a gift under Muhammadan Law. Such a gift can be made orally and need not be made by a registered instrument but there must be evidence from which a declaration by the donor acceptance by the donee and transfer of possession are proved. The declaration, if proved, acceptance and transfer would be sufficiently proved by the evidence but there is no proof of a formal declaration. The fact that Amir-ullah allowed his two sons to be recorded as owners of the property is no sufficient proof of a declaration of gift. Neither of the witnesses affirm any such declaration. A man might allow property to be recorded and possessed by his sons without any intention that they should be owners; as, for instance, if he wishes to baffle his creditors. Any way, the Muhammadan Law, while dispensing with a registered deed, does require a formal declaration. I, therefore, find that there was no evidence from which the lower Court could infer a declaration of gift.

Another point taken by the appellant is that, even if Amjad Ullah was owner of the property in the absence of custom his widow would only be entitled to one quarter and that there is no sufficient evidence of a custom of excluding the other heirs. The lower Appellate Court has stated that P. W. No. 1 has proved the custom. He says: "According to custom a widow takes the entire estate if there is no issue..... If the property left by the *propositus* is ancestral and undivided the brother takes his legal share, but if the property is not ancestral the brother who is alive will not take a share and the widow will get the whole." It is claimed by the appellant that this statement is no assistance to the plaintiffs' case because the property was ancestral. But if the property came to Amjad Ullah as a gift from his father it cannot be regarded as his ancestral property. Ancestral property, in the ordinary sense, must mean property of the father which is inherited. It is, however, further contended that the mere statement of this witness could not be relied upon for proving a custom. I see no force in this objection. The witness was not cross-examined on his allegation of the custom and the lower Appellate Court was entitled to rely on this evidence. It is objected that there was no issue on the point but the written statement of the appellant never resisted the plea that *Musammat* Aliman Bibi was owner by objecting that she would not inherit the whole of her husband's estate. The plaint-

iffs had to prove her title but they could do so by evidence without any distinct issue on the question of custom. The question of custom was involved in the issue No. 1, whether she was owner. The question is, however, of no importance in view of my finding that a gift was not proved.

The appellant has urged that the lower Appellate Court has not affirmed the First Court's decision that *Musammat* Aliman Bibi had title by twelve years adverse possession. If this were so, I should have to send the case back to the lower Appellate Court for decision on this finding as I cannot in second appeal decide a question of fact. It is, however, quite clear that the lower Appellate Court did concur in the finding of the Court of first hearing that *Musammat* Aliman Bibi had all along been in possession. It used the words: "This, conclusively proves Aliman Bibi's possession over her share in Kasba Safipur." It is true that he did not proceed to decide whether the Court of first hearing was right in holding this possession of Aliman Bibi was adverse possession but no other conclusion is possible in view of the rejection of the defendant appellant's appeal that the property was temple property. I, therefore, hold that, in substance, the finding of the Court of first hearing as to adverse possession was upheld by the lower Appellate Court and I cannot go behind it. Even if this were not so, this Court in second appeal may hold that the possession found as a fact by both lower Courts, along with the other facts admitted or proved, justifies the inference (whch is a question of law) that that possession was adverse. It has been urged that the evidence did not show that she was in possession of the whole of the property claimed. It is contended by the respondent's Pleader that he proves this conclusively. It is not necessary to go into the matter because the lower Courts were quite justified in inferring possession of the whole of the property in suit from the evidence as to possession of a part in view of the fact that the defendant never produced any evidence to show that any one else was in possession.

For the above reasons, I find no reasons to interfere and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2028 OF 1919.

November 14, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

KAMINI KUMAR DEB—DEFENDANT No. 1—APPELLANT

versus

DURGA CHARAN NAG AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 25, 26—Order remitting issue, whether can be re-considered—Procedure—Appeal, second—Remand order, form of—Possession and title, questions of, whether can be decided piecemeal.

It cannot be affirmed broadly that when an order has been made under O. XLI, r. 25 of the Code of Civil Procedure, the Court called upon to determine the appeal finaly under O. XLI, r. 26, is competent to treat the order as erroneously made. [p. 394, col. 2.]

When an order has been made under O. XLI, r. 25, of the Civil Procedure Code, the appeal remains pending and undisposed of on the file of the Court and the order, whether rightly or wrongly made, is an order made with jurisdiction. Its validity may be attacked and reviewed, but till it has been set aside in an appropriate proceeding, it must be treated as an interlocutory order which is operative in law [p. 394, col. 2.]

The evidence and findings on remand become part of the record in the suit, and when the Court proceeds to determine the appeal, such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under O. XLI, r. 25, was made, as also what has been added in the Court of Appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon. No portion of the record can be disregarded, and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority. [p. 394, col. 2; p. 395, col. 1.]

In a second appeal, involving several points difficult to disentangle, the appropriate course to follow is to make, not an order under O. XLI, r. 25, but an order of remand in the exercise of the inheren power of the Court. [p. 395, col. 1.]

The principle that a stranger to a deed, which is intended to be real and operative between the parties thereto, cannot dispute the payment or non-payment of consideration, its adequacy or inadequacy, has no bearing in a case where a deed is challenged as fictitious, never designed to operate as a real deed or to effect a transfer of the title. [p. 395, col. 2.]

KAMINI KUMAR DEB v. DURGA CHARAN NAG.

Questions of title and possession cannot always be properly considered piecemeal as disconnected fragments. [p. 396, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Sylhet, dated the 21st of July 1919, modifying that of the Munsif, Second Court at Habiganj, dated the 27th of May 1918.

Babu *Sarat Chandra Roy Chaudhuri* (with him Babus *Sasadhar Roy* and *Promothanath Banerji*), for the Respondents.—I take a preliminary objection that the order of remand made by Greaves and Cuming, JJ., was an entirely misconceived order. The remand order was wholly unnecessary and the appeal was concluded by findings of fact arrived at by the lower Appellate Court. The question, then, is whether your Lordships in determining the present appeal are barred by the remand order which should not have been made. My submission is that the whole of the appeal being open for consideration by your Lordships, you are competent to enquire whether the remand order was or was not necessary. Refers to *Ganendra Nath Roy* v. *Surja Kanta Roy* (1), *East Indian Railway Company* v. *Changa Khan* (2) and *Hiatunnessa* v. *Kailash Chandra Saha* (3).

Babu *Birendra Kumar Dey*, for the Appellant.—Now that the appeal is before your Lordships for final disposal under O. XLI, r. 26, of the Code of Civil Procedure, it is not open to my learned friend to question the propriety of the remand order under O. XLI, r. 25. If the respondents have any grievance with the remand order, appropriate proceedings should have been taken to set aside that order. Refers to *Official Assignee of the Calcutta High Court* v. *Bidyasundari Dasi* (4).

The finding of the lower Appellate Court after remand is in my favour and the appeal should, therefore, be allowed.

Babu *Sarat Chandra Roy Chaudhuri* replied.

JUDGMENT.—This is an appeal by the first defendant in a suit for recovery of possession of land upon declaration of title. The disputed lands are described in two of the Schedules attached to the plaint, namely, the homestead lands in the Second Schedule and the *chara* or *paddy* lands in the Fourth Schedule. The lands originally belongd to a family of Nags, and are claimed by the plaintiffs under title by purchase. The Trial Court dismissed the claim in respect of the homestead lands and decreed the claim in respect of a share of the paddy lands. Both the parties were dissatisfied with this decision, the first plaintiff preferred an appeal and the first defendant filed a cross-appeal. The Subordinate Judge varied the decree of the primary Court in favour of the plaintiffs and dismissed the cross-appeal. The result was, that the decree of the Subordinate Judge gave the plaintiffs a decree in respect of the homestead land and share of paddy land which belonged originally to Gopal Chandra Nag, in addition to what had been awarded by the Court of first instance. This decree is now assailed by the first defendant as erroneous in law. The appeal was heard on the 24th January 1922 by Greaves and Cuming, JJ., who made an order under O. XLI, r. 25, for investigation of three questions, which appeared to them essential to the right decision of the suit upon the merits, namely, first, whether the conveyance by Gopal Chandra Nag, dated the 18th January 1917, which is the root of the title of the plaintiffs, is a genuine document or not; secondly, whether the claim is barred by limitation, and, thirdly, whether the claim is barred by estoppel. The Subordinate Judge has returned his findings and the reasons therefor, and the appeal has now been placed before us for determination under O. XLI, r. 26.

A preliminary objection has been taken on behalf of the plaintiffs-respondents that the matters in controversy are concluded by the findings containd in the judgment of the Subordinate Judge now under appeal, and that it was not open to Greaves and Cuming JJ., to make an order under O. XLI, r. 25. The appellant has urged that the respondents are not competent to take up this position and to invite the Court in substance to review the order previously made. In this connection, our attention has been

(1) 15 Ind. Cas. 39; 17 C. W. N. 462.
(2) 28 Ind. Cas. 245; 19 C. W. N. 1034; 22 C. L. J. 212; 42 C. 888.
(3) 17 Ind. Cas. 224; 16 C. L. J. 259.
(3) 54 Ind. Cas. 700; 24 C. W. N. 145; 30 C. L. J. 428.

drawn by the respondents to *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (3), *Ganendra Nath Roy* v. *Surja Kanta Roy* (1), *East Indian Railway Company* v. *Changa Khan* (2) and *Mubarak Husain* v. *Bihari* (5). In each of these cases, an order of remand was made by a Single Judge under O. XXI, r. 25, of the Code of 1908 or the corresponding provision (section 566) of the Code of 1882, and it was ruled that when the appeal came to be heard ultimately by a Bench of two Judges, that Bench was not bound by the order of the Single Judge. This view has been defended before us on the ground that if, on receipt of the finding, the case had been determined by a Single Judge on the assumption that he was bound by the order previously made, the entire case would have been open for re-consideration in an appeal under the Letters Patent before a Bench of two Judges. The same explanation, however, is not available in justification of the decisions in *Hanuman Das* v. *Gursahay Singh* (6) and *Lachman Prasad* v. *Jamna Prasad* (7), in each of these cases, the order for further finding was made by a Bench of two Judges, and the appeal was determined, after return of the findings, by another Bench of two Judges. Neither of these decisions, however, can be treated as an authority for the proposition that an order under O XLI. r. 25 once made and carried out can be subsequently pronounced to have been erroneously made. In *Hanuman Das* v. *Gursahay Singh* (6) a new aspect of the matters in controversy was, at the final stage, placed before the Court, which had escaped notice at the time when the order for further finding was made. In *Lachman Prasad* v. *Jamna Prasad* (7) the findings on remand and the objections thereto were in fact considered before the final judgment was pronounced. We are of opinion that it cannot, as a matter of principle, be affirmed broadly that when an order has been made under O. XLI, r. 25, the Court called upon to determine the appeal finally under O. XLI, r. 26, is competent to treat the order as erroneously made. No doubt, as pointed out in *Boncharee Ghose* v. *Ainoddeen Biswas* (8), when an order has been made under O. XLI, r. 25 the appeal remains pending and undisposed of on the file of the Court. The order, however, whether rightly or wrongly made, is an order made with jurisdiction; its validity may be attacked on review, but till it has been set aside in an appropriate proceeding, it must be treated as an interlocutory order which is operative in law; *George Henry Hook* v. *Administrator-General of Bengal* (9), *Ram Kirpal* v. *Rup Kuari* (10). There can be no controversy that, if the order had been made under O. XLI, r. 23, its propriety could not have been challenged in an appeal against the final decree made after remand; *Ramkuvarbai* v. *Damodhar Narbheram* (11), *Brojo Soondur Gossamee* v. *Juggut Chunder Dey* (12), *Gungaram Dutt* v. *Chowdhury Junmajoy Mullick* (13) *Suraj Din* v. *Chattar* (14) and *Latchumammal* v. *Gengammal* (15). The same principle is applicable here, subject to the obvious reservation that, as the appeal remains pending, the ultimate decision must be based upon a consideration of all the findings before and after the order under O. XLI, r. 25. This, indeed, is plain from the language used by the Legislature in O. XLI. r. 26. The evidence and findings become part of the record in the suit, and when the Court proceeds to determine the appeal, such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under O. XLI, r. 25, was made, as also what has been added in the Court of Appeal, namely, the order together with the evidence taken pursuant thereto

(5) 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199.
(6) 21 Ind. Cas. 700; 18 C. L. J. 181.
(7) 10 A. 162; A. W. N. (1887) 295; 6 Ind. Dec. (N. C.) 109.
(8) 24 W. R. 137.
(9) 60 Ind. Cas. 631; 48 I. A. 187; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.).
(10) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind Dec. (N. S.) 718 (P. C.).
(11) 6 Bom. H. C. R. 146.
(12) 21 W. R. 199.
(13) 1 C. L. R. 144.
(14) 3 A. 755; A. W. N. (1881) 55; 2 Ind. Dec. (N. S.) 437.
(15) 7 Ind. Cas. 858; 34 M. 72; 8 M. L. T. 233; (1910) M. W. N. 692.

and the reasoned findings thereon. No portion of the record can be disregarded and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority. This view is in accord with that adopted in *Official Assignee of the Calcutta High Court* v. *Bidyasundari Dasi* (4). We may add that we do not overlook that, when a finding is directed upon one or more of several inter-related points, there is a possibility that the new finding may, specially where based on new evidence, not harmonise with the other findings. This would not embarrass the Court in a first appeal, where the entire evidence may be examined, as in the case just mentioned; but it may create a real difficulty in second appeals, where the Court is competent to examine the evidence only to the limited extent mentioned in section 103. This would seem to point to the conclusion that in a second appeal, involving several points difficult to disentangle, the appropriate course to follow is to make, not an order under O. XLI, r. 25, but an order of remand in the exercise of inherent power of the Court; *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited* (16), *Brij Indar Singh* v. *Kanshi Ram* (17).

We have next to consider the result of the application of these principles to the case before us. In respect of the share of Brojo Govinda Nag and Krishna Govinda Nag, the claim was dismissed by both the Courts below, and we are not concerned with the point in the present appeal. Here we have to deal with the share of Gopal Chandra Nag. The plaintiffs claimed title thereto under a conveyance dated the 18th January 1917. The defendants contended that the conveyance was without consideration and passed no title. The Court of first instance found against the plaintiffs on this point. The Subordinate Judge held that it was not open to the defendants to raise the question of consideration, and in support of this view he relied upon the decision of the Judicial Committee in *Lal Achal Ram* v. *Raja Kazim Husain Khan* (18) Greaves and Cuming, JJ., held that the decision mentioned did not apply, and directed the lower Appellate Court to come to an express finding as to the true character of the conveyance. The Subordinate Judge has now found that there was no consideration; that the transaction was fictitious, and that title was not intended to pass. This conclusion makes it manifest that the decision in *Lal Achal Ram* v. *Raja Kazim Husain Khan* (18) has no application. The principle enunciated by the Judicial Committee that a stranger to a deed, which is intended to be real and operative between the parties thereto, cannot dispute the payment or non-payment of consideration, its adequacy or inadequacy, has no bearing in a case where a deed is challenged as fictitious, never designed to operate as a real deed or to effect a transfer of the title. We hold, accordingly, that the conveyance of the 18th January 1917 did not vest in the plaintiffs the title to the share which originally belonged to Gopal Chandra Nag. In this view, it is superfluous to consider, whether the claim to that share is or is not barred by limitation or estoppel. But we may add that we were not impressed by the argument of the respondents that the findings of the Subordinate Judge on these points were so clear as to render unnecessary an order under O. XLI, r. 25. It cannot be denied that the Subordinate Judge had not distinguished between the question of limitation as applicable to the claim put forward by the plaintiffs and the question of acquisition of title by adverse possession by the defendants or their predecessors. We must further bear in mind that questions of title and possession cannot always be properly considered piecemeal as disconnected fragments. We are consequently of opinion that the decree of the Subordinate Judge in so far as it varied the decree of the Trial Court cannot be supported, although it cannot be successfully attacked either as to title or as to

(16) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

(17) 42 Ind. Cas. 43; 44 I. A. 218; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917 (P. C.).

(18) 32 I. A. 113; 27 A. 271; 9 C. W. N. 427; 8 O. C. 155; 15 M. L. J. 197; 18 Sar. P. C. J. 772 (P. C.).

limitation, in so far as it allowed a part of the claim for the paddy land.

The result is that this appeal is allowed. The decree of the Subordinate Judge set as de, and that of the Court of first instance restored. This order will carry costs, both here and in the lower Appellate Court.

B. N. & Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 27, 1923.

Present:—Lord Dunedin, Lord Atkinson and Lord Wrenbury.

KESHAVLAL BROTHERS AND COMPANY—APPELLANTS

versus

DIWAN CHAND AND COMPANY—RESPONDENTS.

Contract—Breach—Damages—Impossibility of performance—Contract Act (IX of 1872), s. 56.

The defendants entered into a contract with the plaintiffs to supply them a certain amount of coal from stock within a certain time, and placed an order with a Colliery firm presumably to secure the coal required. At the time, however, the supply of Railway wagons for transport of coal was restricted by Government only to the wants of actual consumers by whom the indents had to be signed. The plaintiffs, who were merchants and not consumers, supplied the defendants with a special indent in favour of a consumer to evade the Government, but in fact did not enter into any contract with that consumer to supply him the coal to be received from defendants. The defendants failed to deliver the full quantity of coal to the plaintiffs and the latter sued them for damages, claiming the difference between the contract price and the market price of the balance. It was urged in defence that the contract had become impossible of performance, as owing to Government restrictions the defendants could not get a supply of wagons for delivery of coal to plaintiffs who were not consumers and that at any rate as the plaintiffs could not sell that coal in the open market, no damages had been suffered by them. It was admitted that coal was available and could be purchased in the local market:

Held, (1) that as the defendants had agreed to supply the plaintiffs with coal from their stock the latter could sell it in the open market, and that as coal could be had in the local market, the contract had not become impossible of performance; [p. 400, col. 2.]

(2) that, therefore, the plaintiffs were entitled to recover the damages they claimed. [p. 400, col. 2.]

Appeal from a decree of the Bombay High Court, dated the 23rd February 1920, reversing that of the Single Judge, Bombay, dated the 26th June 1919.

Sir *John Simon, K. C.*, and Mr. *Dunne, K. C.*, for the Appellants.

Messrs. *G. Lowndes, K. C.*, and *McNair*, for the Respondents.

JUDGMENT.

Lord Atkinson.—This is an appeal from a decree of the High Court of Bombay in its Appellate Jurisdiction dated the 23rd February 1920 reversing a decree of a Single Judge of the said Court in its Original Jurisdiction, dated the 26th June 1919.

The suit out of which the appeal arises was instituted by the appellants, as plaintiffs against the respondents claiming over Rs. 40,000 damages for breach of a contract for the sale of steam coal. The suit was decided by the Trial Judge in the plaintiffs' favour. He assessed the damages at Rs. 17,508-6-5, but that decree was set aside by a Divison Bench of the High Court (Macleod, C. J., and Heaton, J.,) which allowed the appeal and dismissed the suit on the ground that, in the special circumstances which existed, no damage had been suffered by the plaintiffs.

The main question for determination by this Board is whether, in these circumstances, the appellants are entitled to the sum of Rs. 17, 508-6-5 awarded to them by the Trial Judge or are, as decided by the Court of Appeal, not entitled to recover any damages. On the 11th October 1917 the appellant Company and the respondent Company entered into an agreement in writing in the following terms:—

"Keshavlal Brothers & Co.,
" Bombay,
"11th October, 1917.

"The undersigned have this day sold to Messrs. Keshavlal Brothers & Co. quantity of coal amounting to Rs.— — 1,200 tons or thereabouts.

"Description.—Bengal steam coal, good second class.

"Delivery.—To be despatched to Cotton Depot , coal to be weighed and delivered at Cotton Depot, monthly 200 tons from November 1917 to April 1918, in equal instalments.

"Rate—Rs. 17-15, say Rs. seventeen and annas fifteen, per ton net.

"Delivery—At Cotton Depot,

"Terms.—Payment on delivery in Bombay.

"Indent in any class to be furnished by the buyers and the sellers agree and undertake to deliver the cool guaranteed in instalments as above from stock.

"(Signed) Ramavtar Maini,
"*Per Pro* Diwanchand & Co."

The Cotton Depot mentioned in this agreement is admittedly a place in Bombay where cotton and other goods are deposited for sale. The respondent Company had admittedly a Depot there for coal. It is to be observed that the coal contracted to be sold is not identified. It is to be taken from the vendors' stock.

It is necessary to describe at some length the system for the supply of coal established at this date by the Indian Government. Owing to the shortage of coal due to the War, Committees had been appointed for several districts in India, including Bombay, to regulate the supply of coal, and the means by which it could be obtained. Officials, styled Coal Controllers, were, by the Government of India, appointed to superintend, direct, and control the action of these Committees. On the 30th January 1917 the Coal Controller, having jurisdiction in the matter , issued a notice to the effect that the Committee appointed by Government to regulate coal supplies had directed that wagons would only be supplied after the 5th February then next succeeding, on indents signed by the actual consumer and countersigned by the Authority appointed by the Committee to certify these indents, and further that the indents should be prepared on the prescribed forms, copies of which were obtainable from the coal managers named. These indents were graded for priority into five classes, A, B, C, D, E, not according to the nature of the coal to be supplied, but rather according to the urgency of the need of the different consumers to obtain coal.

The respondent Company had agreed with the Garraria Colliery at Jharia, Bengal, to buy from them the coal necessary, presumably, to implement the above mentioned contract of the 11th October. The whole output from this colliery was placed at the disposal of the Government in December 1917. The indent was thereupon transferred to the Nandkuriki Colliery. Shortly after, the produce of this latter Colliery was restricted, and the indent was transferred to the Fatehpur Colliery.

The appellants wrote to the respondents the following letter or order, it bears date:—

"Bombay,
"8th November 1917.
No. 5951-73.

"Messrs. Divanchand and Company.

"DEAR SIRS,

"*Re* our Contract for 1,200 tons of steam coal dated 11th October 1917.

"With reference to our above Contract we beg to send you herein enclosed a special indent, No. 719, dated, 7th November 1917, in favour of the Proprietors, The Dhanjibhoy Ice Factory, Mazagaon, Bombay. The special indent has been certified by the Deputy Controller, "Coal supplies," Bombay, recommending the special supply of 10 (ten wagons) monthly up to 120 wagons for despatch to Byculla (Bombay) on their account.

" We are forwarding the third part of the indent to the Coal Manager, Calcutta, requesting him to sanction special supply of wagons to Dullabhji Howjee's Garraria Colliery and instruct the District Superintendent, Dhanbad, to allot wagons against indents from the Colliery. Kindly forward this second part to the colliery concerned instructing them to indent for the wagons regularly and despatch coal without the least delay. We enclose herewith a copy of the Coal Manager's letter.

"Trusting you to do the needful, and hoping to hear soon from you *re* despatches.

"(Signed) Girjashanker I. Pathek,
"for Keshavlal Brothers and Co.

"Enc. Sp. Indent and Copy."

On the same day the appellant Company addressed to the Coal Manager at Clacutta the following letter;—

"8th November, 1917.

"To the Coal Manager,
"East Indian Railway, Calcutta.

"DEAR SIR,

We beg respectfully to send you herein enclosed a third part of the special indent No. 719, dated 7th November 1917 in favour of the Proprietor, the Dhanjibhoy Ice Factory, Mazagaon, Bombay. The special indent has been certified by the

Deputy Controller, "Coal Supplies," Bombay, recommending the special supply of ten wagons monthly up to 120 wagons for despatch to Byculla (Bombay) on their account.

"We have to request your goodself to sanction supply of wagons as certified, and instruct the District Superintendent Dhanbad to meet indents from Dulagji Howjee's Garraria Colliery to enable them to expedite despatches.

"Thanking you in anticipation , and hoping to hear soon favourably.

Yours faithfully,

Enc. Sp. Indent.

The indent referred to in this letter was In the follwing form:—

"Keshavlal Brothers and Company
"East Indian Railway,
" Special Indent for Coal.
Indent No, 719.
Dated 7th November 1917.

(1) Full name and address of Consumer: The Proprietors, The Dhanjibhoy Ice Factory, Mazagaon, Bombay.

"(2) Description of Industry: Ice Factory.

"(3) Weekly consumption: 40 ton (forty).

"(4) Stocks held on date, tons: 55 tons.

"(5) Party from whom purchased: Messrs. Bhukhandas Motilal and Company, c/o Dewanchand and Co.

"(6) Name of Colliery : Garraria Colliery.

"(7) Name of managing Agents of the Colliery: Dhulabhji Howji.

"(8) Name of siding: coal will be loaded at Garraria E. I. Railway.

"(9) Description of coal : Steam Coal.

"(10) Toal quantity purchased, tons: 120 wagons.

"(11) Terms of delivery : 10 wagons monthly

"(12) Name of Railway station at which coal will be unloaded: Byculla (Bombay)."

The nature and minuteness of the information inquired after in this specimen indent shows how anxious the officers of the Government of India were that the coal to be carried in the wagons they permitted to be used should be applied to satisfy the needs of consumers and not be trafficked in by middlemen. But the contract which by the use of the requested wagons it was sought to obtain coal to implement, was not the contract entered into between the appellants and the respondents on the 11th October 1917, nor yet a contract entered into between the appellant Company and the Dhanjibhoy Ice Factory. It is apparently a contract entered into between the Ice Factory and a Company named the Bhukhandas Motilal Company.

It may well be that the words "c/o Divanchand and Company, " found in the indent after the name of this Company so represented as the vendors was designed to indicate that the purchase was made by the respondents on behalf of the consumers, the Ice Factory. In a letter written by the respondent Company to the appellant Company on the 9th Novembr 1917 the writers state that they have not bought the coal from the persons mentioned in the indent, but from the Colliery, and express a fear that the Colliery proprietors "may refuse to supply coal to these people." The appellants replied on the same day, calming the fears of the respondents in reference to this piece of deception, and begging of them to instruct the Colliery people to despatch coal under this special indent in favour of the proprietors of the Dhanjibhoy Ice Factory, Bombay. Thus, by the arrangement of these two middlemen, the indent is falsified, the regulations of the Government evaded and possibly its officers deceived.

On the 26th November 1917 the appellants wrote to the respondents requiring delivery of 200 tons of steam coal under their contract of the 11th October 1917. On the next day the respondents' reply that they are receiving coal from the Deputy Controller, and would be pleased to deliver the appellants 50 tons of it next day, the 28th November 1917. The appellants wrote refusing to take delivery of this comparative small quantity of coal and demanding delivery at the earliest date of the full quantity in arrear. On the 10th December 1917 the appellants wrote to the respondents demanding the delivery next day of 100 tons of coal. To this letter the respondents replied next day that they are expecting to receive soon a good lot of coal and asking the appellants to wait a little. On the 18th January 1918 the appellants wrote to the respondents, referring to their

contract of the 11th October 1917, stating that the writers had only received from them 217 tons 19 cwt.; that the instalments for December 1917 and January 1918 were due, and that the writers were ready to accept delivery of these instalments and asking for immediate delivery of them. On the 7th March 1918 the appellants again wrote to the respondents demanding delivery of the instalments due. On the 7th March the respondents wrote making an excuse for non-delivery. To the last letter the appellants on the same day reply, that it is impossible for them to wait longer for the coal due to them; that as they desire to keep up the connection they will wait till Monday, the 11th March, and that if the respondents then fail to deliver to them the coal they are entitled to receive, they will be reluctantly compelled to purchase same in the local market at the risk of the respondents and on their account, and, further, that they will claim the market difference. On the 13th March the appellants wrote to the respondents informing them that being much in want of coal, they had purchased 150 tons at the market price of Rs. 71 per ton. Two days later, they sent to the respondents a bill for Rs. 7,959-6, being Rs. 53-1 per ton difference between the contract price and the price they paid on the 150 tons so purchased. On the 18th March 1918 the appellants wrote to the respondents setting forth precisely how, as regards the fulfilment of the contract of the 11th October 1918, matters stood. They point out that of the 800 tons (200 tons per month for four months) contracted to be delivered, they have only received 335 tons 6 cwt. up to the 28th February 1918; that the balance in arrear on the contract, therefore, amounted on that date to 464 tons 14 cwt.; that the instalment of 200 tons for March was already overdue; that they were compelled to buy 150 tons at the market rate on the account of the respondents, and that they, therefore, claim the difference between the contract price and the market price on the 150 tons so purchased. It will be observed that the respondents never suggest that there is not an open market for the sale and purchase of steam coal in Bombay. Nor up to this do they suggest that the appellants were joint adventurers in this enterprise of selling and delivering or procuring to be sold and delivered to the Ice Factory 1,200 tons of Bombay steam coal, nor yet that the appellants had sub-contracted with the Ice Factory to deliver 1, 200 tons of steam coal to it. On the contrary, the respondents treat the appellants as purchasers from them of this 1,200 tons of steam coal, under the contract of the 11th October 1917, to whom they were bound to deliver the coal purchased. But on the 22nd March 1918, the respondents wrote a letter in which, after stating that they were surpirsed at the appellants making a demand for a difference of Rs. 53-1- on 150 tons, putting forward for the first time the contention that the appellants were bound to deliver the coal deliverable under the contract of the 11th October 1917, to the Ice Factory. They state:—

"You know that the Dhanjibhoy Ice Factory is the consumer of the coal, and the contracted coal is to be supplied to them and to no one else. Before we send a reply to you in respect of the damages claimed by you, please let us know at once whether you delivered these coals to the Dhanjibhoy Ice Factory or not and if so, what quantity."

And then, after a long explanation as to the causes which prevented the receipt and delivery of the coals they expected, say:—

"We fail to understand the reason of your buying coals from the market for the Dhanjibhoy Ice Factory unless they were refused on their application to the Deputy Controller to supply them from Government reserve stock.

"For the present we hasten to inform you that we are not at all liable to pay any damages to you and we repudiate any liability in the matter, and you were not at all justified under the contract and under the circumstances which now prevail to buy coals from market and if you have done so it is at your own risk and responsibility.

"We request you to answer all the queries mentioned above and also to send us the amount of Rs. 3, 940-1-3 due to us which is now very long standing."

To this letter the appellants reply, stating that the respondents know well that they are bound to give the appellants the delivery guaranteed from stock, and that, in spite of their repeated requests, as they have failed to carry out their contract, the appellants are obliged to claim the damages mentioned in their previous letter. They add: "We are convinced that by putting forth such queries your intention is to avoid delivery of the instalment for the month of March 1918, which we regret we are unable to allow you for a moment."

The apellants have sued to recover damages for the respondents' breach of the contract of the 11th October 1917, consisting in the non-delivery of the goods contracted to be delivered. They naturally claimed to recover the difference between the price which they contracted to pay for these goods and the market price at which they could have sold them. Had the goods been delivered and no questions of a sub-contract had arisen, they would have cost the appellants the contract price, and had they been delivered they could have sold them at the market price, which would be presumably their value. The appellants by the non-delivery have lost the money which they might have secured, namely, the difference between these two prices. They have been damnified to that extent. In the 7th paragraph of the statement of defence filed by the respondents it is alleged that on the 8th November 1917, the appellants informed the respondents that they the appellants, had agreed (it is not said with whom) to sell the coal received under this contract to the Dhanjibhoy Ice Factory, Bombay. The whole correspondence which took place between the parties is utterly inconsistent with this assertion, and the parol evidence does not, in any way, sustain it.

It appears to their Lordships that this case does not at all resemble those cases in which, for instance, *A* contracts with *B* to sell and deliver to *B* certain commodities and then contracts with *C* to buy from him similar commodities in order to implement his contract with *B*, informing *C* at the time he buys, of the special purpose to which he intends to devote those commodities. In such a case if *C* does not deliver the commodities, to *A*, questions may arise as to whether the damages to which he, *C*, would become liable for his breach of contract were not to be augmented by the extra loss *A* sustains by reason of the non-fulfilment of his contract with *B*. The authorities in England seem to go the length of holding that notice to *C* of the secial purpose for which *A* requires the goods is not enough that to make *C* liable for the additional damage he must have, expressly or impliedly, contracted to run the additional risk, *Horne* v. *Midland Railway Co.* (1). Sir George Lowndes contended, however, that under the 73rd section of the Indian Contract Act, 1872, notice would be enough to make a vendor liable though he did not contract to run the risk, to which Blackburn, J., refers in the case just cited. It does not appear to their Lordships to be necessary to decide this question, as in their view there is no evidence, oral or written, to establisish that the appellants had sub-contracted with any person or body to deliver to the Ice Factory the whole, or any porton, of the coal they had purchased from the respondents, when they should receive it or at any time thereafter. The parties agreed that the coal in fact delivered by the respondents to the appellants only amounted to 315 tons 16 cwt. Five issues were settied for the respondents. Two of them alone would seem to be of importance. No issue was raised as to whether the appellants ever contracted to deliver over to the Ice Factory Company the coals they might receive from the respondents. The two important issues were, whether the contract sued upon did not become impossible of performance, and whether the appellants were entitled to any damages, and if so how much. Upon those two issues the respondents appear to have concentrated all their efforts. The Trial Judge, rightly in their Lordships opinion, held in favour of the appellants on those issues. Ramavtar Maini, one of the partners of the respondents' firm, admitted that coal was available and could be purchased in the local market, and it was admitted that at no time was an absolute embargo placed on the supply of coal from the Garraria Colliery,

(1) (1873) 8 C.P. 131 at pp. 138, 140, 141; 42 L. J. C. P. 39; 28 L. T. 310; 21 W. R. 481.

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

The Trial Judge awarded to the appellants Rs. 17,508-6-5 as damages. The Court of Appeal set forth their ground of decision in the following passages of their judgment. Macleod, C. J., said: "The defendants knew that the plaintiffs could only deliver coal to the party who signed the indent. The plaintiffs (the appellants) must have known that they could not deal with that coal in the open market. The only profit they could make out of the contract was the difference between the contract price and the price the indentor (The Ice Factory Company) would pay them." It must be taken, therefore, when the contract was made that both the parties knew that the only profit the plaintiffs could make would be the difference between their contract and the contract they might make with either the indentor or an intended party, and would at the most provide the measure of damages."

Heaton, J., expresses a practically identical opinion. He says:—

"The purpose of the contract was to procure coal for one particular customer, and, therefore, under the contract the coal, if procured, had to go to that particular consumer, or as to part might be used to replenish coal in stock from which that consumer had been supplied."

Their Lordhips are unable to accept these views. As between the appellants and the respondents there was no contract to supply to the former the identical coal obtained from the Collieries. On the contrary, it was expressly provided that the coal purchased from the respondents was to be supplied from the respondents' stock. Again, as alrea ly pointed out, no contract was entered into between the appellants and the respondents or between the appellants and the Ice Factory that the appellants should deliver over to the Ice Factory the coal that should be delivered to them under the contract of the 11th October 1917. The indent was, no doubt, mainipulated in the way that has been already pointed out in order to get the use of the wagons. The appellants' name does not appear on the indent. The respondents does appear. No evidence was given as to the particular relations between the respondents and the Ice Factory. Their Lordships are, therefore, of opinion that, whatever those relations may have been, and whatever obligations rest upon the respondents, the appellants would not have been bound, had the agreement of the 11th October been performed, to sell or deliver to the Ice Factory the coals which should be delivered to the appellants out of the respondents' stock. They do not think that the Ice Factory was the appellants' only customer. There view is, that had the coals purchased been delivered to the appellants in pursuance of their contract, the latter would have been entitled to sell them in the open market at the market price, and, that being so, the damages were rightly assessed at the difference between the contract price and that market price. Their Lordships are, therefore, of opinion that the judgment appealed from was wrong and should be reversed and the judgment and decree of Mr. Justice Kajiji be restored, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants here and in the Courts. below.

N. H.

Solicitors for the Appellants:—Messrs. *Hallowes & Carter.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISIONS NOS. 100 AND 101 OF 1921.

February 10, 1922.

Present:—Mr. Daniels, A. J. C.

SHEO PALTAN—DEFENDANT No. 3—APPLICANT

versus

SUKHDEO SINGH AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, Sch II, para 16—Arbitration—Award—Decree on award—Revision.

It cannot be laid down that in no possible case can a revision be entertained against a decree passed in accordance with an award, even if the procedure of the lower Court has been altogether irregular and illegal.

Ghulam Khan v. *Muhammad Hassan*, 29 C. 167; 6. C. W. N. 226; 29 I. A. 51; 12 M. L.

SHEO PALTAN *v.* SUKHDEO SINGH.

J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.), *Merali Visram* v. *Sheriff Devji*, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017 and *Betana* v. *Kedar Nath*, 37 Ind. Cas. 400; 3 O. L. J. 583, relied on.

Where, however, the Court has considered the objections to the award on the merits and has come to, what the applicant contends is, a wrong decision as to whether there has been any irregularity on the part of the arbitrator, the case does come within the provisions of section 115 of the Civil Procesure Code and no revision lies.

Lutawan v. *Lachiya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 and *Ajodhya Prasad* v. *Badarul Husain*, 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427, relied on.

It is the clear intention of the Legislature that objections to an award on the ground of invalidity from any cause whatever should be decided by the Court which had made the order of reference and by no other Court.

Revision against an order of the Munsif, Partabgarh, dated the 16th March 1923.

Dr. *J. N. Misra* and Mr. *G. N. Misra*, for the Applicant.

Mr. *Radha Kishen*, for the Opposite Party.

JUDGMENT.—These are two applications for revision in two connected cases in which a dispute was referred to arbitration in connection with a pending suit; an award was made, and a decree was passed in accordance with the award under paragraph 16 of the Second Schedule of the Code of Civil Procedure. The main question in the case is, whether the Court acted with illegality or material irregularity so as to bring the case within the provisions of section 115 of the Code.

A preliminary objection has been made that no revision is entertainable in a case of this sort and reference has been made to the well-known remark of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (1) that in a case of this sort a revision would be more objectionable than an appeal. This has been interpreted in *Merali Visram* v. *Sheriff Devji* (2) as not laying down that in no possible case could a revision be entertained against a decree passed in accordance with an award if the procedure of the lower Court had been altogether irregular and illegal, and indeed there is one case of this Court in which a revision was entertained on the ground that the Court proceeded to pass a decree without giving the objector time to produce evidence in support of his objections, *Betana* v. *Kedar Nath* (3). Where, however, the Court has considered the objections to the award on the merits and has come to, what the applicant contends is, a wrong decision as to whether there had been any irregularity on the part of the arbitrator, it is clear that the case will not come within the provisions of section 115 and that no revision will lie. I am in entire agreement with the view expressed by the learned Chief Justice of the Allahbad High Court in *Lutawan* v. *Lachiya* (4) and approved by Mr. Justice Piggott in *Ajodhya Prasad* v. *Badarul Husain* (5), that it was the clear intention of the Legislature that objections to the award on the ground of invalidity from any cause whatever should be decided by the Court which had made the order of reference and by no other Court. In this case the only point taken is that the arbitrator questioned certain persons in the absence of the parties. The arbitrator himself has given evidence as to this and has stated that on his way back from the Bazar where he had held his enquiry he had a talk with one or two persons on the subject, but that this was mere casual talk and did not in any way influence his decision. The arbitrator is a man of position, against whose faith no suggestion has been made and the Court has accepted his evidence. I do not wish to commit myself to the proposition that it is in no case open to an arbitrator to make private enquiries. It may be that in some cases the parties contemplate that the arbitrator should do so. Assuming, however, that the parties did not contemplate it in this case, the Court below has found as a fact that the decision of the arbitrator was based exclusively on the evidence which he recorded in the presence of both parties. In view

(1) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017.

(3) 37 Ind. Cas. 400; 3 O. L. J. 583.

(4) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

(5) 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427.

of this finding it is clear that no revision lies and I accordingly reject the applications with costs.

Z. K. *Applications rejected.*

PATNA HIGH COURT.

[CUTTACK CIRCUIT.]

APPEAL FROM ORIGINAL DECREE NO. 3 OF 1921.

November 25, 1922.

Present:—Mr. Justice Mullick and Mr. Justice Ross.

Maulavi MUHAMMAD FAHIMUL HUQ—PLAINTIFF—APPELLANT

versus

JAGAT BALLAV GHOSH—DEFENDANT—RESPONDENT.

Muhammadan Law—Waqf — Alienation by trustee—Beneficiary, whether can sue for recovery of possession—Mussalman, right of, to maintain action against mutwalli—*Courts, powers of—Specific Relief Act (I of 1877), s. 42—Suit for declaration that alienation by trustee is illegal, whether maintainable—Consequential relief—Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120—Declaratory relief—Recurring cause of action—Starting point of limitation.*

A beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of r. 8, O. I, Civil Procedure Code, and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated. [p. 405, col. 2.]

Delrus Banoo Begum v. *Nowab Syud Asgur Ali Khan*, 15 B. L. R. 167; 23 W. R. 453, disapproved.

Jan Ali v. v. *Ram Nath*, 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21, *Zafaryab Ali* v. *Bakhtawar Singh*, 5 A. 497; A. W. N. (1883) 91; 3 Ind Dec (N S.) 432, *Jawahra* v. *Akbar Husain*, 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390 (F. B.), followed.

Every *Mussalman* who derives any benefit from such a *waqf* is entitled to maintain an action against the *mutwalli* to establish his right thereto, or against a trespasser to recover any portion of the *waqf* property which has been misappropriated without joining any other person who may participate with him in the benefit. [p. 405, col. 2; p. 406, col. 1.]

Kazi Hassan v. *Sagun Balkrishna*, 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec. (N. S.) 651; *Afiman* v. *Hamid-ud-din Husain*, 51 Ind. Cas. 799; 58 P. W. R. 1919, followed.

The power of the Courts in India to entertain suits of a civil nature does not carry with it the general power of making declarations except in so far as such power is expressly covered by Statute. [p. 407, col. 1.]

Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar v. *Dorasinga Tever*, 2 I. A. 169; 15 B L. R. 83; 23 W. R. 314; 3 Sar. P. C. J. 465 (P. C.), referred to.

Courts have paid more regard to the protection of trust property than to the protection of the alienee from the trustee, and even if the grantor has himself been implicated in the abuse of the trust, the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust property. [p. 407, col. 1.]

Juggut Mahini Dossee v. *Sokheemoney Dossee*, 17 W. R. 41; 14 M. I. A. 989; 2 Suth. P. C. J. 512; 3 Sar. P. C. J. 23; 10 B. L. R. 19; 20 E. R. 795, *Subbarayudu* v. *Kotayya*, 15 M. 389; 5 Ind. Dec. (N. S.) 623, *Srimati Mallika Dasi* v. *Ratanmani Chakervarti*, 1 C. W. N. 493, referred to.

Where a transfer is void in law no question of equity as between the transferor and the transferee can arise. [p. 407, col. 2.]

A declaration obtained in a suit for possession is merely ancillary and is generally unnecessary; but where the cause of action is based upon a shadow cast upon the title of a person who is not entitled to consequential relief at the moment, limitation must run from the date on which the challenge to his title commences. [p. 408, col. 1.]

The principle of section 23 of the Limitation Act can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief. [p. 408, col. 2.]

Plaintiff, a member of the family of the founder of a charitabe *waqf*, sued for a declaration that the defendant had no proprietary right in the *waqf* properties and that a mortgage bond executed by him in respect to those properties and the auction-sale following thereon were illegal and inoperative:

Held, (1) that consequential relief being clearly available to the plaintiff, he was not entitled to a mere declaration; [p. 406, col 1.]

Deokali Koer v. *Kedar Nath*, 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C 704, followed.

Ashraf Ali v. *Mahammad Nurajjama*, 49 Ind. Cas. 355; 23 C. W. N. 115, distinguished.

(2) that the suit was governed by Art. 120 of the Limitation Act and having been brought more than 6 years from the date of the alienation was time-barred. [p. 408, col. 1.]

Thazhe Vittil Pantheeradi Ananda Varar v. *Kavumpreth Illath Vasudevan Nambudiri*, 8 Ind. Cas 357; 8 M. L. T. 249; (1910) M. W. N. 591, followed.

Appeal from the decision of the Sub-Judge, Cuttack, dated the 28th September 1920.

Mr. *B. N. Das*, for the Appellant.

Mr. *B. N. Bose*, for the Respondent.

JUDGMENT.

Mullick, J.—Suit No. 746 of 1919 out of which this appeal arises relates to a 12 annas 6 pies share in Taluk Kamong *Zemindari*, bearing *Tauzi* No. 1451, and to a 1 anna 6 pies 17 *kranti*' share in Taluk Gobindpur *Zemindari*, bearing *Tauzi* No. 1844, in the district of Cuttack. The properties are alleged by the plaintiff, Muhammad Fahimul Huq, the son of Maulvi Enamul Haq, to be the subject of a *waqf* created by his ancestress, *Musammat* Asmatunnissa, by a deed dated the 31st January 1848, for the endowment of a mosque and *khanka* in *Mauza* Farhattabad, appointing herself as the first *mutwalli*, and, as her successor, her husband, Maulvi Muhammad Faruk, by whom the properties had been conveyed to her by two *hibanamas*, dated the 1st September 1836 and the 14th October 1840, in lieu of deferred dower. It is alleged that Asmatunnissa was succeeded by Muhammad Faruk, who was succeeded by his son, Muhammad Kamal *alias* Muhammad Faik, who again, upon his death, was succeeded by his eldest son, Abdul Gunny, defendant No. 3, in this suit. The plaintiff is the son of Enamul Haq who was Muhammad Faruk's step-brother. He does not claim to be the *mutwalli* but as a member of the founder's family asks for a declaration that the defendant No. 3 had no proprietary right in the properties in suit and that a mortgage-bond in respect thereof, dated the 18th May 1900 in favour of defendant No. 1 and defendant No. 2 and the auction-sale following thereupon, dated the 15th August 1907, are illegal and inoperative. It is admitted that the defendant No. 3, Abdul Gunny, mortgaged both properties to defendants Nos. 1 and 2 on the 18th May 1900, and that in execution of the decree obtained on the mortgage, the mortgagees took possession on the 5th February 1908, and that they subsequently sold property No. 2 to the defendant No. 22, who is Sitanath Roy, *shebait marfatdar* of Sri Hanuman Jiu Thakur. The second declaration which the plaintiff seeks runs as follows:

"That the possession of the defendants Nos. 1 and 2 is that of a trustee and they ought not to have any connection with the property in claim inasmuch as they are not *mutwallis* and are unfit to act as such."

In the plaint there were three other prayers as follows:

"(*Ga*) That if the Court considers that the plaintiff is fit to act as *mutwalli* then it may be decided that the disputed properties may be managed by the plaintiff for the purpose of discharging religious duties in connection with the aforesaid Farhattabad Mosque;

(*Gha*) that if the Court so considers it may settle any other scheme for the management of the disputed properties for the benefit of the *masjid*, and

(*Cha*) that any other relief may be granted to the plaintiff which the Court considers fit."

These prayers were considered by the learned Subordinate Judge to be for consequential relief within the meaning of section 42 of the Indian Specific Relief Act, and, upon the plaintiffs refusing to pay *ad valorem* Court-fees thereon, the Court, by an order, dated the 1st September 1920, directed that they should be deleted.

The suit was defended at first by defendants Nos. 1 and 2 and upon their pleading that it could not proceed in the absence of defendant No. 22, the vendee of property No. 2, the idol Sri Hanuman Jiu, was added as a party through his *marfatdar* Sitanath Roy who has also filed a written statement.

The Subordinate Judge finds that the *waqf* created by Asmatunnissa was valid and operative and that as the plaintiff has declined to ask for any consequential relief the suit is not maintainable by reason of the provisions of section 42 of the Specific Relief Act; he also finds that the suit is barred by the rule of six years' limitation. He has accordingly dismissed the suit and the plaintiff appeals.

There was another suit tried jointly with this suit, namely, Suit No. 112 of 1919 in regard to the same properties in which the plaintiff, Abdul Sakur, claimed to be the *mutwalli* of the *waqf* upon appointment by Abdul Gunny, three or four years before the suit. In that suit he, in addition to the declaration mentioned above, claimed recovery of possession. The learned Subordinate Judge found that the suit was

properly framed but that as Abdul Sakur had not established that he had been appointed *mutwalli* by his father, Abdul Gunny, he was not competent to maintain it. In the course of the trial Abdul Gunny died and Abdul Sakur asked leave to amend the plaint by adding a claim that he was entitled to succeed to the post of *mutwalli* as the eldest son of Abdul Gunny. That prayer for amendment was not allowed and in the result the suit was dismissed.

There was a third suit, No. 244 of 1919, in which the plaintiff, Muhammad Fahimul Haq, asked for declarations similar to those in Suit No. 746. That suit was also dismissed. As there are no appeals against decrees in suits Nos. 112 and 244 we are no longer concerned with them.

The only question, therefore, for decision is one of law, namely, whether Suit No. 746 is maintainable.

Taking the position most favourable to the appellants and assuming for the moment that notwithstanding the cross-objections of the respondents the trust in regard to the mosque was in respect of specific properties for a specific purpose, that it was valid under Muhammadan Law and that the transfers made by Abdul Gunny in favour of defendants Nos. 1 and 2 and, therefore, also the sales by defendants Nos. 1 and 2 in favour of defendant No. 22, were invalid, the sole question for decision is whether the plaintiff, Muhammad Fahimul Haq, is entitled to the declarations which he seeks.

Not being the *mutwalli*, even though he is a member of the family of the founder, he is no better than a member of the public interested in the trust and it was open to him to bring a suit under section 92 of the Civil Procedure Code for the removal of the trustee, the appointment of a new trustee, the vesting of property in the trustee for the settling of a scheme and for the other reliefs enumerated in that section; but the plaintiff has not taken that course and, in my opinion, the learned Subordinate Judge was right in holding that he can obtain no relief under the general law unless he asks for consequential relief in the shape of recovery of possession. His suit clearly offends against the express provisions of section 42 of the Specific Relief Act.

It is now settled that a beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of r. 8, O. I., Civil Procedure Code, and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated. It is true that in *Delrus Banoo Begum* v. *Nowab Syud Asgur Ali Khan* (1) it was held that in respect of a property which is subject to the provisions of Act XX of 1863 no suit could be brought by a beneficiary without the leave of the principal Civil Court as required by section 18 of the Act. But that decision was virtually overruled in *Jan Ali* v. *Ram Nath* (2) where it was held that the plaintiff in such a suit may sue without obtaining permission under section 18 of the Religious Endowments Act but he must sue in a representative capacity after complying with the provisions of section 30, Civil Procedure Code of 1882, which corresponds to r. 8, O. I, of the present Civil Procedure Code; a still wider view has been taken in the later ruling of the Allahabad High Court in *Zafaryab Ali* v. *Bakhtawar Singh* (3) and in a Full Bench decision of the same Court in *Jawahra* v. *Akbar Husain* (4). The judgment of Mahmood, J., in this last mentioned case is clear authority for the proposition that the trust property vests in God and the right of a Muhammadan who is entitled to use a mosque to bring a suit for the recovery of property belonging to it is comparable to a right of suit in respect of a private road which many persons have a right to use. Every Mussulman who derives any benefit from such a *waqf* is entitled to maintain

(1) 15 B. L. R. 167; 23 W. R. 453.
(2) 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21.
(3) 5 A. 497; A. W. N. (1883) 91; 3 Ind. Dec. (N. S.) 432.
(4) 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390 (F. B.)

MUHAMMAD FAHIMUL HUQ *v.* JAGAT BALLAV GHOSH.

an action against the *mutwalli* to establish his right thereto or against a trespasser to recover any portion of the *waqf* property which has been misappropriated, without joining any other person who may participate with him in the benefit. It is clear that, if the *mutwalli* himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property. This also was the view taken in *Kazi Hassan* v. *Sagun Balkrishna* (5). The judgment of Parsons, J., in that case is clear authority for the proposition that a right of suit for a declaration and for the recovery of the property for the benefit of the trust will lie. Ranade, J., the other member of the Bench, was of opinion that the suit was maintainable for the declaratory relief which was the principal cause of action and that the relief as to possession might also be claimed under certain circumstances if it was proved that the plaintiff had succeeded to the office of the *mutwalli* or was rendering service at the mosque. The main question argued before the Hon'ble Judges was whether the suit could be brought without resorting to the procedure of section 539, Civil Procedure Code of 1882, and on a careful reading of the judgment of Ranade, J., it would appear that he did not hold that if there was consequential relief open to the plaintiff, the plaintiff was entitled nevertheless to ask for a mere declaration. I think what that learned Judge intended to hold was that if it should turn out that the plaintiff was not, under the circumstances, entitled to recovery of possession then a suit for a mere declaration would lie; this was also the interpretation put upon his decision by Dundas, J., in the Lahore High Court in *Afiman* v. *Hamiduddin Husain* (6).

The question then is whether consequential relief being clearly available to the plaintiff in the present suit, he is entitled to a mere declaration. In my opinion he is not so entitled, and I rely upon the observations of Jenkins, C. J., in *Deokali Koer* v. *Kedar Nath* (7), where the learned Judge defines the scope of section 42 of the Specific Relief Act as follows: "The limit imposed by section 42 of the Specific Relief Act is on decrees which are merely declaratory and does not expressly extend to decrees in which relief is administered and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required as they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes; it is ordinarily enough that relief should be granted without the declaration."

The decision of their Lordships of the Calcutta High Court in *Ashraj Ali* v. *Mahammad Nurajjama* (8) would seem to offend against this principle, but the circumstances of that case were peculiar. There the plaintiffs, who were worshippers at a mosque, which was *waqf* property, sued for a declaration that the alienations made by the *mutwalli* were void and inoperative and for a decree for *khas* possession with mesne profits either in favour of the plaintiffs or the *mutwalli*. The prayers for *khas* possession and mesne profits were disallowed and the plaintiffs were satisfied with a mere declaration. On second appeal by the contesting defendant the High Court held that a suit by a worshipper was maintainable and they dismissed the appeal. There was no cross-appeal by the plaintiffs in regard to the consequential relief and, under the circumstances, the Court had no option but to maintain the decree of the Court below in the form it was passed. That decision, however, does not seem to be authority for the proposition that a Court can give a decree in violation of the provisions of section 42 of the Specific Relief Act.

It is argued before us that, even though section 42 might be a bar, that section is not exhaustive and that, apart from statutory authority, the general law entitles the plaintiff to a declaration. In my opinion there is no substance whatever in this contention. It is now well settled that the power of Courts

(5) 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec (N. S.) 651.

(6) 51 Ind. Cas. 799; 58 P. W. R. 1909.

(7) 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C. 704.

(8) 49 Ind. Cas. 355; 23 C. W. N. 115.

in India to entertain suits of a civil nature does not carry with it the general power of making declarations, except in so far as such power is expressly covered by Statute. In *Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar* v. *Dorasing Tever* (9) their Lordships of the Judicial Committee in stating the history of declaratory decrees in India and in construing section 15 of the Civil Procedure Code of 1859, observed as follows: "Nor does any Court in India, since the passing of the Code, seem to have considered that it had the power of making declaratory decrees independently of that clause," and their Lordships finally held that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. It may be contended that if a beneficiary is permitted to sue for recovery of alienated trust property and to ask the Court to deliver it to the offending *mutwalli* the Court will in effect be assisting in a fraud upon the alienee and in violating the general principle that a grantor cannot derogate from his grant. That certainly appears at first sight to be a contention worthy of some attention, but the decided cases all show that the Courts have paid more regard to the protection of the trust than to the protection of the alienee and it is now settled that even if the grantor has himself been implicated in the abuse of the trust the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust property. In *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (10) thier Lordships of the Judicial Committee observed that they would not decline to protect the property and leave it further exposed to loss and decline to make a declaration that it is trust property merely because they would not trust the plaintiff with its administration. That case was followed in *Subbarayudu* v. *Kotayya* (11) where the Court went so far as to hold that a hereditary *dharmakarta* of a temple, who had assigned his office to a *zemindar* and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity. To the same effect is *Srimati Mallika Dasi* v. *Ratanmani Chakervarti* (12) where a *shebait* who had mortgaged his priestly office with the emoluments was permitted to plead as a defence to a suit by the mortgagee that the transfer was void and inoperative. The general principle in these cases is that, where the transfer is void in law, no question of equity as between the transferor and the transferee can arise.

The learned Vakil for the appellant finally asks that he may be permitted to amends his plaint as to include a prayer for consequential relief. In my opinion that prayer cannot be allowed at this stage in particular as the prayers (*Ga*), (*Gha*) and (*Cha*) which related to consequential relief were deleted in consequence of his laches in the Trial Court.

The learned Vakil also asks that we should consider the prayer (*Kha*) as a prayer for consequential relief. That clause runs as follows:—

"That it may be declared that the possession of the defendants Nos. 1 and 2 of the property in claim is that of a trustee and that they ought not to have any connection with the property in claim inasmuch as they are not *mutwallis* and are unfit to act as such."

In the first place, it is quite clear that the defendants Nos. 1 and 2 being Hindus cannot be *mutwallis* of the trust property. In the second place, the words, "ought not to have any connection with the property in claim" are vague and do not amount to a request for recovery of possession. The plaintiff throughout prosecuted his suit as a suit for a mere declaration and it is too late in the day to contend that the suit complied with the provisions of section 42 of the Specific Relief Act.

Therefore, on the question whether the

(9) 2 I. A. 169; 15 B. L. R. 83; 23 W. R. 314; 3 Sar. P. C. J. 456 (P. C.).

(10) 17 W. R. 41; 14 M. I. A. 289; 2 Suth. P. C. J. 512; 3 Sar. P. C. J. 23; 10 B. L. R. 19; 20 E. R. 795.

(11) 15 M. 389; 5 Ind. Dec. (N. S.) 623.

(12) 1 C. W. N. 493.

suit is maintainable I am of opinion that the decision of the learned Subordinate Judge must be affirmed and that the suit has been rightly dismissed.

As to limitation, it is contended on behalf of the respondents that the suit is barred by six years' limitation which runs from the date of alienation. That view is, in my opinion, correct. Article 120 of the Indian Limitation Act applies and the judgment of their Lordships of the Madras High Court in *Thazhe Vittil Pantheeradi Ananda Varar* v. *Kavumpreth Illath Vasudevan Nambudiri* (13), though very shortly reported, is clearly to the point. There the manager of a Hindu endowment sued for a declaration that certain alienations were void. It was held that the cause of action dated from the date of the *patta* by which the alienation was made, and that as more than six years had elapsed since that date the plaintiff's suit should be dismissed although the right of the *dewaswam* to the property might not be barred.

The learned Vakil for the appellant contends that if a suit for possession and declaration is maintainable by the successor of a *mutwalli* in respect of alienations made by the *mutwalli* before his death and the period of limitation is twelve years, it should follow *a fortiori* that a suit during the lifetime of a *mutwalli* by a beneficiary or by the *mutwalli* himself cannot be barred; and that, in any event, the period of limitation should not expire till six years from the death of the *mutwalli*. In my opinion this argument is fallacious. The declaration obtained in a suit for possession is merely ancillary and is generally unnecessary; but where the cause of action is based upon a shadow cast upon the title of a person, who is not entitled to any consequential relief at the moment, limitation must run from the date on which that challenge to his title commences. If the learned Vakil's argument is correct then the death of the *mutwalli* can make no difference and there ought to be no limitation at all. Cases coming under Art. 134, for recovery of possession after the death of a trustee, have no application to the present case. The question was considered at some length in *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (14). In that case a beneficiary sued for recovery of property wrongly alienated by a Hindu, and section 120 of the Limitation Act was set up as a bar and the Court held that either Art. 134 or 144 of the Limitation Act would be applicable as the suit was one for possession and not for a mere declaration.

It may, perhaps, be contended on the authority of *Chukkun Lal Roy* v. *Loli Mohan Roy* (15) that in the present case the right of suit is a continuing right and that, so long as the plaintiff's right to the property continues, the suit cannot be barred by limitation. Although certain observations in *Chukkun Lal's case* (15), which was a suit for the construction of a Will by a reversioner, may seem to support this view, I think with great respect that, if it was intended to lay down the general proposition that there is a continuing right to a declaratory decree in respect of property so long as the right to the property is not extinguished, the proposition is too widely stated. The principle of section 23 of the Limitation Act, which deals with continuing wrongs, can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief. It is to be noted that the decision in *Chukkun Lal's case* (15) has been reversed by the Privy Council in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (16) on another point. Their Lordships did not consider the question of limitation but I venture to think that limitation began to run when the defendant did the first act prejudicial to the plaintiff's title.

In any event, the facts of the present suit are different and it is, in my, opinion, clearly barred by limitation as it was instituted more than six years after the date of the alienation.

The result is that the appeal is dismissed with costs.

Ross, J.—I agree.

K. S. D. & N. H. *Appeal dismissed.*

(13) 8 Ind. Cas 357; 8 M. L. T. 249; (1910) M. W. N. 594.

(14) 42 Ind. Cas. 366; 41 M. 124; 33 M. L. J. 357; 6 L. W. 666; 22 M. L. T 218.

(15) 20 C. 906; 10 Ind. Dec. (N. S.) 609.

(16) 24 C. 834; 24 I. A 76; 1 C W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.)

MATA GHULAM SINGH *v.* SITAL PRASAD

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 34 OF 1922.
April 3, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

MATA GHULAM SINGH—PLAINTIFF—APPELLANT

versus

SITAL PRASAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXXII, r.* 3—*Minor—Guardian* ad litem, *appointment of—Presumption—Irregularity in appointment of guardian, effect of.*

Where the Court by its action has given its sanction to the appearance of a person as the guardian *ad litem* of a minor defendant, the absence of a formal order of appointment is not necessarily fatal tothe proceedings. [p. 410, col. 1.]

Where a lawful guardian *ad litem* has been appointed for a minor defendant, any defect or irregularity in the procedure leading up to the appointment, cannot operate to render a decree passed in the suit in which the minor was represented by such a guardian invalid, unless the defect or irregularity has had the effect of prejudicing the interest of the minor or affecting the merits of the case. [p. 410, col. 2.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar P. C. J. 512 (P. C.), *Munnu Lal* v. *Ghulam Abbas*, 6 Ind. Cas. 788; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.), *Ram Brichh Ram* v. *Tarak Tewari*, 33 Ind. Cas. 805; 14 A. L. J. 589 and *Sripal Singh* v. *Jagdish Narayan (Radhe Lal)*, 56 Ind. Cas. 313; 23 O. C. 396; 7 O. L. J. 219; 2 U. P. L. R. (O.) 77, relied on.

Hanuman Prasad v. *Muhammad Ishaq*, 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229 and *Shivnath Singh* v. *Manohar Lal*, 22 Ind. Cas. 245; 16 O. C. 261, distinguished.

Where it was found that an application accompanied by the necessary affidavit had been made for the appointment of a person as guardian *ad litem* of a minor defendant and the person named in the application as the guardian had subsequently appeared in Court and filed a compromise on behalf of the minor to which the Court had accorded its sanction, but the order of the Court appointing the guardan *ad litem* could not be traced on the record owing to the weeding out of papers:

Held, that the presumption was that the proceeding of the Court had been carried out regular y and in accordance wih law, and the decree passed in the case was, therefore, binding on the minor. [p. 410, col. 2.]

Appeal against a decree of the Subordinate Judge, Partabgarh, dated the 15th December 1921, confirming a decree of the Munsif, Partabgarh, dated the 18th April 1921.

Mr. *Ram Prasad Varma*, for the Appellant.

Mr. *Radha Kishen Srivastava*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for the recovery of possession of certain property on the allegation that the father of the defendant-respondent wrongfully took possession of the same during the minority of the plaintiff-appellant. The plaintiff asserted that he attained majority in the month of *Jeth* 1918 and that the defendant had refused to give him possession. The defence was that the property in dispute had been mortgaged by Ajudhia Singh, the grandfather of the plaintiff, by conditional sale with Mata Prasad, the father of the defendant, in lieu of Rs. 129 on the 8th March 1897 that Mata Prasad subsequently obtained a decree for foreclosure on foot of the said mortgage against the present plaintiff under the guardianship of his mother, *Musammat* Sughra Kuar, who entered into a compromise agreeing to pay the mortgage money within four months, that she did not pay the mortgage money and that the mortgage was in the end finally foreclosed in favour of Mata Prasad on the 9th August 1907. The defendant further stated that the plaint ff was about 12 years old when the suit to enforce the mortgage was filed against him, that the present age of the plaintiff was at least 26 years, that the claim was barred by limitation, and that the decree for foreclosure was in any case binding on the plaintiff.

The Court of the first instance did not go into the question of limitation and dismissed the suit on the ground that *Musammat* Sughra Kuar, the guardian *ad litem* of the present plaintiff, had obtained the sanction of the Court to enter into a compromise, with the mortgagee by agreeing to pay the decretal money within four months of the date of the decree and that the final decree for foreclosure obtained by the mortgagee on her failing to pay the mortgage-money was binding on the plaintiff. It further found that the defendant was in any case not a trespasser and that the suit for his ejectment as such was not maintainable. The lower Appellate Court upheld that decree. It treated the final

decree for foreclosure as binding on the plaintiff, though no formal order of appointment of *Musammat* Sughra Kuar as a guardian *ad litem* of the plaintiff owing to the weeding out of the papers was traceable. It further refused to treat the present suit as one for redemption.

It appears that the plaintiff was represented in the previous suit by *Musammat* Sughra Kuar as his guardian *ad litem*. The learned Subordinate Judge observes that owing to the weeding out of the papers it is not possible to say whether an order for appointment of *Musammat* Sughra Kuar as a guardian *ad litem* of the plaintiff was passed or not. Such an order must, in the ordinary course, have been passed on the application made for her appointment in the previous suit accopmanied by an affidavit both of which had been weeded out. On the date fixed for the hearing of that suit *Musammat* Sughra Kuar actually appeared as guardian *ad litem* of her minor son and filed a compromise, agreeing to pay the decretal money within four months and the mortgagee agreed to exempt her from the costs of the suit. The compromise was entered into with the consent of the Court and from the fact that such sanction had been granted it may be inferred that every thing necessary had been done to have the minor properly represented by a guardian *ad litem*. In *Walian* v. *Banke Behari Pershad Singh* (1) their Lordships of the Privy Council observed that where the Court by its action had given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment was not necessarily fatal to the proceedings. Even an omission to serve the minors concerned or their mother personally was treated as mere irregularities covered by section 578 of the old Code of Civil Procedure and not errors fatal to the suit. In *Munnu Lal* v. *Ghulam Abbas* (2) it was similarly held that the absence of an affidavit such as is required by the provisions of section 456 of the old Code of Civil Procedure at the time the application for the appointment of a guardian is made, was not sufficient to render the proceedings illegal and void as against the minors on the ground that they were not properly represented therein. In that case an order was made by the Court appointing a person guardian *ad litem* of certain minors and their Lordships observed that that order being on the record the presumption was, in the absence of the evidence to the contrary, that every thing was regularly and properly done. In *Ramlrichh Ram* v. *Tarak Tewari* (3) where the manager of a family had refused to act as a guardian *ad litem* of one of the minor members of the family and the Court appointed the *nazir* as his guardian *ad litem* without issuing the notices required by O. XXXII, r. 3, of the Code of Civil Procedure and the *Nazir* did not put in any defence on behalf of the minor but the manager fully contested the suit, though without success, it was held that, in the absence of any proof of fraud or collusion or prejudice to the minor concerned, the right of the minor to set aside the proceedings in the suit on the the ground of an irregularity in the appointment of a guardian to represent him in that suit could not be sustained. In *Sripal Singh* v. *Jagdish Narayan* [*Radhe Lal*] (4) it was similarly held that where a lawful guardian *ad litem* had been appointed, any defect or irregularity in the procedure, leading up to such an appointment could not operate to render a decree passed in a suit in which the minor was represented by such a guardian invalid, unless the defect or irregularity has had the effect of prejudicing the interest of the minor or affected the merits of the case. It is not possible to say that no order appointing *Musammat* Sughra Kuar, a guardian *ad litem* of the minor, had been passed in that case. The presumption is that the proceeding of the Court had been carried out regularly and in accordance with law and this presumption becomes stronger when it is found that an application and an affidavit such as is filed in

(1) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar P. C. J. 512 (P. C.).

(2) 6 Ind. Cas. 788; 32 A. 287; ; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.).

(3) 33 Ind. Cas. 805 14 A. L. J. 589.

(4) 56 Ind. Cas. 313; 23 O C. 396; 7 O. L. J. 219; 2 U. P. L. R. (O) 77.

connection with the appointment of a person as guardian *ad litem* of a minor was on the record and that the guardian had subsequently appeared and filed a compromise on behalf of the minor to which the Court had accorded its sanction.

The decisions in *Hanuman Parsad* v. *Muhammad Ishaq* (5) and *Shivnath Singh* v. *Manohar Lal* (6) to which the learned Counsel for the appellant has referred do not apply, because in those cases it was definitely found that no formal order had been passed appointing a guardian *ad litem* for the minor concerned. Here the presumption is that some such order had been passed on the back of the petition though, owing to the weeding out of certain papers, it is not traceable. There is no allegation that the mother and guardian *ad litem* of the minor acted either fraudulently or with gross negligence to the prejudice of the minor.

Moreover, if the allegation made by the plaintiff in the plaint as to his age were to be taken to be correct, he must have been born some years after the mortgage was made and his mother could not have impeached the validity of the mortgage, even if it had not been made to pay the antecedent debts recited therein. The decree passed in the suit for foreclosure is, therefore, in any case binding on the plaintiff.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(5), 28 A. 137; 2 A. L. J. 615; A. W N. (1905) 229.

(6) 22 Ind. Cas. 245; 16 O. C. 261.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 55 OF 1921.

March 21, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, Justice Sir P. C. Bannerji, KT., Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Ryves.

GHANSHAM SINGH—PLAINTIFF—APPELLANT

versus

BHOLA SINGH—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 11—Decrees, several, deciding same question between parties—Appeal against one, competency of—*Res judicata.

When it appears to an Appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate Appellate Court, and only one of such decrees is brought before it in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him. [p. 414, col, 1.]

Zaharia v. *Debi*, 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861 (F. B.), distinguished.

Damodar Das v. *Sheoram Das*, 29 A. 730; 4 A. L. J. 587; A. W. N. (1907) 245, approved.

Balhari Pande v. *Shiva Sampat Pande*, 18 A. L. J. 40, *Dakhni Din* v. *Syed Ali Asghar*, 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995, *Anant Das* v. *Udai Bhan Pargas*, 19 Ind. Cas. 76; 35 A. 187; 11 A. L. J. 214, *Abdul Basit* v. *Ashfaq Husain*, A. W. N. (1908) 211; 4 M. L. T. 172 and *Ramcharan* v. *Lachman Pershad*, 9 Ind. Cas. 667, overruled.

Second appeal against the decree of the Second Additional Sub-Judge, Aligarh, dated the 21st August 1920.

FACTS.—The plaintiff brought a suit for sale on the basis of a simple mortgage executed by the defendant. One of the pleas in defence was that the rate of interest (2 per cent. per annum compoundable half-yearly) was entered in the deed without the knowledge of the defendant, that it was excessive, and not binding on him.

The first Court allowed interest at the rate mentioned in the mortgage deed but in view of the fact that the mortgage-money had swollen to a high figure it did not give the plaintiff his costs.

Both parties appealed to the District Judge, the defendant complaining against the rate of interest and the plaintiff praying for his costs.

The District Judge allowed the defendant's appeal inasmuch as it reduced the rate of interest from compound to simple. He also allowed the plaintiff's appeal and awarded him costs in proportion to his failure and success.

Two decrees were drawn up in the two appeals in the form prescribed by O. XXXIV, r. 4. These two decrees, so far as the operative portions were concerned, were identical in terms. Both of them mentioned the decretal amount on failure to pay which the property would be sold.

The plaintiff filed an appeal in the High Court against the decree which had cut down the rate of interest. He preferred no appeal against the other decree.

A preliminary objection was taken to the hearing of the appeal.

Mr. *Panna Lal*, for the Respondent in support of the preliminary objection submitted: —The plaintiff has filed no appeal against the other decree of the District Judge. That decree has, therefore, become final between the parties and operates as *res judicata*. The hearing of the present appeal is, therefore barred. If this appeal is heard and allowed, there will come into existence two decrees, inconsistent with each other, yet both binding on the parties. This will lead to anomalous results.

[**Banerji, J.**—The other decree related to costs and had nothing to do with the matter now before us *viz.*, the rate of interest].

Although it relates to costs yet it mentions the decretal amount. If the High Court changes the rate of interest, and thereby the decretal amount, its decree will clash with the other decree of the District Judge.]

[**Banerji, J.**—We have to look to the substance of the decree and not to the form.]

If the appeal is allowed and the plaintiff proceeds to execute the decree of this Court the defendant will come forward with the decree of the District Judge and will say that under the terms of that decree, which is binding on the plaintiff, the latter cannot claim more than what is mentioned therein. On the other hand, the plaintiff on the strength of the High Court decree will claim the amount mentioned in that decree. This will be an anamoly. I rely on *Balhari Pande* v. *Shiva Sampat Pande* (1), *Zaharia* v. *Debi* (2), *Dakhni Din* v. *Syed Ali Asghar* (3), *Anant Das* v. *Udaibhan Pargas* (4) and *Abdul Basit* v. *Ashfaq Husain* (5).

Mr. *Iqbal Ahmad*, for the Appellant, was not called upon to reply but he pointed out the fact that both the decrees being preliminary none of them was capable of execution. It would be the final decree that would be executed and, therefore, the apprehended anomaly could not happen.

JUDGMENT.

Mears, C. J., Piggott, Walsh and Ryves, JJ.—This appeal was referred to a Bench of five Judges to decide whether the appellant's right of appeal was barred by what has been called "the principle of *res judicata*" in accordance with a preliminary objection taken by the respondent; or, in other words, whether the ruling in *Zaharia* v. *Debi* (2) applied to it, or whether, as the appellant contended, it was governed by the ruling in *Damodar Das* v. *Sheoram Das* (6) and in effect, therefore, whether the latter decision was correctly reported as having been overruled by the former.

We are of opinion that there is no such bar, and that the preliminary objection fails. The facts are simple. The plaintiff sues upon a mortgage executed by the defendant in his favour on the 28th May 1914, and claims repayment of the principal amount secured, with interest thereon at the contract rate, or, in the alternative, sale of the mortgaged property. The Munsif decreed the claim but deprived the plaintiff of costs upon the ground that the rate of interest was excessive and that the sum due had swelled to an inordinate amount. From this preliminary decree both parties appealed to the Subordinate Judge

(1) 18 A. L. J. 40.
(2) 7 Ind. Cas. 156; 33 A. 51; 7 A.L.J. 861 (F. B.).
(3) 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995.
(4) 19 Ind. Cas. 76; 35 A. 187; 11 A. L. J. 214.
(5) A. W. N. (1908) 211; 4 M. L. T. 172.
(6) 29 A. 730; 4 A. L. J. 587; A. W. N. (1907) 245.

who varied the decree by reducing the plaintiff's claim to one for simple interest only resulting in the sum of Rs. 488 and further interest *pendente lite*, and future interest up to the date of realization, and by awarding the plaintiff proportionate costs upon the amount due. He also directed that each party should pay its own costs of the appeal. Two separate decrees were drawn up in the lower Appellate Court. This fact has given rise to the present difficulty. In spite of the absence from the Code of any provision enabling two cross-appeals from the same decree to be consolidated, the Appellate Court in such a case has inherent jurisdiction, in disposing of the two appeals, as the Court in this case did by one judgment so to mould its decree as to merge the result of the two appeals into one decree, representing the final adjustment of the rights of the parties on all the points raised, in a manner similar to the procedure adopted where there is one appeal, and cross-objections are made on behalf of the respondent. We have, however, to deal with a case in which two decrees were in fact passed, the terms of which were identical, except as regards the contents of the memorandum of costs endorsed on each respectively. The difficulty of carrying out the procedure adopted by the lower Appellate Court in this case, and the practical objection to it, are sufficiently shown by a perusal of the two decrees. Though each is, *ex hypothesi*, intended to be independent of the other, and to be confined only to the separate appeal to which it relates, each in fact is framed in terms which refer to and operate upon both appeals, thereby defeating the object which the practice of drawing up two decrees must be presumed to be intended to achieve. So far as concerns the decree drawn up in the plaintiff's appeal to the lower Appellate Court, both parties were satisfied. The plaintiff achieved his object by obtaining an order in his favour awarding him proportionate costs, and the defendant did not appeal against this. The present appeal is brought by the plaintiff against the decree drawn up in the defendant's appeal to the lower Appellate Court which reduced the amount of his claim as awarded in his favour by the Trial Court.

It is the absence of any appeal by the plaintiff from the decree in his own favour in the lower Appellate Court, which, except in so far as it repeats the reduced amount of the claim, contains nothing to his prejudice that is said to create a bar to his present appeal. In other words, the very decree against which he appeals is sought to be used against him as a bar to his right of appeal against it. So stated, the objection is contrary to justice and common sense, and must, therefore, be fallacious.

The three-Judge decision relied upon, *Zaharia* v. *Debi* (2), certainly did not decide this. In that case there were two suits by two independent plaintiffs asserting inconsistent titles to the same right. One unsuccessful plaintiff appealed, but he did not appeal against the decree in the suit by the successful plaintiff which had been passed against him as defendant. He left outstanding a final decree which so far affected his claim on the merits to his prejudice as to put an end to it altogether in favour of the other party. It would appear that the High Court, as the Appellate Court in that case, might have dismissed the appeal upon the merits, unless the appellant was willing to bring up in appeal the other decree which prejudicially affected his right and that it was not really necessary to invoke the doctrine of *res judicata*. The case of *Damodar Das* v. *Sheoram Das* (6) was a very different case, substantially resembling the present case. In our opinion it was rightly decided, and not being in *pari materia* with the case of *Zaharia* v. *Debi* (2) cannot be said to have been overruled by that case. In *Damodar Das* v. *Sheoram Das* (6) the Court rightly treated the two decrees as being in substance one, though drawn up in duplicate. But it is clear from the subsequent cases, and from the authorized report in *Zaharia* v. *Debi* (2) that *Zaharia* v. *Debi* (2) has been treated as laying down a general rule to be followed in all cases in which an unappealed decree passed in contemporaneous proceedings arising out of the same dispute is outstanding in the lower Appellate Court. It, therefore, becomes necessary to lay down once and for all the practice which should in future bind the Court and

to negative the general applicability of the rule in *Zaharia* v. *Debi* (2).

Without differing from that decision as applied to the facts of that and cognate cases, we are of opinion that some of the reasoning and dicta contained in the judgments went further than were necessary, or than we ourselves are prepared to go, and that they have been misapplied in some of the subsequent cases. Where it appears to an Appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a Subordinate Appellate Court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him. It would be indeed wrong for an appellant to appeal against a decree which did not prejudice him and to which he did not object or to appeal against two duplicate decrees where an appeal against one of them would be sufficient and he is certainly under no obligation to do so. The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last Court of Appeal.

It follows from this that we hold that *Damodar Das* v. *Sheoram Das* (6) was rightly decided, and that the following *Abdul Basit* v. *Ashfaq Husain* (5), *Dakhni Din* v. *Syed Ali Asghar* (3), *Ramcharan* v. *Lachman Pershad* (7), *Anant Das* v. *Udaibhan Pargas* (4) and *Balhari Pande* v. *Shiva Sampat Pande* (1) must be treated as being no longer law.

No doubt, the present case is a particularly strong one. The decree under appeal, which is a counterpart of the decree unappealed, is a preliminary decree in a mortgage suit. It is established law that when a preliminary decree has been modified on appeal, the final decree must follow the appellate decree. It would be indeed strange if the existence of a duplicate preliminary decree in the same suit were a bar to an appeal against such preliminary decree.

Banerji, J.—An objection has been taken to the hearing of this appeal on the ground that the appellant has not appealed from the decision by the lower Appellate Court of a connected appeal both of which were decided by the same judgment. The circumstances under which the objection arises are these. The plaintiff-appellant brought a suit for sale on a mortgage. The defendant contested the suit on the ground among others that the amount of interest claimed was excessive. The Court of first instance overruled this plea and decreed the claim for interest but it disallowed costs to the plaintiff as the amount of interest had swelled to a large figure. Both parties appealed from this decree, the plaintiff, on the question of costs and the defendant on the question of interest. The defendant's appeal was No. 459 and the plaintiff's appeal was No. 460. Both the appeals were disposed of by the same judgment. The lower Appellate Court allowed both the appeals reduced the amount of interest awarded by the First Court but allowed costs to the plaintiff. The plaintiff's Appeal No. 460 was thus decided in his favour. He accepted the decision and did not appeal from it. As the other Appeal No. 459, which related to interest, was decided against him he preferred the present appeal from the decision in Appeal No. 459. It is contended that as both appeals were decided by the lower Appellate Court by the same judgment and the plaintiff has not appealed from the decision in Appeal No. 460 the present appeal is not maintainable. In support of this contention the Full Bench case of *Zaharia* v. *Debi* (2) has been relied upon. In my judgment that case has no bearing on the present case and the objection urged on behalf of the respondent is untenable. The question before us is whether the plaintiff is precluded from maintaining the present appeal by reason of his allowing the decision in the connected appeal to become final and we are not called upon to decide whether the ruling in the case of *Zaharia* v. *Debi* (2) or that in the case of *Damodar Das* v. *Sheo-*

(7) 9 Ind. Cas. 667.

ram Das (6) is right. The case last mentioned was not relied upon by Mr. Iqbal Ahmad on behalf of the appellant though it is referred to in the order of reference to the Full Bench. In my judgment, where the same question in issue arises between the same parties or between persons through whom they claim in two suits or two appeals the party against whom the question or issue is decided is bound to appeal from the decision in both the suits or appeals, and if he allows the decision in one of the suits or appeals to stand unreversed and to become final he is precluded from maintaining the appeal preferred by him from the decision in one of the suits or appeals only where an issue has been decided between the same parties or their predecessors-in-title in two suits or appeals the decision, if unreversed, is binding on the parties. If the party to whose prejudice the question has been decided allows the judgment in one of the cases to become final, and, therefore, binding on him, the Court cannot, in the other case or appeal, go behind the decision which has become final and the necessary result is that the appeal in which the same question is sought to be re-opened cannot be sustained. This is what was held in the case of *Zaharia* v. *Debi* (2). In that case two rival suits for pre-emption in respect of the same sale were brought by two claimants each of whom asserted as against the other, that he had a paramount title to pre-empt. The claim of one of the two rival plaintiffs was decreed. The defeated plaintiff appealed from the decision in one of the suits and the judgment and decree in the other suit thus became final as between the parties. It was held that as the same issue had been raised and tried in both the suits and the decision of it in one suit became final as between the parties it operated as *res judicata* and the issue could not be re-opened and tried in the appeal preferred by the party against whom the issue had been decided. I fully agree with this decision and I can find nothing in the judgment of Stanley, C. J., who delivered the main judgment in the case, from which one may dissent. This case does not, in any way, support the contention of the respondent. The ruling in *Damodar Das* v. *Sheoram Das* (6) was not rlied upon by the learned Advocate for the appellant and we are not called upon to pronounce any opinion as to the correctness or otherwise of the decision in that case. If it be deemed to have laid down any rule of law inconsistent with the decision in *Zaharia* v. *Debi* (2), I am not prepared to follow it. No reason is stated in the judgment for overruling the objection taken in that case. If the learned Judges intended to hold that no plea of *res judicata* could be raised merely because one judgment was delivered in the two cases, as held by the Calcutta High Court in one of the cases cited in the judgment, I am unable, with great respect, to agree with them. In the present case the only question which was decided in the appeal preferred to the Court below by the plaintiff, *viz.*, Appeal No. 460, was the question of costs and that was decided in the plaintiff's favour. He had, therefore, no occasion to appeal against the decision in that case and his omission to appeal from that decision does not bar his present appeal. No issue was decided in Appeal No. 460 which was adverse to him and no issue which arose and was decided in that appeal arises in the appeal now before us. There is, therefore, no bar to the hearing of this appeal. The difficulty which arises in this case is due to the fact that one decree only was prepared in both the appeals and a copy of that decree was filed in each case. This, however, did not entitle the plaintiff to appeal from the decision in the appeal in which he was the successful party. As the suit was a mortgage suit and only one decree could be passed in it, the decree drawn up by the Court below was the decree which was the result of the decision in the two appeals before it. We must look to the substance and not to mere form. Any ruling which militates against the view enunciated in this case cannot be followed. I would overrule the objection taken on behalf of the respondent.

Order accordingly.

M. A. A. & N. H.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 166 AND 239 1918.
CIVIL MISCELLANEOUS PETITION NO. 1442 OF 1922.
August 11, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

IN APPEAL NO. 166 OF 1918.
GOPALASAMY IYENGAR AND OTHERS—APPELLANTS
versus
NUMMACHI REDDIAR AND OTHERS—RESPONDENTS.

IN APPEAL NO. 239 OF 1918.
NUMMACHI REDDIAR—PLAINTIFF—APPELLANT
versus
ALAGIRI RAJA AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 69, 70, scope of—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 132—"Interested", meaning of—Sale—Vendee having notice of vendor's defective title—Payment of encumbrances—Vendee, whether entitled to be reimbursed—Suit for recovery of money paid—Starting point of limitation—Civil Procedure Code (Act V of 1908), s. 151, O. XLVII, r. 1—Review of decision before decree signed—Inherent power of Court.

Sections 69 and 70 of the Contract Act are not designed for the benefit of persons who intermeddle with the affairs of others. [p. 420, col. 2.]

Rajah of Pittapur v. *Secretary of State for India*, 25 Ind. Cas. 783; 16 M. L. T. 375, *Damodara Mudaliar* v. *Secretary of State for India*, 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410 and *Mohendra Ghosal* v. *Bhuban Mardana* [*Suchand Ghosal* v. *Balaram Mardana*], 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566, referred to.

The word "interested" in section 69 of the Contract Act should be interpreted liberally. [p. 420, col. 1.]

Radha Madhub Samanta v. *Sasti Ram Sen*, 26 C. 826; 13 Ind. Dec. (N. S.) 1129, followed.

A man who gets a genuine sale-deed, and on the strength of that sale-deed obtains a valid decree for possession from a competent Court in a contested suit, cannot fairly be accused of an endeavour to manufacture evidence of title if he pays off charges upon the property in order to preserve it from sale. [p 420, col. 2.]

Where an appeal to a superior Court only results in the decree appealed against being confirmed there is no interruption in the running of time calculated from the date of the original decree. [p. 421, col. 1.]

Hukum Chand Boid v. *Pirthichand Lal Chowdhury* [*Juscurn Boid*], 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.), followed.

Sarvothama Row v. *Chinnasami Pillai*, 49 Ind. Cas. 729; 42 M. 507; 36 M. L. J. 157, 9 L. W. 379; 25 M. L. T. 291; (1919) M. W. N. 432, not followed.

When a person pays off a debt which another is bound to pay the ordinary relief that the Courts can give is a personal decree against the defendant for money had and received, as section 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plantiff's delay he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. [p. 422, col. 1.]

Where a vendee's suit for possession is dismissed on the ground that his vendor's title was nominal and that he took the sale with notice of the defect of title, a suit brought by him for recovery of certain sums alleged to have been paid by him in discharge of encumbrances on the property more than three years both from the date when his title was found against by the Court and from the date of the payment of encumbrances, is barred by limitation, whether Art. 62, or 97 of the Limitation Act is the more approp iate Article. Article 132 is inapplicable since the plaintiff can at best obtain only a personal decree against the defendant for money had and received under section 69 of the Indian Contract Act. [p. 420, col. 2; [p. 421, cols. 1 & 2; p. 422, col. 1.]

Rajah of Vizianagram v *Rajah Setrucherla Somasekhararaz*, 26 M. 686 (F. B.) and *Narayana Kutty Goundan* v. *Pechiammal*, 15 Ind Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 353; 22 M. L. J. 364, distinguished.

A covenant for quiet enjoyment between the vendor and the vendee can in law be implied only upon valid sales and not where the sale-deed, to vendee's knowledge, conveys no title whatever. [p. 422, col. 2.]

Article 116 of the Limitation Act is applicable to a suit on failure of consideration for return of any purchase-money paid under a registered sale and must be instituted within six years from the date of sale. [p. 422, col. 2.]

Subbaraya Reddiar v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240; (1914) M. W. N. 376, *Arunachala Aiyar* v. *Ramasami Aiyar*, 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J. 517; 16 M. L. T. 397 and *Secretary of State* v. *Pemaraju Venkayya*, 35 Ind. Cas. 254; 40 M. 910 at p. 915; 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575, followed.

Per *Spencer, J.*—Though a purchaser may have had notice of the defective title of his vendor, if he makes payments to creditors of the vedor *bona fide* after a decree for possession is passed in his favour, to preserve the property and stave off attachments and sales, the vendee is not a mere volunteer and would be entitled as to such payments to equitable relief under section 69 of the Contract Act. [p. 420, col. 2; p. 421, col. 1.]

Per *Devadoss, J.*—A vendee who knows that his vendor has no title and the sale is a sham, is only in the position of a volunteer and is not entitled to any amount for relieving the burden on the properties sold. A Civil Court does

not confer a right to property which a person does not possess but only declares or enforces a right he has. [p. 425, col. 2: p. 426, col. 2.]

Per *Spencer and Devadas, JJ.*—Before a decree is signed it is competent to a Court to review its own decision under O. XLVII, r. 1 of the Civil Procedure Code. [p. 428, col. 2.]

Seyud Tuffuzzool Hossein v. *Rughoonath Pershad*, 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701 and *Debi Bakhsh Singh* v. *Habib Shah*, 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 19; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 151 (P. C.), followed.

A Court has also inherent powers to correct an error obvious on the face of the record before an order has been completed. [p. 428, col. 2.]

In re St. Nazaire Co., (1879) 12 Ch. D 88; 41 L. T. 110; 27 W. R. 854 and *In re Suffield and Watts, Ex parte Brown*, (1888) 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 514; 5 Morrell 83, relied on.

Appeals against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 49 of 1916.

Mr. *S. T. Srinivasa Gopala Chariar*, for the Defendants.—I have a memo. of objections in Appeal Suit No. 239 and my contentions go to the root of the whole case and I ask for permission to open the case. I raise two contentions, first, that the plaintiff's suit is barred by limitation; and, secondly, that plaintiff is purely a volunteer and is not entitled to decree for any amount. (Facts were then stated and the dates given which are contained in full in the judgment of Mr. Justice Devadoss.)

The plaintiff's title was found against by the Sub-Court on 12th July 1911 and the decree was confirmed in second appeal on 14th February 1913 and the present suit was filed on 12th February 1916.

The Article applicable is 97 and the starting point for limitation is 12th July 1911 and not the date of the confirmation of the decree. See the Privy Council decision in *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury (Juscurn Boid)* (1) applied in *Mahomed Ali Sheriff* v. *Budharaju Venkatapathi Raju* (2) and in *Viswanatha Sastri* v. *Sitalakshmi Ammal* (3). The case in *Rajagopalan* v. *Tirupananthal Tambiran* (4) which was followed in *Sarvothama Row* v. *Chinnasami Pillai* (5) is no longer law after the Privy Council decision.

The 42 Madras decision [*Sarvothama Row* v. *Chinnasami Pillai* (5)] was given before the Privy Council decision was published.

Plaintiff's suit is one for failure of consideration. He never got possession. His title was found against on 12th July 1911 and his suit is more than three years therefrom and is hence barred under Art. 97.

If the sale is void *ab initio* and no possession was given, Art. 62 may apply but then the plaintiff's suit is more than three years even from the latest date of payment of money under the sale-deed, *i.e.*, 26th November 1912. See *Hanuman Kamal* v. *Hanuman Mandur* (6), *Venkatanarasimhulu* v. *Peramma* (7), *Kowuri Basivireddy* v. *Tallaparagada Nagamma* (8), *Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudripad* (9) and *Subbaraya* v. *Rajagopala* (10).

Neither is plaintiff entitled to the benefit of Art. 116, *i.e.* six years.

The decision in *Ramanatha Iyer* v. *Ozhaloor Pathiriserri Raman Nambudripad* (9) is exactly in point. A covenant for title is broken on the date of sale and there is no continuing breach. The sale to plaintiff and his vendor was in 1908 and 1907, respectively. See English decisions

(1) 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

(2) 60 Ind. Cas. 235; 39 M. L. J. 449; 27 M. L. T. 304; 11 L. W. 537.

(3) 61 Ind. Cas 979; 13 L. W. 37; (1921) M. W. N. 181.

(4) 17 M. L. J. 149; 30 M. 316;

(5) 49 Ind. Cas. 729; 42 M. 507; 36 M. L. J. 157; 9 L. W. 379; 25 M. L. T. 291; (1919) M. W. N. 432.

(6) 19 C. 123 at p. 126; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

(7) 18 M. 173; 5 M. L. J. 32; 6 Ind. Dec. (N. S.) 470.

(8) 8 Ind. Cas. 1087; 35 M. 39; (1910) M. W. N. 827; 9 M. L. T. 467.

(9) 21 Ind. Cas. 740; 14 M. L. T. 524; (1913) M. W. N. 1029; 1 L. W. 110.

(10) 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240; (1914) M. W. N. 376.

Turner v. *Moon* (11), *Spoor* v. *Green* (12).

Reference was made also to *Secretary of State for India* v. *Pemaraju Venkayya* (13); *Srinivasa Raghava Dikshadar* v. *Rangasami Aiyangar* (14); *Ardesir* v. *Vajesing* (15); *Hari Tewari* v. *Raghunath Tiwari* (16).

Article 132 has no application either. In any case plaintiff can get only a money-decree; *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz* (17).

The suit is barred in any view; *Abkan Sahib* v. *Soran Bivi Saiba Ammal* (18), *Peary Mohan Mukerji* v. *Norendra Nath Mukerji* (19).

On the second point plaintiff took with knowledge of the nominal sale in favour of his vendor. He was purely a volunteer. Law does not recognise subrogation in favour of a purchaser under a nominal sale where there is no obligation to pay.

Gurdeo Singh v. *Chandrika Singh* (20), *Karuppan Ambalagaran* v. *Sakuth Levvai* (21), *Nadhamuni Iyyan* v. *Appu Odayan* (22), *Shiam Lal* v. *Ram Piari* (23), *Ammani Ammal* v. *Ramaswami Naidu* (24), *Chama Swami* v. *Padala Anandu* (25), *Narayana Kutty Goundan* v. *Pechiammal* (26) were then referred to.

The decisions in *Syamalarayudu* v. *Subbarayudu* (27), *Palamalai Mudaliyar* v. *South Indian Export Company* (28), *Govinda Padayachi* v. *Lokanatha Aiyar* (29) and *Nand Kishore Jha* v. *Piraoo Mian* (30) are distinguishable. Section 70 of the Contract Act does not apply either where the person making payment does so for manufacturing evidence of title.

Panchkori v. *Hari Das* (31), *Janki Prasad Singh* v. *Baldeo Prasad* (32), *Jinnat Ali* v. *Fateh Ali* (33) and *Desai Himatsingji* v. *Bhavabhai* (34).

There is no *bona fide* payment at all and plaintiff is not entitled to the benefit of sections 69 and 70, Indian Contract Act.

Yogambal Boyee Ammani Ammal v. *Natna Pillai Markayar* (35) and *Ramasami Naidu* v. *Muthusamia Pillai* (36).

Mr. *K. R. Rangaswami Iyengar*, for the Plaintiff in reply—The sale in favour of the plaintiff is not a void sale at all. It is only voidable. Plaintiff has a good and subsisting cause of action both against first defendant and the 13th defendant. The suit is not barred by limitation. If Art. 97 applies, the time begins to run not from the date of the appellate decree but from the date of the High Court decree. While the case was pending in the High Court it cannot be said plaintiff's right to sue on failure of consideration had arisen. The Privy Council decision in *Hukum Chand Bord* v. *Pirthichand Lal Chowdhury* (*Juscurn Bold*) (1) is distinguishable. The decision in *Sarvothama Row* v. *Chinnasami Pillai* (5) is still good law. It followed an earlier decision in *Rajagopalan* v. *Tirupananthal Tambiran* (4). Art. 62 does not apply to this case. The proper Article to

(11) (1901) 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237.
(12) (1874) 9 Ex 92; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.
(13) 35 Ind. Cas. 254; 40 M. 910 at p. 915; 19 M. L. T. 318; 3 L. W. 443; (1916) 1 W. M. N. 342; 30 M. L. J. 575.
(14) 31 M. 452 at p. 453; 18 M. L. J. 477; 5 M. L. T. 211.
(15) 25 B. 593 at p. 603; 3 Bom. L. R. 190.
(16) 11 A. 27 at p. 30; A. W. N. (1888) 25 4; 6 Ind. Dec. (N. S.) 446.
(17) 26 M. 686 (F. B.).
(18) 28 Ind. Cas. 290; 38 M. 260; 28 M. L. J. 347.
(19) 5 Ind. Cas. 404; 37 C. 229; 14 C. W. N. 261; 7 A. L. J. 125; 7 M. L. T. 63; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27 (P. C.).
(20) 1 Ind. Cas. 913; 36 C. 193 at pp. 217, 220; 9 C. L. J. 611.
(21) 22 Ind. Cas. 253; 26 M. L. J 74; 14 M. L. T. 478; (1914) M. W. N. 131.
(22) 48 Ind. Cas. 799.
(23) 4 Ind. Cas. 706; 32 A. 25; 6 A. L. J. 947.
(24) 51 Ind. Cas 57; 37 M. L. J. 113; 10 L. W. 75; (1919) M. W. N. 866.
(25) 31 M. 439; 18 M. L. J. 306; 3 M. L. T. 395.
(26) 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 553; 22 M. L. J. 364.
(27) 21 M. 143; 7 Ind. Dec. (N. S.) 457.
(28) 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239.
(29) 62 Ind. Cas. 291; 40 M. L. J. 114; (1921) M. W. N. 87; 29 M. L. T. 156.
(30) 42 Ind. Cas. 839; (1917) Pat. 295; 3 P. L. W 220.
(31) 34 Ind. Cas. 341; 25 C. L. J. 325; 21 C. W. N. 394.
(32) 30 A. 167; A. W. N. (1908) 58; 5 A. L. J. 163.
(33) 9 Ind. Cas. 219; 13 C. L. J. 646; 15 C. W. N. 332.
(34) 4 B. 643; 2 Ind. Dec. (N. S.) 935.
(35) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 480.
(36) 48 Ind. Cas. 756; 41 M. 923; 35 M. L. J. 581; (1918) M. W. N. 796.

apply in this case is Art. 132. Plaintiff has discharged encumbrances existing on the properties and is entitled to stand in the shoes of the mortgagees. If plaintiff has a charge in law Art. 132 would apply and the suit will be clearly in time. The question for consideration then is if the plaintiff is entitled to a charge. The payments made by plaintiff were mostly at a time when his title was found established in one Court. I also come within section 95 of the Transfer of Property Act. At the time of the payments I was the purchaser of the equity of redemption. The later decree of the District Court does not affect my prior existing right to subrogation. *Rajah of Vizianagaram* v. *Rajah Setrucherla Somesekhararaz* (17), *Narayana Kutti Goundan* v. *Pechiammal* (26), *Palamalai Mudaliyar* v. *South Indian Export Company* (28) and *Chama Swami* v. *Padala Anandu* (25).

On the second question the plaintiff is in any case entitled to a money-decree.

I rely on sections 70 and 69 of the Indian Contract Act. The plaintiff is not volunteer. The defendant has obviously benefited by the payment of the encumbrances. Plaintiff did not intend to make the payments gratuitously.

Rajah of Pittapur v. *Secretary of State* (37), *Damodara Mudaliar* v. *Secretary of State for India* (38), *Mohendra Ghoshal* v. *Bhubin Mardana* [*Suchand Ghosal* v. *Balaram Mardana*] (39), *Syamalarayudu* v. *Subbarayudu* (27), *Karuppan Ambalagaran* v. *Sakuth Levvai* (21) and *Radha Madhub Samonta* v. *Sasti Ram Sen* (40).

Plaintiff's sale is not void. The decisions cited hold that where a payment is *bona fide* by a person who is interested in paying and the other person has benefited, he is entitled to reimbursement. It is a case of unjust punishment by the defendant at plaintiff's expense.

Mr. *Srinivasa Gopala Chariar* distinguished the cases cited by the appellant.

JUDGMENT.

IN APPEAL NO. 239 OF 1918.

Spencer, J.—This suit was brought to recover from first defendant certain sums of money paid by the plaintiff to first defendant's creditors in pursuance of directions contained in a sale-deed of immoveable property pruchased from 13th defendant who had previously purchased the same property from first defendant.

The sale by first defendant to 13th defendant was effected on January 20th, 1907, through a registered instrument (Exhibit A) and was for Rs. 5,000. That by 13th defendant to the plaintiff was through another registered sale-deed (Exhibit B) dated August 22nd, 1908.

When the plaintiff sued in Original Suit No. 3 of 1909 to recover possession of the lands purchased by him he was successful in the District Munsif's Court, but his suit was dismissed in the Sub-Court owing to a finding by the Subordinate Judge that his vendor's purchase under Exhibit A was a nominal sale which never took effect. There was a second appeal but the High Court declined to interfere for the obvious reason that what was decided by the lower Appellate Court was a question of fact.

The learned Subordinate Judge in the present suit has granted the plaintiff a charge over the suit properties for certain sums of money and a direction for sale in default of payment, (the date by which they are to be paid is not specified in the decree); also a personal decree against defendants Nos. 1 and 13 and a decree against the family properties against first defendant's sons, defendants Nos. 2 and 3, for the unrealised balance after sale of the suit properties; also a personal decree against the 13th defendant for a sum of Rs. 800 paid into the hands of 13th defendant on August 22nd, 1908, and interest thereon up to the date of suit. Plaintiff and 13th defendant appeal.

The memorandum of objections filed by respondents Nos. 1 to 3 strikes at the root of the plaintiff's case and has, therefore, been heard first. The two main objections to the decree of the lower Court are (1) that the payments made by the plaintiff were made voluntarily by him on his own account and give rise to no legal obligation for his being reimbursed, (2), that the suit is barred by limitation,

(37) 25 Ind. Cas. 783; 16 M. L. T. 375.
(38) 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410.
(39) 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566;
(40) 26 C. 826; 13 Ind. Dec. (N. S.) 1129.

The finding of the Subordinate Judge's Court in appeal from the Munsif's decree in Original Suit No. 3 of 1909 to which first defendant was a party, that the sale to 13th defendant was a nominal transaction and never took effect binds the plaintiff in this subsequent suit as *res judicata*. Exhibit VII, which is a notice sent on May 18th, 1908 by first defendant to the plaintiff, warning him that the sale in favour of 13th defendant was nominal, unenforceable and had not been given effect to, and that he would be liable for any loss consequent on any second sale that he might take from 13th defendant, was sufficient to put him on notice of the defects of 13th defendant's title. After this he cannot put forward any plea that he is a *bona fide* purchaser without notice. But although plaintiff's purchase was not the *bona fide* act of a stranger, it does not follow that after he took a sale-deed from 13th defendant the payments he made to preserve the property from the clutches of the original vendor's creditors were not made *bona fide*, especially those which he made after his title had been established in the Court of first instance. His purchase was, no doubt, speculative as, with his eyes open, he took the risk of his sale-deed turning out to be a worthless bit of paper, but having taken it he was bound by the terms of his contract with 13th defendant and by the provisions of section 55 (5) (*d*) of the Transfer of Property Act to make these payments. He was interested in the widest sense in which the word is used in section 69 of the Indian Contract Act in making these payments of money which first defendant was bound by law to pay. The decision in *Radha Madhub Samonta* v. *Sasi Ram Sen* (40) justifies a liberal interpretation of the word "interested".

Whatever may be said of his determination to secure for himself by hook or by crook the first defendant's properties, which adjoined those of first defendant's brother which he had previously purchased, a subject on which the learned Subordinate Judge has enlarged in his judgment, the payments which plaintiff made after purchase in order to discharge encumbrances on the land cannot be characterised as meddlesome or officious. For it is well established that sections 69 and 70 of the Indian Contract Act were not designed for the benefit of persons who intermeddle with the affairs of others [see *Rajah of Pittapur* v. *Secretary of State* (37), *Damodara Mudaliar* v. *Secretary of State for India* (38) and *Mohendra Ghoshal* v. *Bhuban Mardana* [*Suchand Ghosal* v. *Balaram Mardana*] (39)]. I agree with the learned Subordinate Judge that a man who gets a genuine sale-deed and on the strength of that sale-deed obtains a valid decree for possession from a competent Court in a contested suit cannot fairly be accused of an endeavour to manufacture evidence of title if he pays off charges upon the property in order to preserve it from sale.

In *Syamalarayudu* v. *Subbarayudu* (27), *Chinna Swami* v. *Padula Anandu* (25) and *Palamalai Mudaliyar* v. *South Export Company* (28) transferees for value who in good faith discharged mortgages binding on the property have been treated as entitled to equitable relief on account of the payments made by them although the transfers in their favour turned out to be void or voidable.

In *Janki Prasad Singh* v. *Baldeo Prasad* (32) the plaintiff's own purchase was fictitious and inoperative. Here it is his vendor's purchase that failed.

In *Karuppan Ambalagaran* v. *Sakuth Levval* (21) it was recognised by Ayling, J., at page 77* and by Tyabji, J., at page 81* that a sale may be invalid and fraudulent, but a person who pays valuable consideration for it may yet in all good faith make perfectly honest payments to discharge liabilities existing on the property. The sale in that case was collusive and without consideration and was not followed by possession and the payments were made long afterwards with the object of strengthening the colourable purchase. The learned Judges, therefore, refused the equitable relief of subrogation to a person who did not come into Court with clean hands. Here the plaintiff after due notice purchased a title which turned out to be nominal and worthless owing to his vendor's collusion with the original owner, but until that title was tested in Court and

* Pages of 26 M. L. J.—[*Ed.*].

pronounced to be bad he may have honestly believed that the only course open to him for preserving the property and saving any possible right he might be possessed of through his purchase was to stave off attachments and sales by satisfying the first defendant's creditors and when he acted thus he certainly did not intend to do it gratuitously for the first defendant's benefit. I am of opinion that the first objection fails

Coming now to the question of limitation; the important thing is to see what is the starting point from which limitation began to run on the plaintiff's cause of action. In his plaint he puts it on February 14th, 1913, when the High Court dismissed his second appeal. But this is not supportable in view of the Privy Council decision in *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (*Juscurn Boid*) (1) which laid down the principle that when an appeal to a superior Court only results in the decree appealed against being confirmed in India there is no interruption in the running of time calculated from the date of the original decree. For the purposes of execution Art. 182 of the Limitation Act especially provides for the final decree of the Appellate Court forming a starting point and the decision in *Viswanatha Sastri* v. *Sitalakshmi Ammal* (3) dealt with an application for execution. The case in *Sarvthama Row* v. *Chinnasami Pillai* (5) was decided before the Privy Council case in *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (*Juscurn Boid*) (1) was published in this country and cannot be followed so far as it lays down a different principle from that propounded by the superior Tribunal. Similarly, with *Rajagopalan* v. *Tirupanunthal Tambiran* (4). *Mahamed Ali Sheriff* v. *Budharaju Venkatapathi Raju* (2) which was later than *Sarvothama Row* v. *Chinnasami Pillai* (5) followed *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (*Juscurn Boid*) (1). I propose to proceed as the Judicial Committee proceeded in *Hanuman Kamat* v. *Hanuman Mandur* (6), and take either of two alternative Article when it is doubtful which of the two is more appropriate to the facts of the case.

Now, whether the appropriate Article in the present suit is Art. 97, which applies to suits for money paid upon a consideration which afterwards fails or whether Art. 62 applies, the period of limitation in either case is only three years and the starting point in the first alternative is the Subordinate Court's judgment (Exhibit P) dated July 12th, 1911, which dismissed the plaintiff's suit for possession with the observation that his claim to be reimbursed for the debts he paid for the defendant must be separately adjusted, and in the other alternative is the date of payment of each of the debts. The last payment was on November 26th, 1912, and this suit which was instituted on February 17th, 1916, is time-barred whether three years are reckoned from July 12th, 1911, or November 26th 1912.

It appears from *Arunachala* v. *Ramasami* (41) and the *Secretary of State for India* v. *Venkayya* (13) that a lessee or purchaser who gets possession on the strength of a registered contract and is subsequently evicted for want of title in his lessor or vendor has six years from the date of his dispossession under Art. 11 to sue for damages for breach of the title for quiet enjoyment: but if, from the inception, the vendor had no title to convey and the vendee never gets possession, the starting point of limitation, in the opinion of Seshagiri Iyer, J. in *Subbaraya* v. *Rajagopala* (10), is the date of the sale. The present suit was brought within six years of the plaintiff's losing possession on 31st August 1911 in consequence of the First Court's decree being reversed on appeal.

But this suit is not one for damages or for return of the purchase-money, so far as first defendant is concerned, and there is no privity of contract between the plaintiff and first defendant for such a suit to lie.

Lastly, an attempt has been made to bring the plaintiff's case within Art. 132 which gives a period of 12 years from the date of money charged upon immoveable property becoming due. But the plaintiff is not the holder of a charge upon the suit property. If he was in possession and was about to be evicted on the suit

(41) 25 Ind. Cas. 618; 38 M. 117; 1 L. W. 849 27 M. L. J. 517; 16 M. L. T. 397;

of the real owner, the Court might as an equitable relief direct in its decree that on the decree-holder first paying him the cost incurred by him in redeeming the mortgages that existed on the land, delivery of possesson should be given. There would be no limitation against an equitable claim of this sort being set up as a defence to a suit for possession. That, however, is not the plaintiff's position in this suit. Again, the plaintiff has no rights under section 95 of the Transfer of Property Act as a purchaser of the equity of redemption, as it has been found that what he purchased was a sham title, and thus he does notstand on the footing of a mortgagor.

The case of *Rajha of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz* (17) must be distinguished on the ground that there the plaintiff was a co-sharer with those whose revenue charges he paid off and could take advantage of section 82 of the Transfer of Property Act and of the fact that under sections 2 and 44 of Act II of 1864 a statutory charge was created upon every portion of the land in the joint estate. In *Narayana Kutti Goundan* v. *Pechiammal* (26) no question of limitation arose.

When one person pays off a debt which another is bound to pay the ordinary relief that the Courts can give is a personal decree against the defendant for money had and received as section 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. In the cases above quoted where equitable charges were given, that in *Syamalarayudu* v. *Subbarayudu* (27) was probably under section 82, Transfer of Property Act, but no provision of law is cited. *Chama Swami* v. *Padala Anandu* (25) speaks of an equity to re-payment, not an equitable right to a charge. In *Palamalai Mudaliyar* v. *South Indian Export Company* (28) the defendant was the transferee and it was made conditional on plaintiff's getting a decree setting aside the mortgage that he should reimburse the defendant. Apart from the legal position, the plaintiff's case has little or no merits. In spite of warning he made a speculative purchase from a person who, as it turned out, had no legal title. When plaintiff's case failed in the appeal to the Court which had the final determination of question of fact, he had three years to recover the money he had wasted in paying the debts of another. He chose to await the issue of an appeal to the High Court on a point of law which did not exist. After that appeal failed, one year and five months still remained within which he might have brought this suit. But he waited till three years all but three days had elapsed from the High Court's decree and now finds he is too late.

In the result, the memorandum of objections of respondents Nos. 1 to 3 is allowed with costs, and the suit (Original Suit No. 49 of 1916) is dismissed with the costs of first, second, third and fourth, seventh and 14th defendents (one set but) the decree will stand as against 13th defendant's legal representative as he did not appeal. Appeal Nos. 239 of 1918 is dismissed with costs of respondents Nos. 1 to 4. No order is necessary on fourth respondent's memorandum of objections.

IN APPEAL NO. 166 OF 1918.

This is an appeal by 13th defendant against the direction in the decree for the recovery from him of the sum of Rs. 800 paid to him at the date of his sale by the plaintiff and interest thereon. Assuming that upon valid sales of immoveable property there is an implied covenant for quiet enjoyment between the vendor and the vendee in this case we have found that the sale-deed (Exhibit B) conveyed no title and that the vendee was aware of its defects. There was, therefore, no lawful and enforceable contract of sale and further no implied covenant attached to such an agreement. The plaintiff is only entitled to a return of the money paid by him on a consideration that failed and even if he had six years under Art. 116 as the contract was registered, this suit having been instituted more than six years after Exhibit B must fail. The appeal is allowed. The plaintiff will pay the costs of 13th defendant. The 13th defendant will pay the costs of first defendant.

Devadoss, J.—In Appeal No. 166, 13th defendant is the appellant. In Appeal No. 239 the plaintiff is the appellant.

The first defendant has filed a memorandum of objections in Appeal No. 239.

The facts are: the first defendant executed a sale-deed in favour of the 13th defendant, Exhibit A, on 20th January 1907 in respect of the plaint properties. The 13th defendant sold the plaint properties to the plaintiff by Exhibit B on 22nd August 1908. The plaintiff filed a suit, Appeal Suit No. 3 of 1909, for possession, alleging that the first defendant harvested the crops in February 1907 and that he should be given possession of the property sold to him by the 13th defendant under Exhibit B and prayed for an injunction restraining the defendant from committing waste or interfering with his possession. The plaint was filed on 22nd December 1908 and is marked as Exhibit II in this case. The defendant in the said suit, who is the first defendant herein, pleaded that the sale in favour of Gopala Iyengar, the 13th defendant herein, was a nominal sale, that it was not given effect to and that Gopala Iyengar was not entitled to sell the property to the plaintiff and the plaintiff purchased it with the knowledge that Exhibit A, the sale-deed, evidenced a transaction not intended to be given effect to and was only intended as a shield against the creditors of the first defendant. The District Munsif of Srirangam decreed the plaintiff's suit holding that Exhibit A was a real transaction and that the plaintiff acquired a good title under Exhibit B and that possession should be handed over to the plaintiff. His judgment is marked Exhibit O. On appeal the Subordinate Judge of Trichinopoly held that Exhibit A was a nominal transaction not intended to be given effect to and it had not been given effect to and that the plaintiff purchased the plaint properties under Exhibit B in spite of notice to him seven or eight months previous to the date of Exhibit B of the fact that Exhibit A was a nominal sale. His judgment is marked Exhibit P. Against the judgment the plaintiff preferred a second appeal to the High Court which was dismissed on 14th February 1913.

The plaintiff in this suit sues for the recovery of certain sums of money said to have been paid by him to discharge encumbrances on the property and he asks for a charge on the plaint property in respect of those items.

The Subordinate Judge has given a decree in favour of the plaintiff as regards the major portion of his claim and has dismissed the suit as regards the rest. Appeal No. 166 is by the 13th defendant who objects to a certain item being decreed against him. Appeal No. 239 is by the plaintiff who appeals against that portion of the decree of the Subordinate Judge which disallows a portion of his claim.

The memorandum of objections by the first defendant is against the decree passed against him in respect of the sums alleged to have been paid by the plaintiff in accordance with the sale-deed, Exhibit B.

As the main question in these appeals is the liability of the plaint property for the amounts said to have been paid by the plaintiff in order to discharge the encumbrances on it, the memorandum of objections was heard first. Upon the decision in the affimative of the question whether the plaintiff is entitled to claim the amounts paid by him in order to discharge the encumbrances on it depend the other questions, namely, the amount that he would be entitled to and the persons who would be liable to pay the amount.

A few facts are nececssary in order to make the contentions clear. Exhibit A was executed on 23rd January 1907 and Exhibit B on 22nd August 1908. The suit by the plaintiff in Original Suit No. 3 of 1909 (plaint marked Exhibit II) was filed on 22nd December 1908. The judgment of the District Munsif was on 20th January 1910. The judgment in appeal was on 12th July 1911. The judgment of the High Court in second appeal was on 14th February 1913 and the plaint in the present case was filed on 17th February 1916.

Mr. Srinivasa Gopala Chariar on behalf of the first defendant contends that the claim is barred under Art. 97 of the Limitation Act and that even if Art. 62 is held applicable the claim would likewise be barred. The payments were made by the plaintiff as follows: Rs. 1,000 at 7 A. M. on 26th January 1910 (*Vide* Exhibit [illegible]), Rs. 830 was paid on the same date *Vide* Exhibit C (1), Rs. 300 on 18th February

1910 *Vide* Exhibit M, Rs. 188 on 23rd March 1910 *Vide* Exhibit G, Rs. 350 on 10th February 1910 *Vide* Exhibit H and Rs. 399 on 26th November 1912 *Vide* Exhibit E.

The Subordinate Judge has held that the plaintiff's claim is not barred by limitation on the ground that time began to run only from the date of the judgment of the High Court in second appeal. This is clearly wrong. In *Hukum Chand Bold* v. *Pirthichand Lal Chowdhury* (*Juscurn Boid*) (1) their Lordships of the Privy Council have held that time began to run from the date of the decree which deprived the plaintiff of the consideration given or paid by him. To quote their Lordships' words: "Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentaton of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal." Time, therefore, began to run in this case from the date of Exhibit P, the judgment in appeal reversing the decree of the District Munsif, and in order to claim money paid upon an existing consideration which afterwards failed the suit should have been brought within three years of that date. The payments having been made more than three years before the date of the present suit, the claim is barred. It is unnecessary to pursue this question further as Art. 97 has no application to the facts of the present case. There is no privity of contract between the plaintiff and the first defendant. The plaintiff did not give any consideration to the first defendant for any sale. Mr. Rangaswamy Iyengar, who appears for the plaintiff, has conceded that his case did not fall within Art. 97 of the Limitation Act. Art. 62 cannot have any application to the present case as the plaintiff does not pretend that the defendant received any amount for the use of the plaintiff, and Art. 61 can have no application as the plaintiff did not pay any money for the defendant.

Mr. Rangaswamy Iyengar for the plaintiff contends that his client has paid off certain encumbrances on the property which had been created by the first defendant and he, therefore, in equity is entitled to be paid those sums on the security of the plaint property burden on which he relieved. His case is that though Exhibit A was a nominal sale not intended to be given effect to, yet Exhibit B was a real transaction, though with the knowledge of the nature of Exhibit A, and the plaintiff wanted to support his title by paying off encumbrances as he was anxious to get a good title to the plaint property. He further contends that in any event the payments being made by him after he obtained the decree of a Civil Court in his favour he was entitled to discharge the burden on the property inasmuch as his title was declared by a Court of Law, and that even though that title was negatived in appeal he is entitled to be reimbursed the amounts which he paid during the time that decree was in force. He further contends that in respect of those sums he should be treated as having a charge on the property, and the period of limitation being 12 years for enforcing a charge no question of limitation arises in this case. The learned Subordinate Judge held in appeal—*Vide* Exhibit P—that Exhibit A was a nominal transaction and that the plaintiff was aware of the nature of the transaction evidenced by Exhibit A and, therefore, he was not entitled to any relief. Exhibit VII is a very important document which is a letter sent by the first defendant by registered post to the plaintiff on 18th May 1908. Therein he distinctly told the plaintiff that on account of the misunderstandings between him and the plaintiff he was trying to cause loss to him by getting a re-sale from Srirangam Ammanji Gopala Iyengar of his lands mentioned in the sale-deed which he had executed to the aforesaid person and which was not enforceable and had not been given effect to and that it was not at all proper to try to cause loss thereby and he intimated to the plaintiff that in case either he or any other person through him got a sale-deed executed, he should not be bound thereby and that he should be liable for the loss and expenses

etc., that might be incurred thereby. With the knowledge conveyed by Exhibit VII the plaintiff purchased the plaint property under Exhibit B on 22nd August 1908. In his evidence before the lower Court the plaintiff admits that he received notice, Exhibit VII, three months before he bought the property under Exhibit B, that he did not give any reply to it, that he knew that his vendor, the 13th defendant, had not possession of the property and that the first defendant was in possession of the property. It may be safely held, therefore, that the plaintiff had knowledge, constructive or express, of all the circumstances attendant upon the execution of Exhibit A and of the circumstances that preceded and followed. When a man makes no enquiry or wilfully abstains from enquiry, the law presumes that he had knowledge of all the facts which an honest enquiry would have laid bare. In these circumstances, it cannot be contended for a moment that the plaintiff is a *bona fide* purchaser. His object, as stated by the Subordinate Judge, was to get the plaint property by hook or by crook. It appears the plaintiff bought the property for Rs. 5,000 undertaking to discharge certain encumbrances on the property which the 13th defendant had undertaken to discharge by reason of Exhibit A. The consideration for Exhibit B is the same as that for Exhibit A and there is also evidence that the plaintiff is a person who gambles in litigation, and he and the 13th defendant and one Sambasiva Iyer seem to have been friends who were in the habit of entering into speculative transactions. The plaintiff cannot, therefore, be held to have made any payments *bona fide* for the purpose of preserving the property from execution proceedings for the benefit of the first defendant. His sole object seems to have been to put up a claim for the plaint property by means fair or foul. In order to claim payments made to discharge encumbrances on the property the plaintiff must show that he was not a volunteer and that he did not make payments officiously. The *onus* is strongly upon him to show his *bona fide* and I am not prepared to hold that he paid these amounts *bona fide*. *Symalarayudu* v. *Subbarayudu* (27) is quoted for the purpose of supporting the contention that the plaintiff, though not a *bona fide* purchaser, was entitled to be re-paid the amount that he spent in saving the property from execution proceedings. The facts of that case are not similar to those of the present. There *A* agreed to sell his property to *C* and then he sold the property by a subsequent conveyance to *D*. *D*. in order to secure priority got the sale-deed antedated and paid off the mortgage in favour of *B*. The learned Judges observe: "We fail to see in this circumstance anything to affect the validity of the payment which was, no doubt, made by the plaintiff for the purpose of strengthening his own claim. The plaintiff's illegal act in antedating his sale-deed also for the purpose of supporting his title does not vitiate the payment subsequently made, and which in itself was legal. There was, therefore, no want of *bona fides*, and certainly no fraud." There the sale was only a voidable sale. The sale in favour of *D* was a real transaction and was good till *C* moved in the matter and, therefore, when a person who has got a defeasible title makes the payment for the purpose of saving the property in his possession, he is entitled to be paid the amounts which he spent for saving the property. In *Chama Swami* v. *Padala Anandu* (25) it was held that if a purchaser of land, while in possession of the land purchased, pays off an encumbrance on it, he is entitled when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off. The learned Judges observe: "The American Courts apply to cases of this kind an equitable doctrine of subrogation borrowed from the Civil Law, and when equity requires it allow persons paying off mortgages on properties which do not belong to them to be subrogated to the rights of the original mortgagees. This right of subrogation is not extended to mere volunteers who pay off other people's debts without having any concern in them." The learned Judges make it quite clear that the equitable doctrine of subrogation can have no application on volunteers or persons whose conduct is officious. The plaintiff is only a volunteer for he knew that his vendor had no title at all and that

the sale-deed, Exhibit, A, was a sham transaction; and by his taking conveyance from the 13th defendant he cannot be said to have acquired any right to the property when his own vendor had not the shadow of a title to it. If the plaintiff had a voidable or defeasible title he might bring himself within the principle of the decisions in *Syamalarayudu* v. *Subbarayudu* (27) and *Chama Swami* v. *Padala Anandu* (25). The Courts do not always make a distinction between a void and a voidable sale and a transaction which is only a sham one. A void sale can never be made good. A voidable sale is good till it is avoided. But a sham or nominal transaction is no transaction at all and is a mere waste paper. In *Palamalai Mudaliyar* v. *South Indian Export Company* (28) the transferee was a *bona fide* transferee and though the sale was avoided under section 53 of the Transfer of Property Act, yet he was entitled to a charge for the amount spent by him in discharging the mortgage. In that case the transferee had a voidable title which is a good title till it was avoided and the payment by him to discharge any incumbrance on the property during the time he was in possession if it was a *pro tanto* relief of the burden existing on the property and as such the person who defeats his title should in equity pay or make good the amount paid by the transferee during the time his title was considered good. The same principle is applicable to cases of conveyances which are voidable under sections 55 and 56 of the Presidency Towns Insolvency Act. Where a person has paid off certain encumbrances during the time when his title was unchallenged he could in equity claim to stand in the position of the creditor whom has paid. In *Karuppan Ambalagaran* v. *Sakuth Levvai* (21). Ayling, J., after referring to *Syamalarayudu* v. *Subbarayudu* (27) and *Palamalai Mudaliyar* v. *South Indian Export Company* (28) says: "But a perusal of the judgments in these cases shows that in each the person claiming subrogation was at the time of making payment a transferee of the property for valuable consideration. He may have been guilty of fraud or misconduct in connection with the transfer which might render it voidable at the instance of another party; but he had paid consideration for the transfer and was possessed at the time he discharged the mortgage of a substantial interest in the property. The payments for which subrogation was claimed were necessary to protect that interest. This, as it seems to me, is a very real distinction between those cases and the present one." In the case before him and Tyabji, J. the transferee under a nominal sale was held not to be entitled to be subrogated to the rights of the mortgagee as against the purchaser in execution of the decree against the transferor.

The next contention that the plaintiff is entitled to be paid the amounts which he paid for the discharge of encumbrances between the dates of Exhibit C and Exhibit P requires careful consideration. By Exhibit O the plaintiff's title to the property was recognised by a Court of Law and till that decree was upset it was good and could not be questioned by anybody. The question whether payments made subsequent to this for relieving the burden on the property could be considered as payments by persons interested in the property is not free from difficulty. It is urged with some show of reason that when a person gets a decree in his favour from a Civil Court the payments made by him subsequent to the decree must be considered *bona fide*, for he has an interest to support and protect and if there is no appeal the plaintiff would be entitled to the property. This contention cannot hold good for the reason that a Civil Court does not confer a right to property which the person does not possess but only declares or enforces a right which he has. Except in a few cases where decrees themselves are a source of title, the decrees of Civil Courts cannot confer a title to immoveable property which a person does not possess and, therefore, when the plaintiff had no title at all to the plaint property the mere fact that a Civil Court considered or held that he had title would not confer an interest which he did not possess before, and he must have known that the District Munsif's decree in his favour dated 26th January 1910 was liable to be appealed against and that any payments made by him before the decree was upset were made

by him with the knowledge that the decree might be upset on appeal. Therefore, I do not consider that the plaintiff paid the amounts detailed above *bona fide* with a view to protect the property. It is urged that there was an execution taken out by the mortgagee against the mortgaged property and the plaintiff paid the execution creditor to save the property from execution. It must be remembered that the plaintiff was a mere volunteer and could not claim to have done it by virtue of an interest in the property. In *Nadhamuni Iyyan* v. *Appu Odayan* (22) my learned brother (Mr. Justice Spencer) has laid down that a person who claims an equitable relief ought to come into Court with clean hands; and the plaintiff cannot be said to have come into Court with clean hands. *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz* (17) is relied upon by the plaintiff for the contention that he had an interest in the property and that the payment made by him to protect that interest is a *bona fide* payment. The case at the foot-note does not help the plaintiff as there is clear finding that the plaintiff could not be regarded as having paid Krishana Bathan's debt officiously or as a mere volunteer. In *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (42) the Privy Council held that by the acts of the parties and their relations to one another the money borrowed by an agent for a principal for the purchase of property was rendered a charge upon the latter in the principal's hands he being the real purchaser, and the lender of money, which he advanced to the nominal purchaser of property who was the agent of the real purchaser, was entitled to a declaration that the advance of money for the purchase formed an equitable charge upon the property against the real purchaser. In that case the transactions were all real transactions and there was no contention that the payments were not made *bona fide*. In *Ammani Ammal* v. *Ramaswami Naidu* (24) Sadasiva Aiyar and Napier, JJ., held that a purchaser in good faith who buys from the guardian of a minor the property which he considers to be the property of the guardian and not that of the minor was entitled to be paid back the amounts which he paid for discharging the encumbrances on the minor's property when the sale was set aside. It was held that the principle of subrogation did not apply to the case of volunteer or stranger. This equitable principle of subrogation need not be considered in this case for the plaintiff does not contend that he is entitled to stand in the shoes of the mortgagee. All that he claims is, to be entitled to be paid back the sums he paid and to have a charge on the property for those sums. In *Radha Madhub Samonta* v. *Sasti Ram Sen* (40) it was held that the payment of rent made by a purchaser of a *putni taluk* after the decision of the first Court in a suit brought by the defaulting *putnidars* for the setting aside of the *putni* sale by which it was held that the sale was invalid, and during the pendency of an appeal preferred not by the plaintiff, the auction-purchaser, but by the *zemindar* at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of section 69 of the Contract Act. Here, again, there was a real sale and the purchaser was bound to protect or rather was entitled to protect his interest in the property by payment of the amount due to the *zemindar*; otherwise the holding might have been lost, and the person who had the real title to the property was in equity bound to reimburse the person who had only voidable title the amount which he paid for preserving the property from sale for arrears of rent. In the present case the plaintiff does not seek to defend his title against an attack but wants a decree against the property for money paid by him to discharge certain encumbrances. He cannot be said to have acquired a charge by reason of payments made by him when he had no title to the property. He was a mere adventurer who was trying to make out a claim for property to which he knew he had absolutely no title. A man cannot create a charge by paying off an encumbrance on a property when he had not any subsisting interest in the

(42) 15 A. 304; 20 I. A. 108; 6 Sar. P. C. J. 7; 17 Ind. Jur. 320; 7 Ind. Dec. (N. S.) 911 (P.C.).

property. The law in certain cases creates a charge when payments are made by persons who are either bound or entitled to pay off certain amounts, but the law does not favour an adventurer who makes payments only for the purpose of creating a title to property. The case in *Janki Prasad Singh* v. *Baldeo Prasad* (32) is very similar to the present. There the plaintiffs alleging themselves to be the purchasers of the mortgagee's rights in certain land, paid the amount of a decree against the mortgagee in order to save the property from sale. But if had already been found in a suit under section 283 of the Code of Civil Procedure that the sale to the plaintiffs was fictitious and inoperative. It was held that the plaintiffs were not entitled to recover the amount paid from their vendors. The learned Judges quote with approval a passage from the judgment of Straight, J., in *Chedi Lal* v. *Bhagwan Das* (43): "If the plaintiffs, as mere volunteers, chose to put their hands into their pockets and to pay a sum of money not for the defendants but for themselves, that was their own look-out, and they cannot now claim the benefits of section 70." The plaintiff in the present case has made the payments as a mere speculator and in the gamble for the title he must lose what he has paid because he was a mere volunteer and made the payments officiously in order to make out a title to property when he had absolutely no title to it.

I, therefore, hold that the plaintiff cannot claim any amount alleged to have been paid by him for relieving the burden on the plaint property from the first defendant either personally or on the security of the plaint property. The plaintiff's suit so far as the first defendant is concerned must be dismissed with costs.

The memorandum of objections by respondents Nos. 1 to 3 is allowed with costs. The appeal of the plaintiff (No. 239 of 1918) is also dismissed with costs of defendants Nos. 1 to 4. In the result the plaintiff's suit is dismissed with costs against all but the legal representatives of the 13th defendant.

I concur in allowing Appeal Suit No. 166 of 1918 with costs against the plaintiff. The appellant will pay the costs of the first defendant.

These appeals having been set down to be spoken to this day on the minutes of the decree and respondents Nos. 18 and 19 in Appeal No. 239 of 1918 having filed Civil Miscellaneous Petition No. 1442 of 1912 under O. XLVII, r. 1, Civil Procedure Code, praying for a review of the judgment of this Court, dated the 30th March 1922, in the said Appeal No. 239 of 1918, the Court delivered the following

JUDGMENT.—Although the 13th defendant did not appeal or join in the memorandum of objections filed by respondents Nos. 1 to 3, the decree for sale of properties under O. XXXIV, r. 4 was a common decree against all the defendants: and the personal decree for any surplus that might remain due after the sale of the properties was a common decree against defendants Nos. 1 and 13.

Having held that the cause of action arising out of the sale dated 22nd August 1908 to the plaintiff was barred by limitation as against first defendant, we cannot, in the light of section 3 of the Limitation Act, shut our eyes to the fact that it is also time-barred against 13th defendant and his legal representatives and under O. XLI, r. 33 must, to be consistent, make the same order in their case.

The decree has not yet been signed and we have no doubt that there is "sufficient reason" within the meaning of O. XLVII, r. 1 to review our decision apart from our inherent powers under section 151, Civil Procedure Code. [See *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (44), *Debi Bakhsh Singh* v. *Habib Shah* (45).] See also *In re St. Nazaire Co.* (46) and *In re Suffield and Watts, Ex parte Brown* (47) as to the powers of a Court to correct an error obvious on the face of the record before the order has been completed.

(43) 11 A. 234; A. W. N. (1889) 67; 6 Ind. Dec. (N. S.) 577.

(44) 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar P. C. J. 656; 20 E. R. 701.

(45) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 19; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 151 (P. C.).

(46) (1879) 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854.

(47) (1888) 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; 5 Morrell 83.

If the Court of first instance had taken the correct view on the question of limitation it would have dismissed the suit, as laid, against all the defendants; and under section 107 (2), Civil Procedure Code, we have the same powers and duties to see that a proper and workable decree is passed as the original Court had. The decree of the lower Court provided that if any surplus remained after the sale of the properties the plaintiff should have a decree against defendants Nos. 1 to 13 for the recovery of such amounts.

Now that the decree for sale has been held to be not maintainable, we should in effect be allowing the nature of the case to be changed, and in effect be varying the decree of the lower Court as against 13th defendant if we were to allow a personal decree to be made against the 13th defendant's legal representatives, irrespective of the charge.

The words in our judgment "but the decree will stand as against 13th defendant's legal representative as he did not appeal" will now be expunged and the decree will be drawn up as if they had never existed.

V. N. V.
K. S. D. & N. H. *Decree modified.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS Nos. 9, 10, 11 AND 12 OF 1922.

July 8, 1922.

Present:—Mr. Ashworth, J. C.

JUGNU KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

RUDRA PARTAB SINGH—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s 138 (2), (3) (4), applicability of—Partition of lessee mahals—Joint responsibility of lessees for rent, whether affected.

Sub-sections (2), (3) and (4) of section 138 of the U. P. Land Revenue Act merely refer to the responsibility for revenue to Government *inter se* of the owners of a *taluqdari mahal* which is partitioned and do not refer to the responsibility *inter se* of the lessees for rent to the *taluqdar* in the various lessee *mahals*. A perfect partition of a lessee *mahal* does not put an end to the joint responsibility of the lessees for rent to the *taluqdar*. [p. 430, col. 1]

Rudra Partap Singh v. *Sikandar Khan*, 39 Ind. Cas. 598; 10 O. C. 104, followed.

Appeal against a decree of the District Judge, Fyzabad, dated the 1st February 1922, confirming a decree of the Assistant Collector of the First Class, Sultanpur, dated the 7th June 1921.

Messrs. *A. P. Sen* and *Haider Hussain*, for the Appellants.

Messrs. *M. Wasim*, *Radha Krishna* and *Raj Kumar*, for the Respondent.

JUDGMENT.—These four second appeals arise out of suits brought by the plaintiff for arrears of rent against a large number of defendants claiming a decree jointly and severally against each of them. The ancestors of the defendants obtained a decree from the Settlement Court giving them perpetual lessee rights, and rent was fixed by the Settlement Court. In 1914 as between the various lessees a perfect partition was effected. The result was that this *taluqdari mahal* was divided into nine *mahals* and sub-divided further into 30 or 40 *pattis* altogether. Both the lower Courts have given a decree in favour of the *taluqdar* against the whole body of lessees making them jointly and severally responsible. In this appeal it is contended that such a decree was not a proper one inasmuch as it ignored the partition of the *taluqdari mahal* into lessee *mahals* and into *pattis*. Reliance is placed by the appellants on the provisions of section 138, sub-sections (3) and (4), of the Revenue Act. There provision is made for the limitation of the joint responsibility of co-sharers in any newly constituted *mahal* to the rent due in respect of that *mahal* only. It is also provided that all objections to distribution of the lands of a *mahal* into new *mahals* at the time of partition shall be decided by the Collector. Now, there can be no doubt that the responsibility of the co-sharers mentioned in these provisions would support the contention.

But in the case of *Rudra Partap Singh* v. *Sikandar Khan* (1) it was held by Mr. Lindsay that sub-sections (2), (3) and (4) of section 138 merely referred to the responsibility for revenue to Government *inter se* of the owners of a *taluqdari mahal* which was partitioned and did not refer to the responsibility *inter se*, of the lessees for rent to the *taluqdar* in the various lessee *mahals*. The appellants, on the other hand, rely on a decision of Mr. Daniels which is not yet published in Rent Appeal No. 36 of 1920 decided on 25th November 1920. In this case Mr. Daniels held that the main object of a perfect partition, whether of proprietary or under-proprietary right (incidentally he would have held or also of *mahals* held by lessees) is to put an end to joint responsibility. I can find nothing in the Act to support the view that when lessees get their land partitioned off into a *mahal* such partition can affect their relations with the *taluqdar*. Mr. Lindsay has given good reasons for holding that this was not intended. It is true that Mr. Lindsay mentioned as one of the arguments against his view that his interpretation could not be a correct one in view of the provisions which were contained in the old Oudh Revenue Act of 1876 with respect to the partition of these *mahals*. I may say that the provisions of the Act of 1876, so far from furnishing any reason against the correctness of Mr. Lindsay's decision, appear to me to support it. In section 101 of the Act of 1876 there was a provision that the person to whom rent was payable might present an application objecting to the distribution of the rental over the several parts into which the *mahal* has been divided. Now this provision has been omitted in the present Act and it must have been omitted with a purpose. The present Act merely provides that all objections shall be decided by the Collector. It makes no reference to objections by the person to whom the rent is payable. It would, therefore, appear that in the new Act there was no intention to suggest that such objections could be made.

Another ground of appeal is that the appellants have in certain cases been made liable for rent due during the time of their predecessors-in-interest. It is urged that they could only be made liable for such rent to the extent of the assets in their hands derived from their predecessors-in-interest and it is stated that there is no evidence to show that there are any assets in their hands. I find, however, that there was no clear pleading by the appellants in the lower Courts that they were not liable on this ground. If they had set up this plea clearly in the lower Courts it is probable that the Court of first hearing would have fixed an issue as to whether there were assets in their hands. What happened was that the plaintiff, framing his plaint on the *khewat*, included as defendants some persons who had died. On discovering that he had done this he had the names of their successors entered. If the successors had wished to plead that they were not liable for the rents accruing during the time of their predecessors, they should clearly have pleaded the fact. What they did object to was the joinder as defendants of persons who were dead and this defect is cured by the substitution of their names.

For the above reasons, I dismiss these four appeals with costs.

J. K. *Appeals dismissed.*

(1) 39 Ind. Cas. 598; 20 O. C. 104.

PATNA HIGH COURT.

CIVIL REVISION No. 58 OF 1923.

June 4, 1923.

Present :—Mr. Justice Foster.

EAST INDIAN RAILWAY COMPANY AND ANOTHER—DEFENDANTS—PETITIONERS

versus

Firm SUKHDEO DAS GOBARDHAN DAS—PLAINTIFFS—OPPOSITE PARTY.

Pleadings—Suit against Railway Campany for compensation for non-delivery of goods—Risk Note—Failure to plead loss in written statement—Presumption—Loss, whether can be proved during trial—Evidence Act (I of 1872), ss. 103, 106, 114.

If a Railway Company wishes to escape the ordinary liability of a bailee, it should expressly plead the execution of a Risk Note and the loss of goods. [p. 432, col. 1.]

Plaintiff sued a Railway Company for compensation for non-delivery of a bale of cotton consigned to him through the defendant Companies. The Company filed a written statement but there was no assertion or suggestion that the bale of cotton had been lost or destroyed. During trial the Company offered to produce evidence to show that the goods had been lost;

Held, (1) that such evidence could not be admitted; [p. 431, col. 2.]

(2) that a presumption could legally be raised that the goods were still in the possession of the Railway Company and that the plaintiff's case rested upon this presumption; [p. 431, col. 2.]

(3) that the defendant Company not having pleaded loss or special agreement was liable to compensate the plaintiff for the loss he had suffered. [p. 432, col. 1.]

Great Indian Peninsular Railway Company v. *Messrs. Jitan Ram-Nirmal Ram*, 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R (Pat.) 285; 2 Pat. 442, distinguished.

Smith Limited v. *Great Western Railway Company*, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. T. 359, followed.

If a conclusion of fact is arrived at by construction of law, the conclusion must involve a question of law. [p. 432, col. 2.]

Revision from an order of the Additional Subordinate Judge, Gaya, dated the 15th November 1922.

Messrs. *N. C. Sinha* and *N. C. Ghose*, for the Petitioners.

Mr. *S. Dayal*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act. The plaintiff's suit has been decreed for Rs. 490 being compensation for non-delivery of a bale of cotton consigned to the plaintiff at Gaya from Bombay through the defendant Railway Companies. Each of the defendants has filed a written statement. In the plaint it is asserted that out of 16 bales only 15 bales were delivered to the plaintiff's firm under open delivery and one bale was not delivered and was found to be wanting. In the written statement there is no assertion from which it can be gathered even by impliction that the bale of cotton has been lost nor is there on the record any correspondence between the parties which would show that the Railway has ever asserted that the goods have been lost or destroyed. When the case came into the Court the defendant Railway Company offered to produce evidence to show that the goods have been lost. But the learned Subordinate Judge held that such evidence could not be then admitted. In my opinion he was right in this decision. The plaintiff had expressly described his claim as one of compensation for non-delivery and the defendant had not pleaded that the goods had been lost. So, in my opinion, the plaintiffs' case would rest upon the presumption that the goods were still in the possession of the Railway Company, a presumption which may be raised, I think, under the terms of section 114 Illustration (*d*) of the Evidence Act.

The reason why it is so necessary to lay stress on the pleadings in such a case as this is that the plaintiff has already a very heavy burden indeed and that it would not be just to increase that burden by excusing the defendant from the necessity of pleading loss or destruction. It may be loss in the ordinary sense of the word or it may be destruction by fire or water or vermin, but the plaintiff should at least have some knowledge that the goods are no longer in the Company's possession. This is not a mere technicality as will be seen by giving careful attention to the terms of section 72 of the Indian Railways Act. The scheme of that section is that there is a general rule at the commencement imposing a general liability of a considerable extent upon the Indian Railways and then follows a particular rule as to exemption from the extensive provisions of the first sub-section. Applying the facts of the present case to that sec-

tion we see that the plaintiff's firm would ordinarily have the advantage of the terms of section 152 of the Contract Act and he also has the benefit of calling the bailee to account under section 161 of the same Act. The large liability of the defendant indicated in the first sub-section must apply to the present case unless the defendants plead and show that their responsibility has been limited by lawful agreement. The necessity for pleading and showing the special facts is only in accordance with the principles of sections 103 and 106 of the Evidence Act. From this it follows that it is necessary expressly to plead loss and the execution of a Risk Note, if the defendant wishes to escape the ordinary liabilities of a bailee. The special facts of this case distinguish them from the case which has been quoted to me. *Great Indian Peninsular Railway Company* v. *Messrs. Jitan Ram-Nirmal Ram* (1). The facts correspond rather to those of the Irish case [*Curran* v. *Midland Great Western Railway Company of Ireland* (2)] which was discussed and distinguished in *Smith Limited* v. *Great Western Railway Company* (3). At page 178 Lord Buckmaster shows that the case then decided was treated as one in which loss had been pleaded and shown and the Irish case was distinguished by Lord Buck master and Lord Wrenbury in this very respect.

In my opinion there has been no misapplication of the law in the trial of this case in so far as it has been confined to the question of compensation for non-delivery by a bailee of property baled.

Holding this opinion, it follows that I must find also that the Risk Note has no bearing upon the case, inasmuch as it could only be pertinent if loss had been pleaded. But I must refer to the Risk Note in connection with one question which was raised on behalf of the applicants, the Railway Company. The learned Subordinate Judge held that the liability of the plaintiff to the stipulation of the Risk Note had not been established inasmuch as it was not shown that the broker, Balaji, when he signed the Risk Note, signed under the authority of the plaintiff. This cannot be regarded merely as a question of fact, for it is obvious that if a conclusion of fact is arrived at by construction of law, the conclusion must involve a question of law. Now, in this case it may be accepted that the plaintiff had not expressly authorised Balaji to sign for him in Bombay but the question still remains whether the plaintiff is bound by Balaji's signature. Balaji made the whole contract of bailment which included promises as to carriage, payment of consideration and so on. The plaintiff has adopted for the purposes of the suit a large part of this contract of bailment but wishes to discard the portion which is inconvenient to his case. He has in fact adopted the whole contract of bailment and he has in fact ratified the action of Balaji in contracting on his behalf. It is for this reason that the law constructively fixes him, on the principle of section 196, Contract Act, with the same liability as if he has given his authority before the contract. But, as I have said before, this question does not, in my opinion, arise in the present case. The application is dismissed with costs Hearing fee three gold *mohurs*.

K. S. D. & N. H. *Application dismissed.*

(1) 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat 82; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442.
(2) (1896) 2 Ir. R. 183: 2 Ir. L. R. 739.
(3) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359

GULZAR JAN *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1137 OF 1922.
January 8, 1923.
Present:—Mr. Justice Abdul Raoof.
Musammat GULZAR JAN AND ANOTHER—PETITIONERS
versus
EMPEROR—RESPONDENT.

Punjab Municipal Act (III of 1911), ss 33, 152, 228—Powers under s. 152, whether can be delegated—Authority to prosecute, form and contents of.

A Municipal Committee cannot delegate its powers under section 152 of the Punjab Municipal Act to its President.

An authority conferred by a Municipal Committee on any person to conduct prosecutions on behalf of the Committee must, by virtue of the Explanation to section 228 of the Punjab Municipal Act, be in writing and contain full and complete particulars of the person to be prosecuted.

Case reported by the District Magistrate, Jullundur, with his No. 3205 of July 1922.

FACTS.—Two prostitutes, Gulzar Jan and Sardar Jan, were prosecuted under section 152 of the Municipal Act for failing to obey an order issued by the Municipal Committee, Jullundur, to remove themselves from a certain locality of the town. An exactly similar case was instituted against other prostitutes in the Court of Khan Muhammad Zaman Khan, Magistrate, Third Class, Jullundur, and resulted in a conviction, which was, however, upset on appeal by Rai Sahib Lala Shankar Das on the 13th of June 1922. The grounds on which the appeal was accepted were based on points of law, and I give below the relevant portion of the Appellate Magistrate's decision in the case:—

"The Counsel for the appellant has, however, raised an objection to the effect that the notice in question was bad in law as it was not issued by the Committee itself as required under section 152 (1) of the Municipal Act, III of 1911. Counsel for the Municipality urges that the Committee had delegated its powers to the President in its resolution No. 63 of 20th June of 1921, and that consequently as the notice in dispute was issued by the President, it was quite legal and valid. But on reading section 33 of the Act it appears that the Committee could not delegate its powers under section 152 of the Municipal Act. Over and above this, it further appears, on reading section 33, that the Second Class Committee cannot delegate any of its powers to the President or so without the previous sanction of the Commissioner, and similarly the First Class Committee without the sanction of the Local Government. In this case no such sanction was ever obtained for delegating such powers to the President, hence notice issued by the latter cannot be held as legal. Another objection in this case is that the authority given to Pir Bakhsh for prosecuting people on behalf of the Committee is also not within the purview of law.

"In Explanation under section 228 of the Municipal Act it is provided that the authority in all cases must be in writing. This written authority is explained at page 230 of the Act, edited by Hari Chand, M.A., LL. B., in his first edition of 1913. According to this Explanation complete and full particulars of the person to be prosecuted should be given with the authority so given to the prosecutor. As this procedure was not adopted in this case hence the prosecutor who appeared in Court was not properly and legally authorised to conduct this case. Under these circumstances there remains no doubt that the prosecution of the appellant was not legal and under the strict sense of law."

GROUNDS:— I agree with this interpretation of the law, it has also been accepted by the Municipal Committee, Jullundur, which has consequently issued revised notices in accordance with a resolution passed at their last meeting. For these reasons, this case is forwarded to the High Court with a recommendation that the sentences and fines passed on the appellants, Gulzar Jan and Sardar Jan, should be remitted.

JUDGMENT.—For the reasons stated by the District Magistrate I accept his recommendation and set aside the convictions and sentences.

Z. K. *Revision accepted.*

EMPEROR *v.* NAROTAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 23 OF 1922.

March 30, 1922.

Present:—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

EMPEROR—COMPLAINANT—APPELLANT

versus

NAROTAM AND OTHERS—ACCUSED—RESPONDENTS.

Practice—Criminal trial—Previous litigation—Enmity—Prosecution evidence—Immaterial discrepancies or improbabilities—Failure to call all prosecution witnesses—Inference.

The fact that the accused have been generally the complainants or plaintiffs in some previous criminal and other proceedings started against the complainants would not justify the Magistrate to consider that the complainants had reasons of enmity against the accused and not *vice versa*. The bitterness engendered by litigation, especially criminal litigation, is a mutual bitterness and the prosecuting or successful party is likely to feel just as embittered against the prosecuted or unsuccessful party as *vice versa*. [p. 436 col. 1.]

It is not permissible to reject the prosecution evidence owing to immaterial discrepancies or improbabilities, unless some alternative explanation of the facts of the case is forthcoming. [p. 435, col. 2.]

There must be some limit to the number of witnesses which a Court is asked to hear, and no argument favourable to the accused can be based on the fact that one or two witnesses, out of a large number, have not been called by the prosecution. [p. 440, col. 2.]

Appeal against an order of the Sessions Judge, Hardoi, dated the 24th November 1921.

The Government Pleader, for the Appellants.

Mr. *Ram Prasad*, for the Respondents.

JUDGMENT.—This is a Government appeal against the acquittal by the Sessions Judge of Hardoi of four brothers, Narotam Parshad, Gaya Parshad, Jadu Nath and Sri Ram *alias* Ramai, who were charged with murdering one Meharban Pasi, with causing grevious hurt to *Musammat* Dumra, his wife, and with causing simple hurt to Chunni, his brother. The prosecution case is, that the village of Garhi Newada belongs to two sets of Thakurs—Ganga Bakhsh Singh Thakur on the one hand and Kesri Singh, Baldeo and Munan Thakurs on the other hand. Ganga Bakhsh Singh, whose tenant and *raiyat* the deceased was, had leased his *zemindari* rights to Gajodhar of Mahmudpur, while Kesri Singh, etc., have leased their rights to the four accused and a fifth brother named Bishan Narain who have during the last year come to reside at Newada close to Rawatpur. There had been a long pre-existing feud between the family of the deceased and the accused. On the 15th of August the deceased Meharban and his brother, Chunni, were ploughing the former's field at Rawatpur. The four accused were passing the field with their cattle and, after taking their cattle to the jungle, came back and remonstrated with the deceased saying, "We have already told you not to plough the field but you won't listen." Meharban's reply was that the accused had nothing to do with the field. Thereupon Narotam Parshad, accused, ordered his brothers to beat Meharban. They all four attacked him simultaneously and after knocking him down ran at Chunni. He, however, after warding off their blows with his *lathi*, managed to escape. The four accused then returned to where Meharban was lying and began to beat him again. His wife, *Musammat* Dumra, had come to the field with some water and tried to protect her husband but she received a *lathi* blow breaking her fore-arm. This was said to have happened three *gharis* after sunrise which means about 6-20 A. M. The *marpit* was wtitnessed by three boys, Hem Nath, Surj Bali and Gurdin, who were grazing cattle at the edge of the field and of these Gurdin, the eldest, a boy of 10, has given evidence. It is also said that Mithu Pasi, Baideo Gadariya, Rustam Fakir and Jawahir Pasi ran up from the neighbouring fields or jungle and by their arrival caused the accused to decamp. Of these Baideo and Jawahir have been examined as witnesses. After the accused had run off in an easterly direction a cot was obtained and the deceased Meharban carried to his house where he shortly expired. Before he died the brother, Chunni, hastened off to report at the *thana* and met Chheda, *Chaukidar*. Chheda, *Chaukidar*, returned to Rawatpur to see the injured man and caught Chunni up later. The medical evidence proves that Meharban's death was caused by fracture of the skull. The report was made at the Beriguaj Police station after 3 P. M., the distance of the

Police station from Rawatpur being 10 miles. The Sub-Inspector Police arrived at the village of Garhi where the deceased lived at 8 P. M., in the evening. The accused were not arrested until a month after the murder. Their arrest came about by reason of a petition put in by them before the Sub-Divisional Officer at Hardoi on the 8th September in which they complained that they had been falsely implicated by the relations of the deceased and that the Police were getting up false evidence against them. When the Sub-Divisional Officer received this petition the *chalan* of these persons had not come before him and so he merely ordered that a report should be asked for from the Police and the accused were not arrested. It is not clear whether they were present when the petition was handed in or whether it was handed in by a *mukhtar*.

The learned Sessions Judge has acquitted the accused on the following grounds. As to motive, he finds that the deceased and his brother had much more reason to bear enmity against the accused than *vice versa* and that the alleged occasion of the assault on Meharban, namely, that the accused told him to desist from ploughing a field with which they, the accused, had no concern, was ridiculous. As to the evidence, he found discrepancies between Chunni's first report and his evidence in Court. He also found that there was too much delay in making the first report. He could not accept the reason given by *Musammat* Dunna for being at the field. He found that the reason given by the witness Baldeo for being near the field could not be true, that Jawahir, witness, could have seen nothing from the place where he stated that he was and had displayed much contradiction in his evidence, that Gurdin, the boy, would have run away if anything had happened before seeing what he said that he saw, that Gangu Ghamar, witness, had contradicted his evidence before the Committing Magistrate and that Badri Singh, witness, made his statement so late after the occurrence to the Sub-Inspector that he could not be believed. He also found that Gangu Bakhsh Singh, *zemindar* of half the village, who was admittedly on bad terms with the accused, had influenced the investigation and that the Investigating Officer, Lal Singh, had tried to conceal this fact. The accused produced evidence of an *alibi*. The learned Sessions Judge, while not being prepared to declare that this *alibi* was established, held that there were certain facts which made it difficult to reject it and considered that the defence witnesses were more worthy of credit than the prosecution witnesses. It may be stated that the learned Sessions Judge has nowhere referred in his judgment to the explanation of the accused as to how Meharban came by his death. This explanation is to be found in the cross-examination of *Musammat* Dunna. *Musammat* Dunna was asked whether her husband had suspected any intimacy between herself and her husband's brother, Chunni, and whether a fight had taken place between her husband and Chunni. Both these things she denied. In their examination by the Committing Magistrate, Gaya Parshad was the only one of the accused who set up this explanation of Meharban's death. Jadunath merely said that he had been killed at night. The other two accused said that they did not know how Meharban was injured. Before the Sessions Judge they added nothing to their statements made before the Committing Magistrate. There is not an atom of evidence produced by the accused to support any theory of the death of Meharban being due to a fight between himself and the witness, Chunni.

To sum up, the reason for the acquittal of the accused by the learned Sessions Judge is certain inconsistencies and improbabilities in the evidence of the prosecution witnesses which made him feel suspicious of the prosecution story and the difficulty of finding any explanation justifying the rejection of the *alibi*. It does not seem to have occurred to the learned Sessions Judge that if the prosecution is to be rejected in substance there must be some other explanation of the injuries to the deceased, to his wife and to his brother. Failing any such explanation, it is not permissible to reject the prosecution evidence owing to immaterial discrepancies or improbabilities. It is also for the accused to prove their *alibi*.

The best course in dealing with this case appears to us to be to consider in detail

the reasons given by the Sessions Judge for distrusting the prosecution witnesses and then to go on to consider the resasons given by Counsel for the accused in this Court. The latter course is necessary as in this Court Counsel for the accused have largely thrown over the reasons set forth by the Sessions Judge for disbelieving the evidence and have adopted other reasons. After consideration of these two sets of reasons we should be able to state what, in our opinion, are the facts on which we can rely for coming to a decision on the truth of the prosecution story. We will then proceed to examine the defence evidence and determine whether the evidence in support of an *alibi* is sufficiently strong to rebut the prosecution evidence or to throw doubt on it.

The Sessions Judge begins with the motive. The prosecution evidence is, that the past relations of Meharban with the accused were such as to predispose the accused to quarrel with the deceased on the slightest provocation. These past relations certainly prove that the accused had strong reasons for disliking Meharban, Param, the father of the deceased, was a witness for Ganga Bakhsh Singh in proceedings in which both Ganga Bakhsh Singh and the accused were bound over. This happened three years ago. Again, Param was ejected by the accused from a certain field. Again, the accused stopped Param from erecting a wall in the village. The deceased Meharban had complained against the accused for *marpit* and the case went up on appeal. It appears to us that the fact that the accused persons in these criminal and other proceedings have been, generally, the complainants or plaintiffs would not justify the Sessions Judge's remark that the deceased had reasons for enmity against the accused and not *vice versa*. The bitterness engendered by litigation, especially criminal litigation, is a mutual bitterness and the prosecuting or successful party is likely to feel just as embittered against the prosecuted and the unsuccessful party as *vice versa*. These former cases are not produced by the prosecution as the direct occasion for the alleged assault on the deceased. The occasion was the fact of Meharban cultivating his field against the wishes of the accused. The Sessions Judge suggests that the accused would never be so foolish as to tell Meharban not to cultivate a field in which they had no interest. The prosecution case is that the accused told Meharban to leave this field fallow as it was needed for grazing. It is easily imaginable that the accused having taken a *thcka* of half the village felt that they had a right to interfere in the general arrangements for cultivation. Having done so, they, true Brahmans, might well be sensitive as to any discourtesy shown to them by a Pasi such as the deceased was. It is not clear whether the field which the deceased was cultivating had previously been left fallow for grazing or not. There is nothing, however, extraordinary in the accused trying to pick a quarrel on very little foundation. The fact that on the morning in question they are said to have brought their cattle will, if believed, corroborate the statement of Chunni that the accused objected to the ploughing of the field. It appears to us that this field, being on the edge of the jungle, could with difficulty be protected from the encroachment of cattle and that for this reason it was generally left fallow. The accused may well have taken in bad part the fact of Meharban cultivating it and the evidence goes to show that they had told him not to do so some few days before. On the morning in question they found him cultivating it in total disregard of their request and it is possible that they were exceedingly annoyed. It is well-known that serious quarrels arise out of very little when the relations between the parties have previously been strained. We are of opinion that there is nothing impossible or even improbable in the prosecution story as to motive though it may be admitted that the accused had no strong reason for objecting to the cultivation of the field.

As to the evidence of the witnesses, the Sessions Judge objects that there are discrepancies in Chunni's deposition which cannot be reconciled with the first report and the witness's statement before the Committing Magistrate. These discrepancies appear to us to be very immaterial. Chunni stated in the report at the *thana* that abusive language was exchanged previous to the assault while in his evidence

before the Sessions Judge he has stated. "We did not abuse the accused." Before the Deputy Magistrate he stated that he went on warding off the *lathi* blows of the accused and ran towards the village, while before the Sessions Judge he states that all four accused struck at him and he received their four *lathi* blows on his *lathi* and then ran off. In the Initial Report he stated that they were saved by the arrival of Mitthu, Baldeo Rustam and Jawahir and others, while before the Sessions Judge he stated that no one intervened on account of fear. There is no discrepancy between these two statements. It appears that there was no active intervention but the accused decamped upon the arrival of persons from the neighbourhood. Before the Deputy Magistrate, the witness said that he called out the names of the accused —a fact which he denies before the Sessions Judge. Before the Deputy Magistrate he said that the accused had brought many suits for arrears against him while before the Sessions Judge he admitted that there was only one such suit. None of these discrepancies appear to us to be of importance or to affect the material facts of the case. The Sessions Judge has also commented on what he regards as improbability in Chunni's statement. He thinks it improbable that Chunni could have warded off four *lathi* blows by holding his *lathi* horizontally and merely have escaped with an injury to his finger. It is obvious that we cannot demand great accuracy of Chunni in a description of the attack on him. His evidence in substance is that he was attacked and managed to escape by holding up his *lathi* as a protection to his head. The blows at Chunni may have been misdirected. We are unable to understand the Sessions Judge when he says that the doctor was unable to explain how the injury to the witness's finger was caused. We think that the injury to the finger may well have been caused as Chunni himself describes, namely, by a *lathi* glancing down his own *lathi*. Again, the Sessions Judge says that it is a wonder that Chunni managed to escape at all. It is not certain that the accused in attacking Chunni had any other object than to keep him from interfering to save his brother. It was the brother who had insulted the accused by arguing with them. In any case, Chunni did escape and the fact that he escaped cannot be said to seriously throw any doubt on the prosecution story.

The Sessions Judge was impressed by the weakness of the explanation given by *Musammat* Dunna for being present at the field. It is to be noticed that after she had given 20 lines of her evidence the Sessions Judge himself, previous to any cross-examination on behalf of the accused, questioned the woman as to why she brought water to the field at that early hour. Her explanation was that her husband used to ease himself on his way to the field and that when his hands were occupied with his plough and the goad he desired her to bring a *lota* of water for the ceremonial rinsing of his mouth. We are unable to see that there is anything incredible in this explanation. He states, however, "It was necessary to invent an excuse for bringing *Musammat* Dunna on the scene of the occurrence, because she had an injury which could not have possibly been concealed." It is somewhat curious to find this sentence, which seems to admit the possibility or probability of the version hinted at in the cross-examination of *Musammat* Dunna by the accused, namely, that there had been a fight between the two brothers, standing alone in a judgment which nowhere else refers to that version. We would state here that we are quite unable to place the slightest belief in this suggested version in the absence of any attempt to prove the same by any other means than by this single question to *Musammat* Dunna. The accused, being *hekedars* in possession of half the village, must have been able to get some evidence of any such quarrel if such a quarrel had taken place. We hold, whether *Musammat* Dunna's explanation of being on the field is true or not, there is no reason to suspect the truth of the statement that she was on her husband's field that morning. One cannot reduce to a system the habits of wives in respect of such a matter as bringing a *lota* of water to their husband's fields. The deceased may have liked her to do so even though it is unusual for wives to bring a drink of water so early in the morning to the field. As to Baldeo, P. W. No. 3, his reason for

being near the field was that he was breaking in his bullocks on a roadway connecting the village of Sujehta with the field in dispute. The Sessions Judge says that this statement is proved to be a lie by the evidence of Badri Parshad, *Patwari*, D. W. No. 10 (he is by error in the judgment called a prosecution witness), as he proves that there is no such roadway from village Sujehta. Looking at the evidence of this *Patwari*, we do not find that he denies there being a roadway. What the *Patwari* says is: "There is a particular path from Sujehta to the field in question at Rawatpur but one can go there by the boundaries of fields." So, at the most, the *Patwari* appears to call the roadway a path. A road is shown in the map filed by the prosecution as passing one side of the field, its existence is maintained by nearly all the prosecution witnesses. It seems that this road passes to Sujehta and is the road referred to by Baldeo. As to the evidence of Jawahir, P. W. No. 4, the Sessions Judge says that, while he professes to have witnessed the occurrence from the field of one Nanhu, it is satisfactorily proved by the defence that a *dhak* jungle intervenes between this field and the field where the murder is said to have taken place. He goes on to say that the evidence of Badri Parshad proves that it was a physical impossibility for Jawahir to have seen anything going on in Meharban's field. It is clear, however, from the evidence of Jawahir, read with that of the Sub-Inspector and the evidence of the *Patwari*, that the statement of Jawahir was that he ran up from this field and stood in the *usar* where the *dhak* trees existed. The Sub-Inspector stated that the *dhak* trees are not so situated as to prevent a person being seen when walking among them. It follows that a person could easily see out of this *dhak* jungle what was going on in the field beyond. The *Patwari* has not denied this. He has only said that the *dhak* trees are thick and tall. Coming to the evidence of Gurdin, the Sessions Judge states: "It is difficult to believe that a boy of that age could have kept his head in the alleged manner and not run away from fear." This appears to be an unwarrantable inference. We consider it much more likely that the boy would watch from a safe distance what was happening. Boys could always trust to their legs to get away when the occurrence ceased to interest them. Again, it is said that the boy is the nephew of Param, father of Meharban, and the other two boys have not been produced. This boy was only 10 years old and the next elder boy was 8. It is quite reasonable for the prosecution to have produced the eldest of the three boys. As to Ganu Chamar, who speaks of having seen the accused come the first thing in the morning with their cattle, the Sessions Judge objects to his evidence inasmuch as before the Committing Magistrate he admitted having told the Sub-Inspector that he knew nothing about the occurrence. In this he appears to be speaking the literal truth. When the Sub-Inspector said that he wanted to examine him he naturally would say that he never saw the fight. He is not a witness to the fight but a witness to the arrival of the accused with their cattle early in the morning at a stage antecedent to the fight. The witness Badri Singh states that he saw Narotam that very morning at Sandila 10 miles away. The importance of his evidence is to rebut the story of the accused that they have been in Hardoi continuously from the day preceding the murder. As to this man's evidence the Sessions Judge makes two criticisms. The first criticism is that the man himself told the Sub-Inspector that Narotam could not be the culprit. Now it is clear that this witness did not conceive the possibility which, of course, was present to the Sub-Inspector of Narotam having been at Sandila the same morning as the murder was committed and yet having taken part in the murder. The Sub-Inspector has shown us that this was possible. We fail, therefore, to understand why the hastily expressed opinion of the witness that Narotam could not be the culprit owing to a certain reason should have any value when the reason expressed is proved to be inconclusive. Again, the Sessions Judge says that Badri Singh was not examined by the Sub-Inspector till 25th of August, that is, ten days after the occurrence. This is explained by the Sub-Inspector satisfactorily. He states that he happened to meet Badri

Singh by chance at a place called Hatiaran and he told him about Meharban having been killed. The Sub-Inspector, although he denied it, must have mentioned that Narotam, etc., were implicated. Badri Singh at once objected that they could not have done it as he had seen them so far away on the morning in question—a statement, the relevancy of which the Sub-Inspector at once perceived. Badri Singh himself says that his statement was made four or five days after the occurrence and that the Sub-Inspector recorded his statement at once. It is probable that Badri Singh had no accurate memory of the days that had elapsed after an event of which he had only hearsay knowledge. There is, however, a more cogent reason than those stated by the Sessions Judge for distrusting the evidence of Badri Singh, namely, that the Chamar who was driving him when he states that he saw Narotam and Sri Ram has not been called as a witness to corroborate him. The Sub-Inspector probably thought that the corroboration of a master by his servant would not count for much. Again, the Sessions Judge thinks that he has caught the Sub-Inspector tripping when he said that Ganga Bakhsh Singh, the declared enemy of the accused, never met him in the course of the investigation. The Sessions Judge relies on the statement of Tika Ram, constable, who says that Ganga Bakhsh Singh wa sent for by the Inspector eight or ten days after the commencement of the investigation. Now Tika Ram does not say that Ganga Bakhsh Singh was sent for by the Sub-Inspector and the Sub-Inspector's evidence shows that the Inspector came after his investigation was practically concluded in order to test it. The Sessions Judge's criticism, therefore, of the Sub-Inspector on this point entirely breaks down. The Sessions Judge states that the witnesses for the prosecution have stated that their depositions were recorded by the Police in some cases several days after the occurrence, but the Investigating Officer has deposed that he recorded most of the statements the same evening. On looking at the evidence of the Sub-Inspector we find that the only justification for this remark is that Chunni has said that his statement was recorded on the third day, that is the Wednesday, whereas the Sub-Inspector says that he recorded it the same evening. Whether Chunni is right or the Sub-Inspector, the matter is of small importance as Chunni's evidence had already been fixed by his initial report.

There are one or two extraordinary statements in the judgment of the lower Court. The Sessions Judge seems to think that the fact that in the Initial Report Chunni never suggested that the accused intended to kill Meharban and that it was only after the death of Meharban that the idea occurred to the prosecution to charge the accused with murder throws doubt on the prosecution. It is difficult to understand what the Sessions Judge means. As Chunni left his brother before the brother was dead he could not possibly charge the accused with murder. On the other hand, the prosecution could not possibly charge the accused with anything but murder inasmuch as Meharban died as a result of his injuries. Again, it is the prosecution story that Narotam made his way after the murder on horseback to Sandila where he took a train to Hardoi and there is evidence that he was seen on horseback. The Civil Surgeon stated, "can run but not swiftly. If he has acquired practice of riding a horse, he can ride, otherwise not." The Sessions Judge says: "There is no evidence to show that Narotam has practised riding and, therefore, the presumption is that he is unable to ride. The evidence of Badri Singh that he saw Narotam riding a black horse becomes, therefore, incredible." This reason appears to us to be below discussion. Commenting on the medical evidence, the Sessions Judge finds that Chunni's story that the four accused simultaneously struck at the head of Meharban is not borne out by the medical evidence, which is to the effect that both wounds on the skull could have been caused by a single blow. As stated above it is not reasonable to pin down Chunni to a meticulous accuracy in his account of the blows. He was in a state of extereme excitement and fright.

Such being the reasons of the Sessions Judge for rejecting the prosecution evidence, we are not surprised that in this appeal Counsel for the accused did not place serious reliance on those reasons

but they have been unable to point out any alternative reasons of weight for distrusting the prosecution story. Considerable reliance has been placed by the Counsel on the length of time which elapsed between the making of the report and the alleged hour of the occurrence but this criticism is based on a curious logical fallacy. Any delay in making the report can only be of importance if something happened at the field of Meharban. The defence story is that nothing happened at his field. There can be no delay between the making of a report as to an alleged event and an event which never took place. The argument indeed tacitly admits that something took place in the field of Meharban. Of a like nature is the criticism that the witness Chunni must have gone to Ganga Bakhsh Singh, his *zemindar*, on the way inasmuch as Ganga Bakhsh Singh lived quite close to the road. If the defence had admitted that some occurrence took place in suggesting that it was distorted at the instance of Ganga Bakhsh Singh, There is no force in the argument in the face of the denial of anything occurring at the field of Meharban.

Again, Counsel for the appellants rely upon the unfavourable remarks made by the Sessions Judge as to the demeanour of several of the prosecution witnesses. The first of these remarks appears in the record of the evidence of *Musammat* Dunia where the Judge has remarked: "The witness is giving trouble. She repeats her own story frequently but it is with difficulty that an answer to a question put to her by Counsel is given." Again, as to the boy Gurdin, it is stated: "The witness repeats that he does not know. He knows well the story that has been taught to him but he feels at sea as soon as a new point is put to him for which he has not been prepared." Again, as to the evidence of Param, aged 70, father of the deceased, the remark occurs: "Reluctant witness who goes on saying he does not know because he does not like to give any answer. This he says before he has heard the question." There do not appear to be any remarks of the demeanour on the other witnesses. It appears, therefore, that the witnesses whose demeanour was objected to were a woman, a boy of 10 and an old man of 70. We are not disposed to attach much importance to any hesitation in the witness-box displayed by villagers of this character. Param's evidence was not of importance.

Another point taken by the Counsel for the accused is that two witnesses sent up by the Police were not heard by the Court, namely, Rustam and Hem Nath, eye-witnesses of the occurrence. There must be some limit to the number of witnesses which a Court is asked to hear and we are not disposed to base any argument favourable to the accused on the fact that these two writnesses had not been called. The Sessions Judge could have called them himself if he had wanted to.

Lastly, it is urged that this is not a case where an Appellate Court should reverse an acquittal by a Sessions Judge. Various rulings have been cited to us, but the only conclusion to be derived from them is that an Appellate Court will not lightly reverse an acquittal by a Sessions Judge. We shall deal later on with the evidence for the defence. So far as the evidence for the prosecution goes, we have shown that the reasons set forth by the Sessions Judge for disbelieving it or distrusting it are not valid ones. We have pointed out that the alternative explanation for the death of Meharban suggested by the defence is not supported by any evidence and that it is incredible that in the event of there being any foundation for this explanation no evidence would be available to the accused.

It remains now to consider the defence evidence with greater particularity than it has been considered by the Sessions Judge.

There can be no doubt that on the day when the murder is alleged to have taken place a plaint was filed in a civil suit before the Munsif of Hardoi signed by Narotam and Gaya Parshad, accused, and Bishan Narain, the fifth brother, who is not an accused. This plaint was in respect of a certain debt. The file shows that the defendant confessed judgment subsequently in Court. As the suit was filed on the last day of limitation it is common ground that the plaint could have been filed up to 4 P. M. It has been urged by Counsel for the accused that the plaintiffs would not

have risked coming into Hardoi on the last day of limitation. We think that this argument is of little force. The brother, Bishan Narain, is not an accused and may have prepared everything. We know that litigants often leave everything to the last date. The defence, however, produces Hamid Husain, a petition-writer, who says that he wrote the plaint on 15th August at 9 or 9-30 A. M. in the presence of Narotam, Gaya Parshad and Bishan Narain. We are not prepared to place any great reliance on the evidence of this witness so far as he says that Narotam and Gaya Parshad were present at 9 A. M. for general reasons which we shall disclose later. Likewise, the stamp-vendor, Ram Parshad, says, that he sold the stamp on the plaint at 10 or 11 A. M. The same remark applies to the evidence of this man and to thatof another stamp-vendor, Anant Ram. This plaint would only support the *alibi* of Narotam and Gaya Parshad, but the defence have also put in evidence which pretends to show that all five brothers executed an agreement to refer a certain dispute among themselves to arbitration about 10 or 10-30 A. M. on the same day, the 15th of August. The same scribe, Hamid Husain, deposes to having faired out the agreement and the stamp-vendor, Anant Ram, deposes to having sold the stamp at about the same time. This agreement was never before the Sessions Judge. The defence story was that their Pleader, Babu Ram Prasad, lost it when he was preparing their evidence. Babu Ram Prasad can only say that he thinks that he had the agreement given him and that when he looked for it he could not find it. It is possible that the agreement was handed to Babu Ram Prasad. On the other hand, it is possible that the accused averred that they had handed it to him and that Babu Ram Prasad is not in a position to deny that they had done so. He says that Bishan Narain came to his house with a few witnesses and tried to give him the paper but he returned it. Later on, when he was inspecting some maps he thinks somebody gave it to him. Assuming, however, that an agreement in the terms alleged by the defence between the five brothers was executed at some time on the 15th of August, we do not think that the fact will assist the accused. The agreement is one of a very unusual character. The terms of it are given in Exhibit 2. It sets forth that a mortgage had been executed in favour of Jadu Nath, one of the brothers, and that his name alone stood in the *khewat* as mortgagee in possession, whereas the mortgage-money had been paid by all the five brothers. It goes on to say that, as a measure of foresight, it seemed expedient that the *khewat* should be prepared in the names of all the mortgagees with equal shares to which Jadu Nath had various objections which could not be settled mutually. No evidence has been tendered by the defence to show that there had been any disputes between the brothers in respect of this mortgage-money or that there could be any dispute. The agreement purports to refer the dispute to two persons. These persons are not produced to show that their consent to arbitrate was ever asked. It seems extremely unlikely that the five brothers would go the length of executing a formal agreement in a dispute of this kind which could be settled, if it existed, without any formal agreement. The agreement has a decided appearance of having been hastily invented for the very purpose of supporting the *alibi*.

It is to be noted that the defence case is, that all the accused were in Hardoi from the previous day. One witness is produced who says that he travelled by train with them, but his evidence has only to be read to show that it is unreliable. The witness said that he often came to Hardoi but could not specify any other day on which he came to Hardoi nor the passengers with whom he travelled. It was for the appellants to prove their *alibi*. They have not attempted to show at what time the one train in the day by which they could have arrived at Hardoi before the afternoon actually left Sandila. The time in the time-table of the Oudh and Rohilkhand Railway is 9-8, but it is a passanger train and it might be couple of hours late. The probability of its being an hour late is greater than of its being punctual. Any of the accused who went by horseback could very easily have arrived in time and it would have even been possible to travel by foot from the alleged scene of

the murder to Sandila Railway Station in the interval between 6-30 (this is allowing ten minutes for the commission of the offence) and the time when the train left Sandila. An alternative route indeed was possible as the accused might have travelled across country to the station of Balamau from which the train leaves an hour later than from Sandila and which like Sandila is about 10 miles from Kalyanmal (the main village round which Newada, Garhi, Rawatpur and Sujehta lie).

It is not only, however, on the score that the accused have failed to fill in what we may call the interstices of the evidence required to substantiate their *alibi* that we would reject the *alibi* but also on the following general gorund. The occurrence in question took place on the 15th of August. It would be natural to suppose that if the accused were in possession of such clear evidence of an *alibi* they would have at once on hearing that they were implicated in the murder (and they must have heard that they were implicated within a day or two of the occurrence) gone to a Magistrate and stated that they had been wrongly implicated and could give convincing proof of their absence at the time. Even if they had, before doing this, wished to verify the precise witnesses who would prove their *alibi* it was inevitable that they would at once go to these witnesses while their memory was fresh and ask them to bear in mind that they had been with them at 9 to 10 A. M. on the 15th. So far from having done this we find that the scribe, Hamid Hasain, puts as 8 to 10 days after the 15th when Narotam came and told him that there was a case against him. The stamp-vendor, Ram Parshad, says that it was 2 or 4 days after the 15th of August that Narotam came to him. The other stamp-vendor, Annant Ram, does not mention when Narotam came to him, Ram Lal, the Pleader's clerk, says that it was 10 or 12 days after the 15th that Narotam told him of his being implicated in the murder. We should have expected the accused at once on hearing that they were implicated to have gone and fixed the memory of the witnesses all on one day and on a date very close to the 15th. Their not having done so does raise a suspicion that these witnesses were approached at various times during the course of making up a defence. This suspicion is strengthened by the fact of the application of the four accused on the 8th September to the Sub-Divisional Officer. They waited apparently so long after the 15th of August because before that time they had not got sufficient evidence on which they thought they could make up a defence case. In conclusion, the defence evidence cannot be relied upon to prove definitely anything further than that, some time before 4 P. M. on the 15th, Narotam and Gaya Parshad presented a plaint to the *munsarim* of the Munsif of Hardoi. Their presence at Hardoi in the afternoon was compatible with their having taken part in the murder. The evidence of the prosecution witness, Badri Singh, that he saw Narotam on horseback near Sandila was obtained long before the prosecution could have known the nature of the defence of the accused. It may be objected that there is no evidence how Gaya Parshad and Jadu Nath got from Meharban's field to the Railway Station. It was, however, for these two persons to prove that they could not have got to Hardoi by 4 o'clock. We have given reasons above to show that, in our opinion, it was quite possible. Lastly, the allegation of the *alibi* is scarcely consistent with the suggestion that the murder was committed by some one else and attributed to the accused owing to the enmity of Ganga Bakhsh Singh. Ganga Bakhsh Singh must have known that any such conspiracy would be difficult to carry out in any case even if the accused had been at Newada on the day in question. He would never have attempted the conspiracy attributed to him without ascertaining that the accused were in the neighbourhood on the day. He would easily have come to know if all four accused had been away in Hardoi and would never have risked prosecuting the accused for an offence in one place in the knowledge that a complete *alibi* was available to them.

We are, therefore, of the opinion that the Sessions Judge was wrong in acquitting the accused. As regards the charge under section 302, Indian Penal Code, we do not find that the evidence proves that there was any intention to kill Meharban. We also doubt whether it can be held proved

that the four accused intended to cause him such bodily injury as was likely to cause death or that it was their common intention to cause his death. The medical evidence shows that there was only one wound on the head, and there is nothing to show by which of the accused it was inflicted. Section 149, Indian Penal Code, cannot be invoked as there were only four accused. The only offence we find proved against the accused in respect of the death of Meharban is an offence under section 325, Indian Penal Code. The evidence also does not disclose which of the accused struck Chunni and the woman. The accused could be convicted of causing simple hurt to these persons but it does not seem necessary to convict on such charge.

The result is that we allow the appeal and set aside the acquittal, find all the accused guilty of an offence under section 325, Indian Penal Code, and sentence them to seven years' rigorous imprisonment each.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 127 OF 1922.
June 4, 1923.
Present:—Mr. Justice Kanhaiya Lal.
MAHARAJ PRASAD—OPPOSITE PARTY
versus
EMPEROR—APPLICANT.

Criminal Procedure Code (Act V of 1898) s. 195—Sanction for perjury—Deposition by witness—Locus penitentiae.

A witness is entitled to *locus penitentiae* and an opportunity to correct himself and if, when he gets that opportunity, he re-calls to his mind any fact about which he had made a statement which was not quite accurate a prosecution for perjury in respect of the former statement is not desirable.

Lachhmi Narain v. *Emperor*, 19 Ind. Cas. 712; 16 O. C. 81; 14 Cr. L. J. 280, followed.

No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected if necessary; till then it is open to the witness to qualify or correct any statement.

Civil revision against the order of the Additional Subordinate Judge, Bareilly, dated the 24th of August 1922

Messrs. *Nehal Chand* and *J. M. Banerji*, for the Opposite Party.

Mr. *L. M. Banerji*, for the Crown.

JUDGMENT.—The order passed by the Court below is irregular and cannot be sustained. In a suit for the recovery of money due on a mortgage made by Maharaj Prasad, the mortgagor, Maharaj Prasad, was examined and in the course of his deposition he made certain statements in regard to which the Court below has directed his prosecution. The main question for consideration in that case was, whether the mortgage in question was made for legal necessity. Various questions were put to him about certain other transactions about which he made replies which he had subsequently to modify on a certain account, Exhibit 3, being shown to him. The Court below was of opinion that in saying what he did Maharaj Prasad had deliberately made false statements. But as pointed out in *Lachhmi Narain* v. *Emperor* (1), a witness is entitled to *locus penitentiæ* and an opportunity to correct himself and if, when he gets that opportunity, he recalls to his mind any fact about which he had made a statement which was not quite accurate, a prosecution for perjury will hardly be desirable. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected, if necessary, for, till then, it is open to the witness to qualify any statement or to correct it himself, as this man seems to have done, when he was confronted with a certain account. The statements relied on were, moreover, statements hardly material to the issue before the Court. The order for prosecution does not specify those statements, but refers to another *rubkar* wherein a reference is made to them. Considering all the circumstances, no useful purpose can be served by allowing the prosecution to proceed. The order of the Court below is, therefore, set aside and the proceedings, if any, started in pursuance thereof will be quashed

M. A. A. *Order set aside*

(1) 19 Ind. Cas. 712; 16 O. C. 81; 14 Cr. L. J. 280.

MAHBUB ALI KHAN *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 219 OF 1919.

September 22, 1919.

Present:—Mr. Justice Broadway.

MAHBUB ALI KHAN AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR, THROUGH FATEH MUHAMMAD—COMPLAINANT — RESPONDNET.

Criminal Procedure Code (Act V of 1898), ss. 199, 345, 403—Penal Code (Act XLV of 1860), s. 498—Abduction of married woman—Complaint by person having care of woman—Complainant, whether can compound offence—Acquittal on charge of abduction, whether bars trial on charge of detention.

Although by virtue of section 199 of the Criminal Procedure Code a person having the care of a married woman on behalf of the husband during his absence can prefer a complaint in respect of an offence under section 498 of the Penal Code, the only person who is authorised under section 345 of the Code of Criminal Procedure to compound this offence is the injured husband.

An order of acquittal, therefore, in respect of an offence under section 498 of the Penal Code, which is the result of the offence having been compounded by a complainant other than the husband, is illegal.

An acquittal on a charge of abduction under section 498 of the Penal Code is no bar to the trial of a charge of detention.

Petition, under sections 435 and 439 of the Criminal Procedure Code, for revision of an order of the Magistrate, First Class, Pind Dadan Khan, District Jhelum, dated the 21st December 1918.

Dr. *Nand Lal*, for the Petitioners.

Lala *Hakumat Rai*, for the Respondent.

ORDER.—The facts of this petition are as follows.—Fateh Muhammad Khan, a Naik in the 17th Cavalry, went on service leaving his wife in charge of his mother, *Musammat* Taliabi. During his absence it is alleged that his wife was abducted by Mahbub Ali Khan and others. The abduction is said to have taken place on the 26th December 1916. *Musammat* Taliabi endeavoured to get her daughter-in-law back but failing in this she lodged a complaint under section 498, Indian Penal Code, on the 27th August 1917. On the 16th October 1917 she filed a deed of compromise and the Magistrate passed an order to this effect:—"Complainant does not now wish to proceed with her case. She presents a compromise which I accept as the case is compoundable and acquit the accused." Fateh Muhammad Khan was in Persia and any communication with him was difficult, if not impossible. On return from service he filed, on the 2nd September 1918, a fresh complaint against the same persons charging them with having abducted his wife on the 26th December 1916 and having detained her ever since. The persons accused, the present petitioners, pleaded that under section 403, Criminal Procedure Code, the fresh complaint could not proceed as they had already been acquitted. The learned Magistrate, however, apparently ignored this plea and framed charges against the petitioners who have now come up to this Court on the revision side through Mr. Nand Lal, and I have heard Lala Hakumat Rai on behalf of Fateh Muhammad Khan.

Mr. Nand Lal has referred me to *In the matter of Poona Churn Pal* (1), *Empress* v. *Miyaji Ahmed* (2), *Heera Bai* v. *Framji Bhikaji* (3) and *Thandavan* v. *Perianna* (4) as authorities for the propposition that once a person has been acquitted he cannot be tried again on the same facts. He has also referred me to *Emperor* v. *Bishen Das* (5) and *In re Kuppusami Aiyar* (6), as authorities for the proposition that this Court had power to quash proceedings at this stage. Lala Hakumat Rai in reply has referred me to *Emperor* v. *Sultan Singh* (7), *Queen-Empress* v. *Balwant* (8) and *In re Narayanaswamy Naidu* (9).

(1) 7 C. 447; 3 Ind. Dec. (N. S.) 837.
(2) 3 B. 150; 2 Ind. Dec. (N. S.) 101.
(3) 15 B. 349; 8 Ind Dec. (N. S.) 238.
(4) 14 M. 363; 2 Weir 571; 5 Ind. Dec. (N. S.) 253.
(5) 8 Ind Cas. 1161; 38 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50 P. W. R. 1910 Cr.
(6) 29 Ind. Cas. 109; 39 M. 561; 28 M. L. J. 505; 2 L. W. 468; 17 M. L. T. 398; (1915) M. W. N. 365; 16 Cr. L. J. 477.
(7) 4 Ind. Cas. 24; 31 A. 606; 6 A. L. J. 882; 10 Cr. L. J. 473.
(8) 9 A. 134; A. W. N. (1886) 322; 5 Ind. Dec. (N. S.) 521 (F. B.).
(9) 1 Ind. Cas. 228; 32 M. 229; 5 M. L. T. 233; 9 Cr. L. J. 192; 19 M. L. J. 157 (F. B.).

The Madras case cited is to some extent similar to present matter.

It has to be borne in mind that, although there has been an acquittal, this acquittal was clearly based on an erroneous view of the law, for under section 345 the only person who is authorised to compound an offence under section 498, Indian Penal Code, is the injured husband, although by virtue of section 199, Criminal Procedure Code, *Musammat* Taliabi was competent to lodge the complaint that she did. The order of acquittal, therefore, was clearly erroneous and before proceeding further with their present petition I issue notice under section 439, Criminal Procedure Code, to the petitioners to show cause why the order of acquittal passed on the 16th of October 1917 should not be set aside. The office will fix as early a date as possible. The present petition will come up again on that day.

JUDGMENT.—The material facts of this case are contained in my order of the 17th May 1919 and need not be repeated.

Dr. Nand Lal objected to any interference with the order of acquittal on the ground that a High Court very rarely acts on the revision side in matters of this sort especially after such a lapse of time. Various authorities were cited in support of this contention; they, however, need no discussion as with the principles enunciated in them I am in complete accord. It is, however, by no means clear that the order acquitting the three accused was a legal one. After a careful consideration of the matter I have come to the conclusion that I ought not to interfere with it at this stage. There reamains the question of quashing the present proceedings.

It was argued that as the petitioners have been acquitted of having abducted the woman they cannot be tried again for the same offence. Accepting the order as one of acquittal which is still in force, this contention is correct but the charge does not confine itself to the abduction of the woman but includes a subsequent detention. If it can be proved that the woman is now being detained by the petitioners, I do not think the case is barred. I would, therefore, direct that the Magistrate concerned do consider the question from this aspect of the case and if there is evidence which he believes to establish a present detention to amend the charge accordingly; if there is no such evidence, the plea in bar must prevail. On the merits I myself express no opinion one way or the other. Let the records be returned to the Magistrate accordingly.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 136 OF 1922.
December 5, 1922.
Present:—Mr. Daniels, A. J. C.
Musammat FEROZA JAN—ACCUSED—APPLICANT
versus
MIRZA AMIR ALI—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), s. 195—Evidence Act (I of 1872), s. 91—Civil Procedure Code (Act V of 1908), s. 115, O. XVIII, r. 5, O. XXVI, r. 17—Oudh Laws Act (XVIII of 1886), s. 19—Evidence given before Commissioner—Deposition not read over to witness—Perjury—Sanction to prosecute whether can be granted—Deposition, whether can be proved—Revision—Costs, whether can be allowed.

The provisions of O. XVIII, r. 5 of the Civil Procedure Code are not applicable to Oudh, where corresponding provisions are contained in section 19 of the Oudh Laws Act. [p. 446, col. 2.]

The effect of r. 17 of O. XXVI of the Civil Procedure Code is that the provisions of the Code as in force in Oudh shall apply to witnesses examined on Commission equally with witnesses examined in Court. [p. 446, col. 2.]

Section 19 of the Oudh Laws Act does not require that a deposition shall be read over to the witness, and the same rule applies to witnesses examined on Commission. [p. 446, col. 2.]

A sanction for prosecution, therefore, for perjury granted in respect of a false statement made before a Commissioner appointed by a Court in Oudh, is not invalid merely because the statement in respect of which it is granted was not read over to the witness. [p. 446, col. 2.]

FEROZA JAN v. AMIR ALI.

Where a Commission is addressed to a private person, he is the delegate of the Court issuing the Commission and acts under the authority of that Court and must adopt the procedure of that Court. [p. 446, col. 2.]

A Court in Oudh issued a commission to a private person for the examination of witnesses in Behar. The Commissioner examined the witnesses in accordance with the procedure laid down in section 19 of the Oudh Laws Act, and the depositions of the witnesses were not read over to them:

Held, that the procedure adopted by the Commissioner was perfectly legal. [p. 447, col. 1.]

Obiter:—A deposition which is not read over to a witness does not become inadmissible in evidence owing to that defect. Section 91 of the Evidence Act, even if it covers a deposition, merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. [p. 447, col. 1.]

In re Nalluri Chenchiah, 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296, 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356, 20 Cr. L. J. 379, dissented from.

Elahi Baksha Kazi v. *Emperor*, 45 Ind. Cas. 258; 45 C. 825; 22 C. W. N. 646; 27 C. L. J. 377; 19 Cr. L. J. 498, relied on.

Where sanction for prosecution has been granted or refused by a Civil Court and the High Court is moved in revision, the application falls under section 115 of the Civil Procedure Code, and the High Court can, in disposing of the application, allow costs to the successful party as in any other civil revision. [p. 447, col. 1.]

Musaji v. *Mohammed Walayatullah Khan*, 6 O. C. 216, followed.

Criminal revision against an order of the Sessions Judge, Lucknow, dated the 13th November 1922, upholding that of the Additional Munsif, Lucknow, dated the 25th September 1922.

Messrs. *J. Jackson* and *S. N. Sinha*, for the Applicant.

Mr. *Niamat Ullah*, for the Opposite Party.

JUDGMENT.—This is an application under section 115, Civil Porcedure Code, for revision of an order granted by the learned Additional Munsif of Lucknow, which has been upheld by the learned District Judge. The deposition, in the course of which the false statements are said to have been made, was recorded at Gaya by a Commissioner appointed by the Munsif under O. XXVI. The Commissioner appointed was a local Pleader of Lucknow. The evidence was recorded in accordance with the law of procedure binding on the Oudh Courts and contained in section 19 of the Oudh Laws Act, 1876. This section does not require that a deposition shall be read over to the witness. The substantial point in the revision is that the deposition ought to have been recorded in the manner prescribed by O. XVIII, r. 5, of the Code of Civil Procedure, read with r. 17 of O. XXVI. The section of the Code of Civil Procedure of 1859 which corresponded to O. XVIII, r. 5, of the present Code was repealed as regards Oudh by the Oudh Laws Act and the corresponding provisions of subsequent Codes have never been in force in this Province. At the time of the Oudh Laws Act there was no provision in force laying down the mode in which evidence should be recorded on Commission. Such provisions were inserted in subsequent Codes after the passing of the Oudh Laws Act. Their effect was to assimilate the procedure for recording the Commission evidence with the procedure for recording evidence in Court. This is the rule laid down also by the present Code. Rule 17 of O. XXVI runs.

"The provisions of this Code relating to the .....examination of witnesses.....shall apply to persons required to give evidence.....under this Order."

The reasonable interpretation of this rule is, in my opinion, that which has been accepted by the learned District Judge, namely, that the provisions of the Code as in force in Oudh shall apply to witnesses examined on Commission equally with witnesses examined in Court.

At the close of the argument of the applicant's learned Counsel an additional objection not taken in the grounds of revision was suggested to the effect that as the Commission was executed at Gaya the Commissioner was bound to record the evidence according to the procedure in force in Behar. If the Commission had been addressed to a Court in Behar there might have been much force in this. That Court would no doubt have executed the Commission in accordance with its own procedure. The Commission was, however, directed to a private person at Lucknow. The

Commissioner was, therefore, a delegate of the Court acting under the Court's authority and the procedure adopted by him would naturally be the procedure of the Court from which he derived his authority.

I may add that even if I accepted the applicant's argument on this point it would not conclude the matter. I have been referred to a ruling of the Madras High Court in *In re Nalluri Chenchiah* (1), which held that where a deposition is not read over to a witness the deposition is inadmissible in evidence and no other evidence could be given to prove what the witness said. The view there taken has been disapproved by the Calcutta High Court in *Elahi Baksha Kazi* v. *Emperor* (2). The learned Judges held that section 91 of the Evidence Act, even if it covers a deposition merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. It is objected that these remarks were really *obiter* as the Court found in the case before it that there was no proof that the deposition had not been read over, but Mr. Justice Beachcroft in his concurring judgment rested his decision mainly, if not entirely, on the legal point, and even if the remarks were *obiter* there is nothing to prevent my accepting the reasoning of the judgment which, in my opinion, lays down the correct rule of law as opposed to the view taken in the Madras case. On the facts, there is, no reason to interfere. The result is, that I dismiss the present application with costs.

On the question of costs it has been argued on the authority of *Musaji* v. *Mohammed Walayatullah Khan* (3) that costs cannot be allowed, but at that time the view was taken that an application of this kind did not come under the provisions of section 622 of the Code of Civil Procedure, corresponding to section 115 of the present Code. That view is not now accepted and the case being entertained as a civil revision, there is no reason why costs should not be allowed on the same footing as in any other civil revision.

Application rejected.

Z. K.

(1) 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296; 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356; 20 Cr. L. J. 379.
(2) 45 Ind. Cas. 258; 45 C. 825; 22 C. W. N. 646; 27 C. L. J. 377; 19 Cr. L. J. 498.
(3) 6 Q. C. 236.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 74 OF 1922.
(CRIMINAL REVISION PETITION No. 70 OF 1922.)

May 3, 1922.

Present:—Mr. Justice Ramesam.

A. MAHALAKSHMI AND OTHERS—COUNTER-PETITIONERS—PETITIONERS

versus

P. SUBBARAYADU AND ANOTHER—PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145—Attachment and sale of crops—Proceedings dropped—Order disposing of sale-proceeds.

Where a Magistrate declines to continue proceedings under section 145 of the Criminal Procedure Code in respect of a dispute relating to certain crops on the ground that there is no likelihood of a breach of the peace, he has no jurisdiction to direct that the sale proceeds of the crops attached under the preliminary order should be deposited in Court till one of the parties establishes his right to them in the Civil Court. The proceeds must be restored to the person from whose possession the crops were taken.

Subbarama Aiyar v. *Mariya Pillai*, 24 Ind. Cas. 967; 16 M. L. T. 52; 1 L. W. 493; 15 Cr. L. J. 559; (1914) M. W. N. 798, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Deputy Magistrate, Head-quarters Division, Cocanada, dated 26th October 1921, in M. P. No. 4 of 1921.

Messrs. *G. Lakshamanna* and *Viyanna*, for the Petitioners.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.

DUKHI v. EMPEROR.

FACTS.—Proceedings were instituted under section 145 of the Criminal Procedure Code by the respondent herein who obtained an order of attachment of lands and standing crops; the Magistrate, however, held, on hearing the petitioner, that there was no likelihood of a breach of the peace and refused to take action under the section. He, however, directed, by paragraph 9 of his order, that the proceeds of the sale of crops subsequent to the attachment should be deposited in Court till either of the two parties established his right in the Civil Court. The propriety of this direction was challenged in criminal revision case as being without jurisdiction.

ORDER.—The Magistrate found that there was no likelihood of a breach of the peace and refused to take action under section 145 of the Criminal Procedure Code. If so, he had no jurisdiction to pass the direction in paragraph 9 of his order. It is hereby set aside, *vide Subbarama Aiyar* v. *Mariya Pillai* (1). The proceeds realised in the sale of the crops will be restored to the persons from whose possession the crops were taken, *viz.*, the petitioners in this Court who admittedly raised the crops. It appears that the right to cultivate the land was also put to auction and the land was let out to the highest bidder. If so, the rents realised also properly belong to the petitioners in this Court.

These rents will also be paid to them by the Magistrate.

Order set aside.

V. N. V.

Z. K.

(1) 24 Ind. Cas. 967; 16 M. L. T. 52; 1 L. W. 493; 15 Cr. L. J. 559; (1914) M. W. N. 798.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 230 OF 1923.

April 26, 1923.

Present:—Mr. Justice Daniels.

DUKHI—PLAINTIFF—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 349—Trial by Second Class Magistrate—Reference to Joint Magistrate—Joint Magistrate, powers of.

A Second Class Magistrate trying an accused person under sections 352 and 506 of the Penal Code being of the opinion that the accused should be bound over under section 106 of the Criminal Procedure Code referred the case to the Joint Magistrate. The latter passed an order under section 106. On the record going back the Second Class Magistrate convicted the accused on the substantive charge. On a reference by the Sessions Judge;

Held, that the Joint Magistrate acted without jurisdiction and the order passed by him was liable to be set aside.

Criminal reference against the order of the Sessions Judge, Allahabad, dated the 12th of April 1923.

JUDGMENT.—This case has been referred by the learned Sessions Judge at Allahabad on the ground that an order under section 106 of the Code of Criminal Procedure was passed without jurisdiction. A case under sections 352 and 506 of the Indian Penal Code was before a Magistrate of the Second Class. Being of opinion that the accused should be bound over under section 106 of the Code of Criminal Procedure, he referred the case to the Joint Magistrate. The Joint Magistrate passed an order under section 106 but did not deal with the substantive charge and on his sending the record back the accused were convicted by the Second Class Magistrate in whose Court the case originally was. Under these circumstances, the learned Sessions Judge is right in saying that the Joint Magistrate acted without jurisdiction. The learned Sessions Judge appears to be of opinion that the order was a proper order on the merits but he has not thought it necessary to ask this Court to reastore the order in the exercise of its revisional jurisdiction under section 106 (3) of the Code of Criminal Procedure. I accept the reference and set aside the order passed under section 106.

Reference accepted.

Order set aside.

M. D. J.

BALGOBIND v. BADRI PRASAD.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

May 10, 1923.

Present:—Lord Buckmaster, Lord Dunedin, Lord Carson, Sir John Edge, KT., and Lord Salvesen.

BALGOBIND, DECEASED (NOW REPRESENTED BY SURAJ DAT, AND ANOTHER) AND OTHERS—APPELLANTS

versus

BADRI PRASAD AND ANOTHER—RESPONDENTS.

Wajib-ul-arz, *construction of—Custom, proof of.*

Settlement Officers in recording customs in *wajib-ul-arz* have to perform duties which the Government orders them to perform. One of these duties is, to record customs as the Settlement Officer finds them, and not as he might think they ought to be. Where it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. [p. 451, col. 1.]

Appeal from a decree of the Oudh Judicial Commissioner's Court reversing that of the Subordinate Judge, Gonda.

Messrs. *De Gruyther, K. C.*, and *Dube*, for the Appellants.

Messrs. *Kenworthy Brown* and *Hyam*, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, which reversed a decree of the Subordinate Judge of Gonda, and dismissed the suit. The suit was a suit for the possession of the village, Aunian Durga, in the District of Gonda, and for mesne profits, and it depended on whether there was or was not a family custom in the village by which daughters and their issue were excluded from inheritance. The Subordinate Judge found that there was such a custom and decreed the suit. The Court of the Judicial Commissioner on appeal found that the custom was not proved, and accordingly dismissed the suit.

In order to understand how this question as to a custom excluding daughters and their issue from inheritance has arisen in this suit, it is necessary to refer briefly to the family to which the plaintiff Balgobind Pande, had belonged. Balgobind Pande and his three elder brothers, Sital Prasad Pande, Radha Pande and Raghubar Pande, had, with their father, Narain Dat Pande, constituted a joint Hindu family which was governed by the law of the Mitakshara subject to any lawful variation of that law by custom. A lawful variation of that law would be a custom which excluded daughters and their issue from inheritance. Such a custom is not uncommon in Oudh and in other parts of India.

The elder brother of Narain Dat Pande was Harnarain Pande who was a *sanad* holder, and was possessed of considerable immoveable property in Oudh. Harnarain Pande gave some of his villages to Narain Dat Pande absolutely. Narain Dat Pande also acquired other villages, one of which was the village Binduli. Their Lordships do not know when Narain Dat Pande died. At the Settlement in Oudh after the Mutiny, the villages which Narain Dat Pande had self-acquired and those which he had acquired by gift from his elder brother were by courtesy described as *taluqa* Binduli, and the property was in the Settlement papers referred to as a *taluqa*. It is not necessary to consider whether that property was or was not correctly described as a *taluqa*.

Sital Prasad Pande was at the time of the Settlement the manager on behalf of the then joint family, and he was also the *lambardar* of some, if not of all, the villages included in the *taluqa*.

The Settlement Officer prepared a *wajib-ul-arz* for each of the villages. The fourth paragraph of the *wajib-ul-arz* of Binduli as translated by the official translator is as follows:—

'Paragraph 4.—Rights of transfer and inheritance.

"Each of the two co-sharers has the right to transfer his share; but so long as one of them is willing to purchase, the other shall not sell to a stranger. The rule of inheritance and division (thereof) in this village is that on the death of a

co-sharer his sons become owners of his share in equal shares and the daughter does not get any share by inheritance. If a co-sharer has several wives, of whom one has one son and the other several, then on the death of the co-sharer his share will be divided equally among his sons. There is no custom of *stribhag* (division according to number of wives). When one wife has sons and another has daughters only, then such other will not get a share. The issue of the (former) wife will possess the share and maintain (in food and clothing) the daughters and bear the expenses of their marriage. If, there is no male issue born of the wives, they will remain in possession in equal shares. The widows have no power to adopt; on (their) death the nearest relation of the husband succeeds to the share. An unmarried wife and her children are given maintenance: they do not get (inherit) a share."

The vernacular words of the sentence which the official translator has translated as "the rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares, and the daughter does not get any share by inheritance," given, presumably correctly, by the learned Judicial Commissioners in their judgment, do not include between the words 'equal shares" and the words 'the daughter" any word which could be translated as "and." Their Lordships do not consider it necessary to refer this case back to the Court of the Judicial Commissioner for a report as to whether a word representing "and" is or is not in the original *wajib-ul-arz* between the words "equal shares" and the words "the daughter," as in either event the sentence, in their Lordships opinion, would have the same meaning; that is, that a daughter and her issue are excluded from a right of inheritance. Paragraph 4 of the *wajib-ul-arz* of Binduli is not repeated in the *wajib-ul-arz* of Aunian Durga as the villages of the Settlement were treated as villages of the *taluqa* Binduli, having a common custom as to rights of inheritance, but reference as to the customs of Aunian Durga is made to paragraph 4 of the *wajib-ul-arz* of Binduli. Sital Prasad Pande signed the *wajib-ul-arz* of the village of Binduli, and verified before the Settlement Officer the *wajib-ul-arz* of Aunian Durga, and no exception was taken by any one to the record of the custom.

After the Settlement the brothers separated and the village Aunian Durga fell to the share of the second brother, Radha Pande. Radha Pande married *Musammat* Janka, but whether the marriage took place before the Settlement or afterwards their Lordships do not know. Radha Pande had by his wife a dauhgter, *Musammat* Thakur Dei, but no son. *Musammat* Thakur Dei married and had a son, Badri Prasad, who is defendant No. 1. Radha Pande died in 1901 and on his death *Musammat* Janka came into the possession of Aunian Durga for the interest of a Hindu widow. On the 4th April 1902 *Musammat* Janka granted a perpetual lease of 80 *bighas* of Aunian Durga to Tibhawan Tewari and Baleshar Tewari, the defendants Nos. 4 and 5, and on the 1st May 1902, mortgaged with possession an undivided moiety of the village to the predecessors-in-title of defendant No. 3. On the 31st October 1916 *Musammat* Janka made a gift of a 6 anna share in Aunian Durga to Gajadhar Prasad, defendant No. 2. On the 3rd November 1916 *Musammat* Janka and her daughter, *Musammat* Thakur Dei, gave all such rights and interest as they possessed in the remaining 10 annas share of Aunian Durga to Badri Prasad, defendant No. 1. On the 4th March 1917 *Musammat* Janka died. On her death the plaintiff Balgobind Pande was the next reversioner to her husband, Radha Pande; Sital Prasad Pande and Raghubar Pande being then dead. On the 24th August 1917 Balgobind Pande gave an 8 annas share in Aunian Durga to Kesho Dat Ram Pande and Tikam Dat Ram Pande, who were grandsons of Sital Prasad Pande, being the sons of his son, Mahadeo Prasad, who was then dead. On the 7th September 1917 Balgobind Pande, Kesho Dat Ram Pande and Tikam Dat Ram Pande brought this suit. Balgobind Pande is now dead, and is represented in this appeal by his sons, Suraj Dat and Jagdish Dat, a minor, through his guardian.

It is not proved or contended that any of the alienations already mentioned by *Musammat* Janka were made for necessity and the only question which it is necessary

for their Lordships to consider is, whether by custom daughters and their issue are excluded from inheritance in Aunian Durga. As has been already stated, the learned Subordinate Judge, who tried the suit found that that custam was proved. The learned Judicial Commissioners who heard the appeal apparently did not doubt that the entry of the custom in the *waijb-ul-arz* of the village Binduli was evidence of the custom which governed the right to inherit in the village Aunian Durga, but they were of opinion, that paragraph 4 of the *wajib-ul-arz* of Binduli was ambiguous and that owing to that ambiguity the custom was not proved. It is quite true that a custom is not established by an ambiguous statement of it in a *wajib-ul-arz*.

In their Lordships' opinion there is no ambiguity in the statement as to the custom. The only construction to which it is open is, in their Lordships' opinion, that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance, whether he had left sons or not. How such a custom would operate in cases in which an owner died leaving no relation but a daughter who could inherit it is not necessary now to consider. If a daughter had no right to inherit, her issue could not inherit. The provision that on the death of a co-sharer his sons became owners of his share in equal shares was probably inserted to exclude any claim under a custom of primogeniture which is not an uncommon custom in Oudh.

Settlement Officers in recording customs in *wajib-ul-araiz* have to perform duties which the Government orders them to perform.

One of these duties was, to record customs as the Settlement Officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

There was no evidence to prove or even to suggest that the Settlement Officer in stating the custom as he did in the *wajib-ul-arz* had in any way neglected his duty in ascertaining what the custom was or was misled as to the custom; nor was there any evidence given in this suit in denial of or at variance with the custom.

Their Lordships find, that the custom excluding daughters and their issue from inheritance was proved, and they will accordingly humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs, and that the decree of the Subordinate Judge should be restored and affirmed.

Z. K. *Appeal allowed.*

Solicitor for the Appellants:—Mr. *E. Dalgado.*

Solicitors for the Respondents:—Messrs. *Barrow, Rogers & Nevill.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2516 OF 1919.

January 9, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

MUHAMMAD HASSAN-UD-DIN—DEFENDANT—APPELLANT

versus

SAIF ALI SHAH—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLII—Appeal, second—Copy of judgment of Trial Court filed after expiry of limitation—Extension of time—Sufficient cause—Ignorance of rule—Custom—Alienation — Necessity — Antecedent-debt—Alienation for purposes of trade.

A memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of first instance, and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation. [p. 452, col. 2.]

Molu Mal v. *Sri Ram*, 63 Ind. Cas. 33; 2 L. 227; 3 U. P. L. R. (L.) 99, followed.

Where it was found that the copy of the judgment of the Court of first instance was not presented within limitation owing to the fact that sufficient time had not elapsed after the publication of the rule requiring such copy to be filed along with a memorandum of second appeal, for the rule to become well known at the time when the appeal was filed:

MUHAMMAD HASSAN-UD-DIN *v.* SAIF ALI SHAH.

Held, that there was sufficient cause, within the meaning of section 5 of the Limitation Act, for extending the period of limitation prescribed for the appeal. [p. 452, col. 2.]

Ordinarily, the payment by an alienee of an antecedent debt due to a third person is justified and there is no necessity for the alienee to go further and to prove that the previous debt was in itself incurred for necessity. [p. 453, col. 1.]

It cannot be laid down that, under no circumstances, can a member of an agricultural tribe alienate ancestral property for the purpose of engaging in trade. [p. 453, col. 2.]

Santa Singh v. *Waryam Singh*, 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914, explained.

Where an alienor, who owns a very small piece of land, which is not sufficient to enable him to earn his living as an agriculturist, and who has no other means of subsistence, alienates the land for the purpose of engaging in trade, the alienation cannot be challenged on the ground of want of necessity. [p. 453, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Attock at Campbellpur, dated the 30th July 1919, reversing that of the Senior Subordinate Judge, Attock at Campbellpur, dated the 6th May 1918.

Messrs. *Ghulam Rasul* and *Mul Chand*, for the Appellants.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts of the two cases out of which the two connected second appeals Nos. 2516 and 2517 of 1919 arise are briefly as follows:—

On the 25th October 1911 Chiragh Ali Shah, a *Sayad*, of Campbellpur, Saidan, mortgaged a *serai* situate in Campbellpur Cantonment to one Sundar Singh for Rs. 700 and promised to pay interest at Rs. 1-8-0 per cent. per mensem. On the 9th January 1914 he sold this *serai* to Muhammad Hassan Din, defendant-appellant, of Murree for Rs. 1,250 which included Rs. 750 payable to Sundar Singh, mortgagee. The plaintiff Saif Ali Shah is the son of the alienor and he brought two suits praying for declarations that both the mortgage and the sale should not affect his rights after the death of the alienor. Consideration for the mortgage is said to have been borrowed to pay off a prior mortgage of Rs. 140 and for purposes of trade. The learned District Judge held that Chiragh Ali Shah, being a *Sayad* agriculturist, could not alienate ancestral property for purposes of carrying on trade and therefore found that there was no necessity for the mortgage. He also found that the balance received by the vendor at the time of the sale was not taken for a necessary purpose. He accordingly decreed both the suits. The vendee has filed a second appeal in each of these two cases.

A preliminary objection was raised by Dr. Nand Lal on behalf of the respondents that the appeals were barred by time. The appeals were filed within time on the 30th of October 1919, but were returned on the 11th November, as copies of the judgments of the Trial Court had not been filed. The appeals were re-filed on the 27th November 1919 and if that be taken as the date of filing the appeals they were time-barred. In *Molu Mal* v. *Sri Ram* (1) it was held that a memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of first instance, and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation. Under O. XLII, read with O. XLI, r. 1, Civil Procedure Code, the only copies which it is necessary should accompany the Memorandum of Appeal are copies of the appellate decree and of the judgment on which it is founded; but this Court, in exercise of the powers conferred upon it, has made a rule that in the case of second appeals the Memorandum of Appeal shall, in addition to the copies specified in O. XLI, r. 1, be accompanied by a copy of the judgment of the Court of first instance. This rule is dated the 17th October 1919 and was published in the *Punjab Government Gazette* of the 24th October 1919 as Notification No. 4685-G.

Now, the appeals in this case were filed on the 30th October 1919, in other words, six days after the new rule was published in the *Government Gazette*. It is, therefore, contended that there is sufficient cause within the meaning of section 5 of the Limitation Act for admitting the appeals beyond time. In our opinion there had not been sufficient time for the new rule to become well known by the 30th October

(1) 63 Ind. Cas. 33; 2 L. 227; 3 U. P. L. R. (L.) 99.

1919, and as the appeals were re-filed within a reasonable period we consider that there is sufficient cause within the meaning of section 5 of the Limitation Act. It is, however, pointed out by Dr. Nand Lal that a copy of the judgment of the Court of first instance in the case relating to the mortgage has not been filed up to the present time. The Subordinate Judge disposed of both the suits Nos. 103 and 104 of 1917 by one and the same judgment and a copy of this has been field in the appeal relating to the sale. In the case relating to the mortgage the Subordinate Judge recorded merely a brief order :—

"For detailed judgment see File No. 103 of 1917. Plaintiff's suit dismissed, parties to bear their own costs. File."

This is not really a judgment at all and, in our opinion, there has been a substantial compliance with the law by filing a copy of the detailed judgment in the appeal relating to the sale. We, therefore, overruled Dr. Nand Lal's preliminary objection.

As will appear from what we have already stated, the vendee was a different person to the mortgagee. Ordinarily, the payment by an alienee of an antecedent debt due to a third person is justified and there is no necessity for the alienee to go further and to prove that the previous debt was in itself incurred for necessity. In the present case, however, the mortgage-deed was attested by Muhammad Gul, the father of the vendee. Muhammad Gul was the agent of the vendee, his son, and the contract of sale was entered into through him. The learned District Judge, therefore, was of opinion, that the vendee's father and agent had reason to know or believe that the object for which the mortgage-debt was raised was not a necessary one. He, therefore, held that the vendee was not protected merely by the fact that the antecedent-debt was due to a third party. It is urged before us that the only knowledge with which Muhammad Gul was fixed was that the mortgage debt was raised to pay off a previous mortgage and for purposes of trade, and that the mortgagee was not bound to see that the money advanced by him was applied to the purposes for which it was alleged to have been taken. It appears that at the time of the mortgage Chiragh Ali Shah had only some 10 or 11 *kanals* of land. This was not sufficient for him to earn his living as an agriculturist. It was held in the case reported as *Santa Singh* v. *Waryam Singh* (2), that money borrowed for purposes of trade could not be regarded as money borrowed for a necessary purpose. What the Judges said in that case was that,—

"We have no doubt that village custom would not look with favour upon the conversion of a *Jat* agriculturist into a shopkeeping trader and would not countenance an alienation of ancestral land in order to enable such agriculturist to carry on the business of his shop."

The facts of that case are distinguishable from those of the present one. There the alienor was an agriculturist and a *lambardar* and was alienating a part of the ancestral land in order to engage in trade. In the present case the alienor had no other means of subsistence and, under these circumstances, we think he was justified in alienating the *serai* for the purposes stated by him. We do not think that the Division Bench in the 1915 case intended to lay down that, under no circumstances, could a member of an agricultural tribe alienate ancestral property for the purposes of engaging in trade.

Having regard to the facts, we think that the vendee in this case was fully justified in paying off Rs. 750 due to the prior mortgagee, and that he was not bound to show how the money advanced by the mortgagee was actually expended. As regards the balance of Rs. 500, the finding of the learned District Judge is one of fact and cannot be contested in second appeal.

The reslult is that we accept both the appeals and, setting aside the orders of the lower Appellate Court, we dismiss the plaintiff's suit in regard to the mortgage. In the suit relating to the sale we give the plaintiff a decree to the effect that the sale shall not affect his reversionary rights except to the extent on Rs. 750, and that he can recover the property sold on payment of this sum. Under all the circum-

(2) 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

stances of the case, we direct that the parties should bear their own costs in all Courts.

Z K *Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 928 AND 929 OF 1920.

July 27, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Maharaja KESHO PRASAD SINGH—PLAINTIFF—APPELLANT

versus

RAMDENI SINGH—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 52 (1) (b), 188—Rent, meaning of—Suit by co-sharer landlord for his share of rent—Tenant, whether can claim abatement.

Rent under the Bengal Tenancy Act means, whatever is lawfully payable or deliverable in money or kind by a tenant to his landlod on account of the use or occupation of the holding by the tenant. That, which is payable by a tenant not to his landlord, which must mean the whole body of landlords, but only to one of them is not rent. [p. 457. col. 2.]

A suit by a co-sharer landlord for that which is payable to him by a tenant on account of the use or occupation of his share of the land is not a suit contemplated by the Bengal Tenancy Act, the decree passed in such a suit is not a decree under the Bengal Tenancy Act, and such a decree is executable under the Civil Procedure Code and not under the Bengal Tenancy Act. [p. 457. col 2.]

In a rent-suit by a co-sharer landlord, who under an arrangement between himself, his co-sharer landlords and the tenants, was entitled to collect his share of the rent separately, the defendants claimed a reduction of the rent proportionate to a deficiency in the area of their holding;

Held that the tenants could claim the abatement of rent in this suit. [p. 456, col. 2.]

Bhoopendra Narain Dutt v. *Romon Krishna Dutt*, 27 C. 417; 4 C. W. N. 107; 14 Ind. Dec. (N. S.) 275 and *Khettermani Dasi* v. *Jiban Krishna Kundoo*, 28 Ind. Cas. 510; 21 C. L. J. 315; 19 C. W. N. 546, referred to.

Appeal from a decision of the Additional District Judge, Shahabad, dated the 28th April 1920, reversing that of the Munsif, Shahabad, dated the 26th July 1919.

Messrs. *Kulwant Sahay* and *Nirsu Narayan Sinha*, for the Appellant.

Mr. *Kallas Pati*, for the Respondents.

JUDGMENT.

Das, J.—These appeals arise out of suits for rent by a co-sharer landlord who, under an arrangement between himself, his co-sharer landlord and the tenants, is entitled to make separate collection of his share of rent. The defendants in their written statement claimed an abatement of rent under section 52 (1) (*b*) of the Bengal Tenancy Act. The Courts below have concurrently found that there is a deficiency in the area of the holding of the defendants as compared with the area for which rent has been previously paid by them. The Court of first instance being of opinion that a claim for abatement could not be put forward in a suit in which all the landlords and all the tenants are not parties, refused to give effect to the plea. The lower Appellate Court has taken a different view and has given the defendants a decree for abatement of rent.

In this Court, it was urged by Mr. Kulwant Sahay on behalf of the appellant-landlord that the view of the learned Judge in the Court below is erroneous and that he was conclusively bound by a decision of this Court in the case of *Parhamdayal Singh* v. *Maharaja Kesho Prasad Singh*, S.A. No. 2797 of 1915. The decision referred to undoubtedly supports the argument of Mr. Kulwant Sahay. That decision is, however, a decision of a Single Judge; and, though it is entitled to great weight, it is necessary for us to examine the principle upon which that decision rests. The view of the learned Judge in the case cited is this; that a claim under section 52 of the Bengal Tenancy Act is subject to the limitation imposed by the Legislature in section 188 of that Act, and that the claim cannot be given effect to except in a properly constituted suit between all the landlords and all the tenants. The arguments employed by the learned Judge receive considerable support from certain observations made by the learned Judges in *Bhoopendra*

Narain Dutt v. *Romon Krishna Dutt* (1), but are negatived by the decision in *Khettermani Dasi* v. *Jiban Krishna Kundoo* (2). The decision in the last mentioned case, however, is confessedly based on the decision in the first mentioned case and, in so far as it clearly misstated the rule laid in *Bhoopendra Narain Dutt* v. *Romon Krishna Dutt* (1), it can scarcely be regarded as an authority of much force.

Section 52 (1) (*b*) of the Bengal Tenancy Act provides that every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area. It is not disputed that all the circumstances are present in this case entitling the tenants to claim an abatement of rent under section 52 (1) (*b*) of the Act; but it is urged before us that section 188 of the Act effectively prevents the tenants in this case from claiming the benefit of section 52 (1) (*b*) of the Act. Section 188, upon which reliance is placed by Mr. Kulwant Sahay, provides that where two or more persons are join landlords, anything which the landlord is under the Bengal Tenancy Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them. It will be noticed that section 188 applies to joint landlords and applies only where the landlord is required or authorized by the Bengal Tenancy Act to do something. The section has no direct application to the tenants; and it certainly does not touch the question whether the tenants being authorized to claim a right as against the landlords and (as in this case) acting together can put forward that claim in a suit by a co-sharer landlord. The principle that underlies section 188 is this: that, where two or more persons have a joint right, they cannot assert that right except jointly. But here the defendants are the only tenants of the holdings in respect of which these suits have been brought, and they are certainly acting together in putting forward their claim for abatement of rent in these suits. Even if section 188 were to apply to a case of tenants asking for abatement of rent, a proposition to which, as at present advised, I do not assent, I can see nothing in its operation which would prevent joint tenants from putting forward a claim or abatement of rent in a suit against them by a co-sharer landlord. Section 52 (1) (*b*) is expressed in the widest terms and, in my view, we cannot take away or add to the express provision of the Legislature by having recourse to an alleged principle on which section 188 is said to rest.

I have now to consider the cases which were cited before us. In the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (3) the Calcutta High Court held that, having regard to the provisions of section 188 of the Bengal Tenancy Act, 1885, where two or more persons are joint proprietors, they must all join in a suit for enhancement of rent under section 30 of the Bengal Tenancy Act or for additional rent under section 52 (1) (*a*) of that Act. So far as a suit under section 30 is concerned, it is clearly a suit which the landlord is authorized by the Bengal Tenancy Act to bring. That being so, section 188 must be read as imported into section 30 with the result that a suit for enhancement of rent by a co-sharer landlord would be barred under the provisions of section 188 of the Act. A suit for additional rent by a co-sharer landlord stands on a somewhat different footing. Section 52 differs from section 30 in so far as section 52 declares the liability of the tenant to pay additional rent, but does not expressly authorize the landlord to bring a suit or import the provisions of section 188. The learned Judges, however, took the view that the same principle applies alike to a claim for enhanced rent and to a claim for additional rent. This decision, in no way, throws any light on the case before us.

(1) 27 C. 417; 4 C. W. N. 107; 14 Ind. Dec. (N. S.) 275.
(2) 28 Ind. Cas. 510; 21 C. L. J. 315; 19 C. W. N. 546.
(3) 17 C. 695; 8 Ind. Dec. (N. S.) 1004.

The next case is that of *Bhoopendra Narain Dutt* v. *Romen Krishna Dutt* (1). The question raised in that case was whether in a suit for rent brought by some of the several joint landlords against one of several joint tenants for recovery of the plaintiff's share of the rent payable on account of the defendant-tenants' share of the tenure under a previous arrangement, the tenant-defendant could claim abatement under the provisions of section 52 (1) (*b*) of the Bengal Tenancy Act. The learned Judges answered the quesition in the negative. So far as the actual decision is concerned, it is undoubtedly right; but in deciding the case Sir Francis Maclean expressed the opinion that the principle underlying section 188 applies to the converse case of a co-sharer tenant claiming the benefit of section 52 in a suit such as that which that learned Judge was considering, and that a relief under section 52 could not be granted except in a suit between all the co-sharer landlords and all the co-sharer tenants. In my opinion, it was not necessary to have recourse to section 188 for the purpose of deciding the case: it was sufficient to say, as the learned Judges did say, that the expression "tenant" in section 52 did not include the case of a mere co-sharer tenant who had only a fractional share in the tenure, but that it meant the tenant of the tenure, not one of many tenants. The only principle which underlies section 188 of the Act is that where two or more persons have a joint right between them, they cannot assert it except jointly. That principle is recognized in section 52 of the Act, and I quite accept that if two or more co-sharer tenants have a joint right for abatement of rent, they can only assert that right in a suit to which all the tenants are parties. In the case before us all the tenants are parties to the suit and the actual decision in the case cited does not prevent them from asserting that right as against a co-sharer landlord.

The last case to which I need refer is that of *Khettermani Dasi* v. *Jiban Krishna Kundoo* (2). The learned Judges in that case held that section 188 has no reference to joint tenants and cannot apply by analogy to a co sharer tenant who brings a suit authorized by the Act, *e.g.*, a suit for abatement of rent. As I have said before, section 188 need not be imported into section 52 of the Act; for the expression "tenant" in section 52 must mean the tenant of the holding and not one of the tenants of the holding. The decision is also open to the objection that it is expressly based on the decision last discussed which undoubtedly lays down a contrary proposition.

These are all the cases which were cited before us. Except the decision of this Court to which I have referred, there is no decision which expressly decides that it is not open to the tenants of a holding in a suit by a co-sharer landlord to claim abatement of rent. The section is in very wide terms and there is nothing in section 188 to control it. In my opinion the defendants are entitled to claim an abatement of rent in the suit brought against them by the co-sharer landlord.

The case may be put in another way, A co-saharer landlord has no absolute right to maintain a suit for his share of rent. He may be allowed to bring such a suit under an arrangement between all the landlords and all the tenants; but that arrangement must be consistent with the continuance of the original lease of the entire holding, see *Gani Mahomed* v. *Moran* (4). It has been held that though the co-sharer landlords may have the right under such an arrangement to collect their portion of the rent separately, there is nothing to prevent them from reverting to their original condition if they are all agreed, and that a suit brought by all the co-sharers for the recovery of the entire rent is maintainable, see *Raja Promodanath Roy* v. *Raja Ramoni Kant Roy* (5) and [*Shyama Charan Bhattacharya* v. *Akhoy Kumar Mitter* (6)]. In the last mentioned case Pratt J., came to the conclusion that an arrangement for separate collection of rents is an arrangement for mutual convenience and cannot bind the parties for all time but may be put an end to by the tenants or by the landlords collectively, though not by one of the landlords

(4) 4 C. 96; 2 C. L. J. 370; 2 Ind. Dec. (N. S.) 63 (F. B.).
(5) 9 C. W. N. 34.
(6) 10 C. W. N. 787; 3 C. L. J. 627.

against the consent of the others. All these cases were reviewed by Rampini and Woodroffe, JJ., in *Akshoy Kumar Mitra* v. *Gopal Kamini Debi* (7). The learned Judges approved of all the decisions to which I have referred and came to the conclusion that there is nothing to prevent the co-sharer landlords at any time from putting an end to the arrangement under which they have been collecting their rents separately. If that be so, it is equally open to the tenant to put an end to the arrangement and to refuse to pay rent separately to the landlords. The tenant may, at any time, take up the position that circumstances have arisen which would make it impossible for him to pay his rent separately to the landlords; and the circumstances of the present case are certainly such as would entitle the tenant to take up that position. Section 52 (1) (*b*) of the Bengal Tenancy Act gives the tenants a right to claim abatement for rent under certain circumstances. The case for the landlord is that though all the circumstances exist which would entitle the tenant to claim abatement of rent, still he cannot do so having regard to the fact that the suit is by a co-sharer landlord and not by the whole body of landlords. The tenants may retort by saying: "If that be so, we refuse to pay you your share of rent and require you to bring a proper suit for rent by you and your co-sharer landlords in which case, it would be open to us to claim abatement for rent." There is, in my opinion, no doubt that the tenants could take up that position and compel the landlord to consent to an abatement of rent in his suit for his share of the rent.

It has been urged before us that to allow the tenant to claim abatement of rent in a suit to which the co-sharer landlords are not parties is to affect the integrity of the rent without giving any opportunity to the other co-sharer landlords to be heard. It is argued that rent is one and entire and that to affect that one and entire sum called rent payable by the tenants jointly to the joint landlords in a suit to which they are not all parties is to invite complications. The argument assumes that, what is paid by a tenant to a co-sharer landlord under an arrangement is, in fact, rent; but it is nothing of the kind. No doubt, it has been referred to as rent in the decisions of our Courts, but that is only for want of a better term. "Rent" under the Bengal Tenancy Act means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the holding by the tenant. That which is payable by a tenant not to his landlord, which must mean the whole body of landlords, but only to one of them is not rent. A suit by a co-sharer landlord for that which is payable to him by a tenant on account of the use or occupation of his share of the land is not a suit contemplated by the Bengal Tenancy Act; the decree passed in such a suit is not a decree under the Bengal Tenancy Act and such a decree is executed under the Code of Civil Procedure and not under the Bengal Tenancy Act. It may be urged that if what is payable by a tenant to a co-sharer landlord is not rent then section 52 is clearly inapplicable. That may be so; but the principle underlying section 52 is undoubtedly applicable and it would entitle the tenant to take up the attitude either that as he is no longer in possession of the landlord's share of the land held by him there ought in equity to be an apportionment of that which was hitherto payable by him to the landlord on account of the use or occupation of his share of the land; or that the condition under which he agreed to pay to the landlord his share of the rent no longer exists and that he would not pay to the landlord his share of rent unless all the landlords join in bringing a suit as against him or unless the co-sharer landlord consents to an apportionment of rent. A relief given to the tenant in a suit by a co-sharer landlord for his share of the rent does not in any way touch the integrity of the rent for the subject-matter of the suit is not rent but that which is payable to the co-sharer landlord by the tenant on account of the use or occupation of the co-sharer landlord's share of the land.

In my opinion there is no answer to the claim put forward on behalf of the tenants in these cases. The decision of the learned Judge in the Court below is,

(7) 13 C. 1010; 10 C. W. N. 952.

in my opinion, right and I would dismiss these appeals with costs.

Coutts, J.—I agree.

K. S. D. & N. H. *Appeals dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 34 OF 1921.

January 20, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

KONDINE KAMAYA AND ANOTHER—APPELLANTS

versus

KOVIDENA RAMAMMA AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 166, 181—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22, 90—Execution of decree—Sale—Failure to give notice to judgment-debtor—Application to set aside sale, nature of—Limitation.

An application under section 47 of the Civil Procedure Code to set aside an auction-sale is governed by Art. 166 and not by Art. 181. of Sch. I to the Limitation Act.

Muthiah Chettiar v. *Bava Sahib*, 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969, *Thekkedath Neelu Neithiar* v. *Subramania Moothan*, 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59, *Satish Chandra* v. *Nishi Chandra Dutta*, 54 Ind. Cas. 431; 46 C 975, *Pasumarti Payidanna* v. *Ganti Lakshminarasamma*, 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525, followed.

Shivbai Babya Swami v. *Yesu Cheoo Nayakin*, 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925, *Baldeo Singh* v. *Meghu Singh*, 74 Ind. Cas. 202; (1919) Pat. 386, distinguished.

Quaere:—Whether an application to set aside an auction-sale on the ground of want of notice to the judgment-debtor falls under section 47 of O. XXI, r. 90, of the Civil Procedure Code.

Appeal against an order of the District Court, Guntur, in Civil Miscellaneous Appeal No. 27 of 1920, preferred against the order of the District Munsif, Narsapur, in Miscellaneous Petition No. 3965 of 1919, (in Original Suit No. 63 of 1904 on the file of the Bapatla Munsif's Court).

Messrs. *B. Jagannatha Rao* and *M. Rama Chandra Rao*, for the Appellants.

Messrs. *P. Narayanamurty* and *P. Salyanarayana*, for the Respondents.

JUDGMENT.—A preliminary objection has been raised that no second appeal lies. We are inclined to think that this is a good objection, and that the failure to give the petitioners notice before the sale though they had attained majority between the date of decree, and the date of execution is a mere irregularity in publishing the sale which would bring the application within rule 90.

But it is unnecessary to decide this point as, assuming that the application can be treated as one under section 47, it was clearly out of time under Art. 166 of the Limitation Act, not having been made within one month of the sale.

For the proposition that Art. 166 and not Art. 181 will apply even to applications which fall under section 47, there is ample authority in *Muthiah Chettiar* v. *Bawa Sahib* (1), *Thekkedath Neelu Neithiar* v. *Subramania Moothan* (2), *Satish Chandra* v. *Nishi Chandra Dutta* (3) and *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (4).

The cases in *Shivbai Babya Swami* v. *Yesu Cheoo Nayakin* (5) and *Baldeo Singh* v. *Meghu Singh* (6), in which Art. 181 was applied, can be distinguished. The first was a case where an *ex parte* decree had first to be set aside before the applicant had any *locus standi* to set aside the sale in execution of that decree, and the Patna case was one of fraud and not illegality or irregularity.

The civil miscellaneous second appeal is dismissed with costs.

M. C. P.

Z. K. *Appeal dismissed.*

(1) 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969.
(2) 53 Ind. Cas. 809 (1919) M. W. N. 897; 11 L. W. 59.
(3) 54 Ind. Cas. 431; 46 C. 975.
(4) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525.
(5) 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925.
(6) 74 Ind. Cas. 202; (1919) Pat. 386.

KUSAM DEI *v.* HUR DUTT.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 93 OF 1922.

August 17, 1922.

Present:—Mr. Ashworth, A. J. C.

Musammat KUSAM DEI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HAR DUTT AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 111 (b)—Civil Procedure Code (Act V of 1908), O. I, r. 1, O. II, r. 2—Partition—Title suit—Joinder of parties—Parties not directed by Revenue Court to file suit, whether can join as plaintiffs—Abandonment of claim—Title not claimed, whether can be subsequently asserted.

A direction by a Revenue Court in the course of a partition proceeding, under section 111 (*b*) of the U. P. Land Revenue Act, to one party to bring a title suit in a Civil Court implies a right of joinder in the suit of any person as plaintiff in whom a joint right of relief exists. The direction to bring a suit to any person must mean that he is to bring it according to, and as permitted by, the law of procedure, and O. I, r. 1 of the Code of Civil Procedure allows such joinder. [p. 461, col. 1.]

Obiter:—Where a party asks for and obtains a declaration of his title against another, that title thenceforth must be deemed to be the title claimed and not anything more. [p. 461, col. 2.]

Appeal against a decree of the Subordinate Judge, Bara Banki, dated the 23rd December 1921, upholding that of the Munsif, Ram Sanehi Ghat, dated the 17th March 1921.

Mr. *Bishambhar Nath Srivastava*, for the Appellants.

Mr. *Ram Bharose Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs co-sharers in *Mahal* Sheoratan *Patti* Bindra Prasad and in the *Mahal* Bindra Prasad of the village of Behlauna, against the widow (defendant No. 1) and the daughter (defendant No. 2) of the deceased Bindra Prasad. The 3rd defendant is another co-sharer who has not joined as plaintiff and is, therefore, made a *pro forma* defendant. The suit is for a declaration that the plaintiffs and defendant No. 3 are owners and title-holders of a certain area of land in each *mahal* by reason of their being share-holders of certain fractions.

The facts have been very clearly and fully set forth in the judgment of the Court of first hearing. For the purpose of deciding this appeal, the essential facts are as follows:—

One Saligram had two sons, Permeshar Din, married to *Musammat* Daryai Kuar, and Debi Shankar. Debi Shankar had two wives. By the first wife he had a son Sheoratan and by the second wife four sons of which one was Bindra Prasad, another Beni Madho, a third Brij Bhukhan, and a fourth Chandrika. Bindra Prasad married *Musammat* Kusum Kuar, defendant No. 1, and had a daughter, *Musammat* Mangal Dei, defendant No. 2. The plaintiff No. 1, Har Dat, is a son of Beni Madho and the defendant No. 3 Bisheshar Dat, another son. Plaintiffs Nos. 2, 3, 4 and 5 are sons of Brij Bhukhan. This will appear from the genealogical tree in the plaint. Parmeshar Din and Debi Shanker each owned a 5 annas 4 pies fractional share in the village which was a single *mahal* at that time. On Debi Shanker's death he was succeeded by Sheoratan as owner of 2 annas 8 pies and by the four sons of his second wife as owners of the other 2 annas 8 pies, each getting 8 pies. Sheoratan and Bindra Prasad, however, added to their share by purchase of the 5 annas 4 pies from the widow of Parmeshar Din, that is, *Musammat* Daryai Kuar. Thereafter, a partition was made and Sheoratan got a separate *mahal* called the *mahal* Sheoratan in which was included his fractional share derived from his father Debi Shanker and also the fractional share derived by purchase from *Musammat* Daryai Kuar, widow. Similarly, Bindra Prasad got a separate *mahal* containing his original share and his acquired share. Sheoratan died in 1906 and his *mahal* was divided between his three brothers, Bindra Prasad, Beni Madho, and Brij Bhukhan. Chandrika having died childless, the Sheoratan *mahal* being divided into three *pattis* one of which was called Bindra Prasad's *patti* and contained the original and acquired share of Sheoratan which Bindra Prasad inherited. Consequently, at the time of the proceedings in question in this suit Bindra Prasad owned the whole of the Bindra Prasad's *mahal* and a *patti* in the Sheoratan *mahal*. In both of them he had one fractional share inherited also-

lutely from his father and one as transferee of *Musammat* Daryai Kuar, widow of Permeshar Din. He executed a deed of gift in favour of his daughter, defendant No. 2, of a considerable number of specific plots scattered through both the *mahal* and the *patti*. A suit was at once brought by his brother and nephew, apparently as co-reversioners with him of Permeshar Din, to set aside this deed of gift but without success. In 1911 *Musammat* Daryai Kuar, widow of Permeshar Din, died and the reversioners of her husband at once sued Bindra Prasad's widow, *Musammat* Kusum Kuar, defendant No. 1, (Bindra Prasad having meanwhile died) for recovery of the fractional shares in the *mahal* and the *patti* which Bindra Prasad held as transferee of *Musammat* Daryai. They were successful. In execution of decree they not only obtained entry of their names in the village *khewat* as owners of the fractional share decreed to them in the *mahal* and *patti* respectively but also obtained the entry of a note in the *khewat* that the plots gifted by Bindra Prasad to his daughter were to be deemed to have been given out of the fractional shares enjoyed by Bindra Prasad's widow and not out of those the enjoyment of which was obtained by their decree. In August 1918 Har Dat, son of Beni Madho, one of the successful reversioners, sued the other co-sharers of the *mahal* for partition. He did not join the plot-holder *Musammat* Mangal Dei but she was made a party on her request. Her objection to the partition as claimed was, that her plots should be deemed to have been given out of the entire *mahal* and *patti* and not merely out of the widow's fractional shares. As this claim conflicted with the note in the *khewat* mentioned above she was directed to get the note in the *khewat* altered in her favour. She did so. This suit is in effect one to have a declaration that the original note in the *khewat* was correct. The claim has been decreed by both the lower Courts. The widow and daughter of Bindra Prasad appeal. Only three questions arise in appeal. They are set forth in grounds Nos. 1, 2 and 3, ground No. 4 having been dropped by the appellants.

The first question is, whether the failure of the reversioners of Permeshar Din in the suit brought in 1908 for cancelation of the deed of gift should operate by way of *res judicata* against the present claim of the plaintiffs. Both the lower Courts have held that it does not and they are clearly right. The validity of the deed of gift and its effect are distinct matters. It certainly held good so long as *Musammat* Daryai Kuar was alive but it ceased to be operative after her death as against her husband's reversioners though it was operative against Bindra Prasad's widow. This point is, therefore, decided against the appellants.

The second point is, whether the present suit was barred by O. II, r. 2, of the Code of Civil Procedure, that is to say, whether the reversioners when suing Bindra Prasad's widow for possession of the fractional shares in the *mahal* and *patti* that had been acquired from *Musammat* Daryai Kuar ought to have claimed that the gift to the daughter of these specific plots should be held inoperative to prevent them getting the total fractional shares claimed in respect of the *mahal* and the *patti*. Both the lower Courts held that the suit is not barred and, again, I consider that they were right. The suit for possession in 1911 was only brought against the widow, defendant No. 1, and not against the daughter, defendant No. 2. As the daughter was in possession of these plots no suit for possession of them could be brought against the widow nor did the deed of gift to the daughter affect the widow's liability to surrender enjoyment of the shares claimed though it might affect the extent of the subject-matter of that suit. At most the plaintiffs in that suit got a decree against the widow for something more than they were entitled to. The plea that the present suit is *res judicata* as regards the claim against defendant No. 1 by reason of the former possessory suit would possibly be a valid plea to rule out any defence by *Musammat* Kusum Kuar. It cannot operate as against the plaintifts. This point is, therefore, decided against the appellants.

The third question is, whether the Civil Court was debarred from jurisdiction in the suit so far as it was brought by plaintiffs Nos. 2 to 5 by reason of section 233 (*k*) of the

KUSAM DEI *v.* HAR DUTT.

Land Revenue Act which forbids a Civil Court entertaining a suit with respect to partition of *mahals*. A Revenue Court before which a partition is pending is given power by section 111 (*b*) of the Land Revenue Act to require any p rty to institute a suit in the Civil Court for determination of an objection involving a question of proprietary title. In the partition suit now pending the objection was made by the daughter, *Musammat* Mangal Dei. She obtained a note in the *khewat* favouring her claim as to title. So the plaintiffs were required to institute this suit. The plaintiff has joined with him as plaintiff's four other co-sharers who were *pro forma* defendants in the partition suit, that is to say, co-sharers who, although not denying the plaintiff's right to partition, did not claim partition on behalf of themselves. The appellants' contention appears to be that where a party to a partition suit is required to bring a civil suit to clear his title no other co-sharer has a right to join in the bringing of the suit. There is authority for holding that a party to a partition suit may not, while the partition suit is pending, bring a suit against another party in the Civ l Court to clear title otherwise than under the direction of the Court hearing the partition suit. The basis of this proposition is that the partition Court is given jurisdiction in respect of title and this impliedly makes the question of title an essential part of the partition proceeding so that a Civil Court is debarred from entertaining questions of title except in a suit instituted by direction of the partition Court. Conceding that this view is correct, it does not follow from it that a party not directed to bring a title suit cannot join a party directed to do so in the bringing of one. A direction by a Revenue Court in the process of a partition suit under section 111 (*b*) to one party to bring a title suit in a Civil Court implies a right of joinder in the suit of any person as plaintiff in whom a joint right of relief exists. The direction to bring a suit to any person must mean that he is to bring it according to, and as permitted by, the law of procedure and O. I, r. 1, of the Code of Civil Procedure allows such joinder. This point, therefore, is decided against the appellants.

It is desirable to point out that in this suit the plaintiffs have claimed less than they were entitled to claim in respect o their cause of action. They have only claimed that the gift to *Musammat* Mangal Dei of the plots will leave them entitled to be given on partition as large an area as if no such gift had been executed. They have not claimed that, for the purposes of partition, the settlement should entirely disregard the deed of gift to the daughter. They could have claimed this because it is obvious that the deed of gift was not valid at all against them and that the compactness of any specific area awarded to them might be prevented by any attempt to keep that area clear from the plots. All that they have claimed is that they are not to suffer in respect of area. The lower Courts have stated that the area assigned to *Musammat* Mangal Dei must contain the plots and not that assigned to the plaintiff No. 1. They based their remark on equity. This is not correct. The remark should have been based on the failure of the plaintiffs as statedabove to claim all that they were entitled to. This failure in the light of O. II, r. 2 (2), of the Code of Civil Procedure, would appear to bar the plaintiffs from claiming that the deed of gift should be ignored in partition to any extent beyond that claimed in the plaint. The claim in the plaint is that the deed of gift should not affect the area but there is no claim that it should not affect the choice of area. Where a party asks for and obtains a declaration of his title against another, that title thenceforth must be deemed to be the title claimed and not anything more. These remarks, however, in respect of the *obiter dictum* of the lower Courts are themselves a *obiter dictum* and are not binding on the Partition Officer, as it is for him to decide what is the effect of the present decree. It would not be permissible to give in this suit the plainstiffs more than they have asked for.

Accordingly I dismiss this appeal with co t.

Z. K. *Appeal dismissed.*

JATTI *v.* BANWARI LAL.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

May 15, 1923.

Present:—Lord Buckmaster, Lord Dunedin Lord Carson, Sir John Edge KT., and Lord Salvesen.

Musammat JATTI—PLAINTIFF—APPELLANT

versus

BANWARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation of one member—Presumption—Re-union, proof of—Partnership—Accounts, suit for—Limitation—Limitation Act (IX of 1908), *Sch. I, Art.* 106.

Under the Hindu Law there is no presumption, when one co-parcener separates from the others, that the latter remain united. An agreement amongst the remaining members of the family to remain united or to re-unite must be proved like any other fact. [p. 463, col. 1.]

Balabux Ladhuram v. *Rukhmabai*, 30 I. A. 130 at p. 137; 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar P. C. J. 470 (P. C.) and *Balkishen Das* v. *Ram Narain Sahu*, 30 I. A. 139 at p. 151; 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar P. C. J. 489 (P. C.), followed.

Four brothers who formed a joint Hindu family carried on a family business. One of them separated from the others, and the latter carried on the business, the profits being carried to the separate accounts of the three remaining brothers in equal shares. Subsequently, one of the three brothers died, and although his share continued to be dealt with in the books, his widow was only paid maintenance. More than six years after his death, his widow brought a suit for partnership accounts and recovery of one-third of the partnership assets;

Held, (1) that there was no presumption that on the separation of one of the brothers the three remaining brothers had remained united; [p. 463, col. 2.]

(2) that after the separation the business carried on by the three brothers became an ordinary partnership subject to the law relating to partnership; [p. 463, col. 2.]

(3) that on the death of the plaintiff's husband the partnership was dissolved and a right to an accounting arose; [p. 463, col. 2.]

(4) that the suit having been brought more than six years after that date was barred by time; [p 463, col. 2.]

(5) that the mere fact that the deceased's share continued to be dealt with in the books after his death was no evidence of a partnership with his widow. [p. 464, col. 1.]

Appeal from the Chief Court of the Punjab.

Messrs. *De Gruyther, K. C.*, and *Dube*, for the Appellant.—Subsequent dealings and drawings show that the lady was a partner. There was joint ledger and the name of her husband continued in account-books. Reference was made to *Balabux Ladhuram* v. *Rukhmabai* (1) and *Balkishen Das* v. *Ram Narain Sahu* (2).

Dr. *Majid*, for the Respondents.—Definition of share was not conclusive. [*Nageshar Bakhsh Singh* v. *Ganesha* (3).] There might have been partial division [*Suraj Narain* v. *Iqbal Narain* (4)]. The real test of separation was intention which must be unequivocal [*Appovier* v. *Rama Subba Ayyar* (5), *Rewum Persad* v. *Radha Beeby* (6); *Kawal Nain* v. *Budh Singh* (7)]. West and Majid, Chapter Partition.

If there was any right to account it was barred by limitation. *Knox* v. *Gye* (8).

Mr. *De Gruyther K. C.*, replied.

JUDGMENT—In 1876 four brothers, Isher Das, Harbhagwan, Rup Chand and Daya Ram, lived as a joint Hindu family and carried on a family business. In that year a deed was executed by which the assets of the family were described and divided, and Isher Das was finally paid out. Thereafter, the business was carried on, but the profits were carried to separate accounts of the three remaining brothers in equal shares.

In 1905 Rup Chand died, leaving a widow who is the appellant. In 1914 the widow raised this suit against the remaing brother and the sons of the other who had predeceased, claiming accounts and payment of one-third of the partnership assets.

(1) 30 I. A. 130 at p. 137; 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

(2) 30 I. A. 139 at p. 151; 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar P. C. J. 489 (P. C.).

(3) 56 Ind. Cas. 306; 47 I. A. 57 at p. 70; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 23 O. C. 1; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 42 A. 368; 13 L. W. 622 (P. C.)

(4) 18 Ind. Cas. 30; 40 I. A. 40 at p. 45; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).

(5) 11 M. I. A. 75; 8 W. R. (P. C.) 1; 20 E. R. 30.

(6) 4 M. I. A. 137; 7 W. R. (P. C.) 35; 18 E. R. 651 (P. C.).

(7) 40 Ind. Cas. 286; 44 I. A. 159; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330; 39 A. 496 (P. C.).

(8) (1872) 5 H. L. 656; 42 L. J. Ch. 234.

JATTI v. BANWARI LAL.

The defence put up was two-fold. It was alleged that though in 1876 Isher Das separated from this joint family, the other brothers remained joint; that in consequence on the death of Rup Chand, the husband of the plaintiff, she had only the right of maintenance as a Hindu widow, which maintenance she had duly received. Consequently, it was said that assuming that there was a complete separation, the suit was time-barred under Art. 106 of the First Schedule of the Limitation Act. The statement of the plaintiff as to what happened at her husband's death was not expressed with precision, but might be read as an averment that on her husband's death she was admitted to be a partner, her share being the same as that of her deceased husband. The issues as originally framed were only three in number, one of which, being as to the plaint being adequately stamped, may be disregarded. The remaining two were: (1) On the separation of Isher Das did not the remaining male members of the family become seperate? (2) Did they convert the joint family business into a partnership? The case went to trial and no evidence was produced by the plaintiff, except the account-books of the firm, which showed that after Isher Das separated, the profits of the business were carried to separate shares in the names of the three brothers and this continued after Rup Chand's death. The learned Senior Subordinate Judge found, first, that the deed executed at the separation of Isher Das showed separation of the whole brothers; that re-union had not been proved, and that the joint family came to an end. But finding in the pleading a clear plea to the effect that the suit was time-barred, he added an issue to that effect and decided it in favour of the defendants.

The plaintiff appealed and on appeal the learned Judges of the Chief Court of the Punjab held that in 1876, though Isher Das had separated, separation had not taken place among the other brothers, and consequently the plaintiff had only the rights of a Hindu widow for maintenance and could not maintain the suit. They, therefore, found it unnecessary to consider the question as to limitation. The plaintiff has appealed to the King in Council.

Their Lordships do not find themselves able to agree with the views of the learned Judges of the Chief Court.

The law is well settled by the cases of *Bilabux Ladhuram* v. *Rukhmabai* (1) and *Balkishen Das* v. *Ram Narain Sahu* (2). Lord Davey remarks in the former case:

"It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united.....Their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

Their Lordships think that the result is well stated by the learned Trial Judge, who says:—

"There is absolutely no material on the file from which it can be inferred that the three brothers continued united or reunited as co-parcenery members of a Joint Hindu family, while defendants' own books show the contrary.....I have, therefore, not the least hesitation in finding that, on the separation of Isher Das, the family of the parties ceased to be a joint Hindu family in the strickest sense of the term; or, in other words, its members ceased to be co-parceners. Thus, I find the first issue against the defendants."

There remains, however, the question of limitation. The position here seems clear. Separation having been effected in 1876 and the business being carried on by the three brothers, the business became an ordinary partnership subject to the Partnership Act. On the death of Rup Chand, the plaintiff's husband, the partnership was dissolved and a right to an accounting arose. But Rup Chand died in 1905 and this suit was not raised until 1914. It is, therefore, time barred as a suit for such an accounting. If, however, on Rup-Chand's death the widow was admitted as a partner to a new partnership, then the date of dissolution would only be the raising of the suit and no limitation could apply. It is possible to read the averments of the plaintiff as alleging such a partnership. But the existence of such a partnership was denied. The case went to trial, and not a scrap of evidence directly proving such an agreement was produced. All that the widow got was a mere allowance

of Rs. 51 a month. The fact that Rup Chand's share still continued to be dealt with in the books is no evidence of a partnership with his widow.

Their Lordships think that a perfectly correct view was taken by the learned Subordinate Judge. As, however, the result is the same as if the grounds of judgment of the Court of Appeal had been adopted, the form of judgment which will be appropriate will be simply to dismiss the appeal with costs, and their Lordships will humbly advise His Majesty accordingly.

Z. K. & A. M. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Roaken, Ford & Chester.*

Solicitors for the Respondent.—Messrs. *Chapman, Walker & Shephard.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 839 OF 1920.

July 27, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

JANKI RAY AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja KALANAND SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XI, r. 9, scope of—Bengal Tenancy Act (VIII of 1885), s. 158—Application for assessment of rent dismissed in default—Subsequent suit for compensation for occupation of land and for determination of annual rental, whether barred.

Order IX, r. 9, of the Civil Procedure Code applies only to the case of suits. [p. 464, col. 2.]

An application under section 158 of the Bengal Tenancy Act, for assessment of rent having been dismissed for default under O. IX, r. 9, Civil Procedure Code, the landlord instituted a suit for compensation for occupation of the same land by the same tenants, and for determination of the amount of annual rent payable by the tenants:

Held, that, in so far as the matters under appeal concerned merely an application under section 158 of the Bengal Tenancy Act, they could not be regarded as a suit within the meaning of O. IX r. 9, Civil Procedure Code, and that the claim for determination of the amount of the annual rent payable by the tenants was not barred. [p. 465, col. 1.]

Barhamdat Missir v. *Krishna Sahay*, 20 Ind. Cas. 910; 18 C. W. N. 466, referred to.

Second appeal from a decision of the Officiating Subordinate Judge, Monghyr, dated the 16th June 1920, modifying that of the Munsif, Monghyr, dated the 28th November 1919.

Messrs. *Kulwant Sahay* and *Sant Prasad*, for the Appellants.

Mr. *C. C. Das*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal brought on behalf of the defendants against a decision of the Subordinate Judge of Monghyr affirming with slight modifications the decree of the Munsif. The suit was instituted in 1919 by the plaintiffs as landlords against the defendants as tenants claiming compensation for occupation of certain land for the last three years and a determination of the annual amount of rent payable by the tenants. The only question which arises in this appeal is, whether the decree of the lower Appellate Court assessing the rent at a certain rate according to the nature of the different plots of land is barred by reason of O. IX, r. 9, of the Civil Procedure Code. It appears that a claim for assessment of rent was preferred by the same plaintiffs against the same defendants in respect of the same land in the year 1915. That application failed for default and was dismissed. The defendants contend that under the provisions of O. IX, r. 9, the previous suit having been dismissed under r. 8 of that Order, the plaintiffs are precluded from bringing a fresh suit in respect of the same cause of action. The question which we have to determine in the present appeal is, whether O. IX, r. 9, applies to a case like the present at all. The rule applies only to the case of suits and the relief sought in the present instance in so far as it is for past rent is clearly not a relief which is barred by any previous suit for past rent in the year 1915 and that indeed is not suggested. In so far as the relief sought is for assessment of fair rent in a case where no rent has been paid previously or where no rent has been agreed previously, it is not a suit at all. The only provision for

asserting a claim of that sort is under section 158 of the Bengal Tenancy Act, which provides that the Court having jurisdiction to determine a suit for the possession of land may on the application of either the landlord or the tenant determine certain matters, amongst others the rent payable by the tenant at the time of the application. But for that section, the plaintiffs would have no cause of action at all. They would certainly have no right to bring a suit for the assessment of rent merely on the ground that the tenant was in possession and that no agreement had been come to between him and the landlords as to the proper amount of rent payable. That must primarily be a matter of contract between the parties and no Court will make a contract for the parties or give enforcement to a contract which has not in fact been made between the parties. But under the special provisions of section 158 of the Bengal Tenancy Act the plaintiffs have a right in such a case to apply for assessment of rent. Therefore, in so far as the matters now under appeal concern merely an application under section 158 of the Bengal Tenancy Act, they clearly cannot be regarded as a suit within the meaning of O. IX, r. 9. It is contended, however, on behalf of the appellants that section 158 of the Bengal Tenancy Act has no application in the particular circumstances of the present case. It is said that that section, at the most, only applies to cases where the landlord asks that it may be determined what is the rent payable by the tenant at the time of the application and, therefore, if there is already in existence an agreement between the parties as to the rent payable the Court has no power to disregard that agreement and make a new agreement for the parties even if it considers that the rent payable is not fair and equitable, because that would be in fact enhancing the rent which the Court has no right to do under section 158. I entirely agree that if there is already in existence an agreement between the parties as to the amount payable the Court in an application like the present has only to consider what was the amount payable under that agreement and cannot substitute therefor some other amount even if it should think that that would be more equitable. If, however, it should turn out that there is in fact no agreement between the parties as to the amount of rent payable, then I think that the case is governed by the decision in *Barhamdat Misstr* v. *Krishna Sahay* (1), where it was laid down that in such a case, that is to say, where there is no existing agreement between the parties, the Court has power under section 158 (1) (*d*) to ascertain in the absence of such agreement, what is the proper rent payable and to determine that under the provisions of the section. In the present case the defendants say that it is shown by the evidence that there was in fact an agreement between the parties to pay rent for the land in suit upon the same basis as they had previously held the lands. It appears that some years ago, in the year 1896, the landlords obtained a decree for rent against the defendants or their predecessors and having put up the land for sale purchased it themselves. Some time later the defendants applied for a fresh settlement and they were in fact settled on the land by the plaintiffs, and their contention is, that at that time the agreement between themselves and the plaintiffs was that they should pay the rent which they had previously paid when they had formerly held the lands. If that case could be made out, and I entirely agree that the only function of the Court could be to ascertain what the previous rent was, but it seems to me that in the judgment of the lower Appellate Court there is a distinct finding that there was no such agreement as that contended for. First of all, the Record of Rights which was finally published in the year 1908 after the defendants were re-settled on the lands records this land as *belagan kabil lagan* which means that no rent has been settled for the land but it is the class of land for which rent is assessable. The presumption, therefore, was that no rent had been settled between the parties for this land, and, therefore, when the matter was before the Trial Court and again before the Subordinate Judge on appeal they had to consider whether the evidence called by the

(1) 20 Ind. Cas. 910; 18 C. W. N. 466.

parties was sufficient to rebut that presumption. The conclusion they came to was that the presumption had not been rebutted and that the land was in fact, as recorded in the Record of Rights, *kabil lagan*. The suggestion put forward by the defendants was that they had approached the plaintiffs' manager and that he had offered them the land upon paying a *salami* of Rs, 500 at the old rental and issued a *parwana* to that effect, the terms being that the lands were to be settled at the old rental, 4½ *bighas* at a *nagdi* rental and the remainder on a produce rent and that the defendants were to execute a *kabuliyat* in respect of the settlement. The evidence showed that the defendants never did execute a *kabuliyat* in respect of this land and it further shows that they never did in fact pay a *salami* of Rs. 500, although they paid a sum of Rs. 250 and they say that they agreed to pay the rest by instalments, but there is no evidence that it was ever paid. Further, there was no evidence at all to indicate that the defendants have accepted the terms put forward by the manager in the *parwana* or agreed to pay the rental which was offered to them and in fact from that day to this, as far as the evidence goes, they have never paid any rent at all and there has been a dispute going on between the parties as to the exact amount of rent payble. In these circumstances, the Judge, even if we had any power to interfere with his finding, was perfectly justified in arriving at the conclusion that the Record of Rights had not been rebutted. He, therefore, found in favour of the plaintiffs and assessed the land as I have already said, at various rates as being the rent payable at the time of the application. In my opinion, the appellants' contention fails and this appeal should be dismissed with costs.

Mullick, J.--I agree. So far as the claim for an assessment of fair and equitable rent is concerned the plaint must be treated as an application under section 158 of the Bengal Tenancy Act, and the present proceeding is not barred under the provisions of O. IX, r. 9, of the Civil Procedure Code which is only applicable to suits.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 49 OF 1921.
May 14, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

GAURI SHANKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANKI KUNWAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI—Pleadings—Particulars—Courts, duty of—Procedure—Fraud, proof of.

Courts should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met. This rule is of general application. [p. 468, col. 1.]

A defendant is entitled, before delivering his written statement, to have an order that the plaintiff shall deliver to him a pleading in compliance with the provisions of O. VI of Civil Procedure Code. Equally, a aintiff is entitled, before being called to take any further step in the action, to have proper particulars of the defendants' written statement. If the Judge is of opinion that a groundless application is made to him, the party putting in the application should be ordered to pay costs. [p. 468, cols. 1 & 2.]

A **Court** should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application, such payment to be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff is in default, he should have his action stayed; and if the defendant is in default his defence should be struck out. [p. 468, col. 1.]

Particulars having been furnished, the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original pleading and the particulars. [p. 468, col. 1.]

To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true, that they were made for purpose of being acted upon and believed, that they were believed and acted upon and caused the actual damage for which the relief is claimed. [p. 469, col. 1.]

First appeal from a decree of the Additional Subordinate Judge, Benares.

Dr. *Surendro Nath Sen*, Messrs. *Damodar Das*, *Kailas Nath Katju*, *Kumuda Prasad* and *Badri Narain*, for the Appellants.

Messrs. *B. E. O'Conor*, *Mukhtar Ahmad* and *Narain Prasad Asthana*, for the Respondent.

JUDGMENT.—In the lower Court this was a suit for specific performance

of a contract for sale embodied in a document dated the 2nd of December 1918. That document set forth that a dispute had arisen between *Musammat* Manki Kunwar and the defendant and other parties in like interest in relation to about 17 acres of land in *Mauza* Lachipur. That land had been bought by Gauri Shankar a few years before. That land was the subject of a pre-emption suit brought by the present plaintiff, which, at the date of this agreement of the 2nd of December 1918, had been through two Courts, and in each Court had been decided adversely to the lady. At the date of this agreement there was an appeal pending in the High Court with a view to put an end to the dispute relating to this land in *Mauza* Lachipur, and also with a view to put an end to a rivalry between the parties with regard to certain land under the control of the Maharaja of Benares, they entered into the agreement in suit. In substance, in certain events, the lady had to pay Rs. 5,000 in order to become the owner of the land in *Mauza* Lachipur; and as regards the other property, *Mauza* Saktanpur and other *Mauzas* set out in the plaint, the parties were willing to become partners in that property, and partners on the basis of each taking a half. It appears that there were various persons who wished to acquire this property, and a man whose name is of no importance in the action, first offered a small amount of *nazrana*. The lady capped that by what became ultimately an offer of Rs. 10,000 and thereupon the defendant and his party added to it Rs. 1,000 making the offer Rs. 11,000. In this state of affairs the Court of His Highness the Maharaja of Benares looked into the matter, and by the 2nd of December all the parties to this suit had recognised the inadvisibility of bidding against each other, and, indeed, on the 4th of January 1919, they made it perfectly clear to the officers of His Highness that Rs. 11,000 would be paid —as to Rs. 5,500 by the lady and, as to Rs. 5,500 by Gauri Shanker and his father, and they would be content each to receive one-half of the property. That is in fact what has happened.

The complaint of the present plaintiff was that, in breach of the definite agreement, the defendants had refused to convey to her the Lachipur property for the Rs. 5,000 set out in the agreement. The defendant, searching about for a defence, thought that some vague allegations of fraud would help him and embodied them in paragraph 4. The plaintiff did not apply for particulars of the fraud and the learned Subordinate Judge, in entire disregard of the provisions of O. VI of the Code of Civil Procedure, proceeded to frame issues. The one relating to fraud was remarkable. It runs as follows:—Issue No. 1 (*c*) "Were there any allegations in connection with the pre-emption second appeal made with intense deception which affected the defendants as alleged in paragraph 4 of the written statement? If so, how does that fact affect the claim?"

It was the duty of the Pleader for the plaintiff to apply to the Subordinate Judge to order the defendant to deliver further and better particulars of the charge of fraud. He did not do so. When settling issues, it was the duty of the Judge himself to require the defendant to specify with particularity the nature of the fraud alleged. He should have done this in the interest of the plaintiff, and because the rules require it, and in the public interest. If Subordinate Judges would make the parties comply with reasonable strictness with the provisions of O. VI, cases would be more satisfactorily decided and a very large amount of public time would be saved in their disposal, with a corresponding benefit to litigants.

Taking the case of fraud as an illustration, the proper form of application in an ordinary suit where the plaintiff has alleged fraud vaguely would be somewhat as follows:—"that the plaintiff be ordered within 10 days to deliver to the defendant further and better particulars of the fraud alleged in paragraph..... of the plaint stating."

(4) Whether the representations alleged were verbal or in writing. If in writing, identifying and producing the document or documents for inspection; if verbal, giving "the substance of each and every of the said representations and stating as regards each one the date when and

GAURI SHANKAR v. MANKI KUNWAR.

the place where and the person by whom and the person to whom the said representation was made, and that the plaintiff be precluded at the trial from giving any evidence of any representations other than those (if any) clearly pleaded in.... paragraph and the particulars to be delivered and that the plaintiff be ordered to pay Rs..... to the defendant as the costs of and occasioned by this application, such payment to be made with the delivery of the particulars ordered."

Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently, the result of ordinary particulars of nebulous claims and defences will be to make it mainifest that the claim or defence has no substance.

A Subordinate Judge should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff, if in default, should have his action stayed; and if the defendant is in default, his defence should be struck out.

Particulars having been furnished, the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and the particulars and should give that as his reason

Unless pleadings are definite, a Judge is entirely at the mercy of the parties and has a difficulty in excluding evidence however irrelevant. The case is protracted and the opposite party, not infrequently, put in an unfair position. A defendant is entitled, before delivering his written statement, to have an order that the plaintiff shall deliver to him a pleading in compliance with O. VI. Equally, a plaintiff is entitled, before being called to take any further step in the action, to have proper particulars of the defendant's written statement. If the Judge is of opinion that a groundless application is made to him, the party putting in the application should likewise be ordered to pay costs.

We have made these observations at length because we are persuaded that, without undue strictness or pedantry, every Subordinate Judge could effect a large saving of public time by requiring reasonable compliance with the existing rules, and we think that Subordinate Judges should entertain applications by the parties if made within a few days on the receipt by them of the plaint and written statement, respectively. Pleadings at present are not infrequently deliberately framed in the most general of terms and are involved, unsystematic, argumentative and, indeed, abusive. They should contain clear, definite allegations of fact, with, when occasion demands it, the necessary reference to statutory law.

In the particular case under consideration, if the defendant had been made to specify in clear terms what was the nature of the fraud that he alleged with the proper particulars which such a plea requires, it would have been found at once that there was no substance in his allegation. It now turns out that it condenses itself into this that because the lady was alleging from first to last that she had a right of pre-emption, therefore, she was guilty of deceit or, to use the curious language of the Subordinate Judge as embodied in Issue No. 1 (c), "intense deception." That is a phrase with which we are wholly unfamiliar. There is no doubt that the lady was alleging a right of pre-emption. It may have been a good claim, it may have been a bad claim. At the very time when the right of pre-emption was being asserted by her in the agreement of the 2nd of December 1918, matters had reached the stage when two competent Courts had decided against her, and this was a fact that was known to the defendants; and yet it is said that the lady made statements as regards her right to pre-emption which were false to her knowledge, were intended to deceive, and in fact did deceive these defendants and caused them damage in that they were induced to enter into the contract because it is not put in that way in the pleadings, that would have shown there was no substance in the plea. The

learned Subordinate Judge, when he got into close quarters with the facts, said that he did not believe the defence allegation that the plaintiff got the agreement "through deceptive words." To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them, or were such that the party making them could have no reasonable belief that they were true, that they were made for the purpose of being acted upon and believed, that they were believed and acted upon and caused the actual damage for which relief is claimed. We can find no possible answer of the defendant to this suit, and we are of opinion that this is one of those cases in which specific performance of the contract must be declared and that the Judge was right. We, therefore, dismiss this appeal with costs.

M. D. J. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 12, 1923.

Present :—Lord Dunedin, Lord Atkinson and Lord Wrenbury.

THE TATA IRON AND STEEL COMPANY, LIMITED—APPELLANTS

versus

THE CHIEF REVENUE AUTHORITY, BOMBAY—RESPONDENT.

Income Tax Act (VII of 1918), s. 51—Case stated to High Court—Decision of High Court, nature of—Appeal to Privy Council, whether competent.

A decision of the High Court on a reference by case stated under section 51 of the Income Tax Act, is merely advisory, and not in the proper and legal sense of the word final, and is, therefore, not appealable to His Majesty in Council. [p. 474, col. 1.]

Special leave to appeal to His Majesty in Council will not be granted, when the subject is adequately dealt with in the High Court's Letters of Patent. [p. 474, col. 2.]

Appeal from the judgment of the Bombay High Court.

Messrs. *W. Finlay, K. C.*, and *Raikes*, for the Appellants.

Messrs. *Dunne, K. C.*, and *Holts*, for the Respondent.

JUDGMENT.

Lord Atkinson.—This is an appeal from a judgment of the High Court of Bombay on a question referred to it under section 51 of the Indian Income Tax Act, 1918. The facts out of which the appeal has arisen are shortly as follows:—For the official year 1919-1920 the appellant Company was, by the the Collector of Income Tax, assessed on a sum of Rs. 61,84,848, alleged to be income earned in the previous year, 1918-1919. The Company claimed to deduct from this assessment a sum of 28 lacs of rupees, paid by it to certain under-writers on an issue of Rs. 7,00,000 preference shares of the Company of Rs. 100 each, as expenditure incurred by the Company for the purpose of making profits in its business. By section 9, sub-section (1), of this Act it was provided that the tax (*i.e.*, the income tax) shall be payable by an assessee under the head of "income derived from business," in respect of the profits of any business carried on by the tax-payer, and by sub-section 2, (*ix*), it is further provided "that an allowance is to be made in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits."

The appellant Company claimed to deduct from the income on which they had been assessed this sum of 28 lacs of ruppees, paid to the under-writers to help to float the issue of these preference shares. The Collector of Income Tax and the Chief Revenue Authority were of opinion that the payment of the 28 lacs was in reality capital expenditure, inasmuch as it was expended to procure capital, and was not an allowable deduction from the profits of the business under the provisions of the Income Tax Act.

A reference by case stated was accordingly made by these officials to the High Court under section 51 of the Income Tax Act of 1918, of the question whether the expenditure of these 28 lacs could be allowed under section 9 sub-section (2) (*ix*), of this Statute, as not being in the nature of capital expenditure, nor as having been incurred "solely for the purpose of earning such profits" within the meaning of this sub-section. The High Court delivered

judgment on the 28th February 1921,* holding that the words "any expenditure (not being capital expenditure) which had been incurred solely for the purpose of earning profits," meant profits generally and not merely profits earned in the year of assessment, but that the expenditure in this case of the 28 lacs was in the nature of capital expenditure, and, therefore, not an allowable deduction. From this judgment the apellant Company have, by leave of the High Court of Bombay, apppealed to His Majesty in Council. On the appeal being called on for hearing, a preliminary objection was raised by the respondent to the effect that the appeal was not competent inasmuch as no such appeal, it was contended, lay from the decision of the High Court on a reference by case stated under section 51 of the Statute, that such a decision is only advisory, as it is styled, and was something in the nature of an opinion for the guidance of the Revenue Authorities as to how they should deal with the question referred to the High Court.

The point thus raised, which is one of some difficulty, was very well argued by the Counsel on both sides. It is admitted that no Statute, Imperial or Indian, is to be found giving expressly, or by implication, a right of appeal, either with or without the leave of the High Court of Bombay, to His Majesty in Counsil from a decision or order made, or judgment given by the High Court under the provisions of the 51st secton of the Indian Income Tax Act of 1918, neither can any such Statute be found giving a general right of appeal to His Majesty in Council from the orders or judgments of any class of Courts, as the third section of the English Appellate Jurisdiction Act of 1876 gives a general right of appeal to the House of Lords from the judgments or orders of the Courts therein mentioned. It has been contended, however, that a general right of appeal of a character somewhat similar to that given by the Appellate Jurisdiction Act has been given in Bombay by the 39th clause of the Letters Patent of the High Court of Bombay, dated the 28th December 1865. This 39th clause provides that any person. may appeal to Her Maesty in Council. First in any matter (not being of Criminal Jurisdiction) from any final judgment, decree or order of the High Court of Judicature at Bombay, made on appeal, and, second, from any final judgment, decree or order made in the excercise of its Original Jurisdiction by the High Court from which an appeal does not lie to the High Court under the 15th clause.

In their Lordships' view the words "Original Jurisdiction" are only used in contradistinction to the words "made on appeal" mentioned earlier in the clause; but it is quite obvious that the matters to be dealt with under the Original Jurisdiction are serious and important, because by the succeeding clause, namely, clause 40, specified provision is made for obtaining the permission of the Court to appeal to Her Majesty in Counicl in respect of preliminary or Interlocutory judgments, decrees, orders or sentences (not being matters of Criminal Jurisdiction) of the High Court. The granting of this permission is entirely discretionary with the Court or Judge empowered to give it. There is not an appeal as of right in these interlocutory matters, and, but for the provision of clause 40, an appeal in such matters would be incompetent. *Goldring v. La Banque d' Hochelage* (1).

It is not pretended that the permission in this clause referred to was ever asked for or obtained in the present case, nor was it argued that the decision was an interlocutory judgment, order or decree within clause 40.

In order, therefore, that the appeal in this case should be held to be competent, the decision and order of the High Court under section 51 of the Income Tax Act must come within clause 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. Now, what is a final judgment as understood in English litigation? In *Ex parte Moore, In re Faithfull* (2) Lord Selborne laid it down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and

* See 64 Ind. Cas. 12—[*Ed.*]

(1) (1880) 5 A. C. 371; 49 L. J. P. C. 82.
(2) (1885) 14 Q. B. D. 627 at p. 632; 54 L. J. Q. B. 190; 52 L. T. 376; 33 W. R. 438; 2 Morrell 52.

a final adjudication between the parties to it on the merits.

In *Onslow* v. *Commissioners of Inland Revenue* (3), reported in the Court below as *Onslow* v. *Commissioners of Inland Revenue* (4), it was determined on high authority what it is that amounts to a final judgment. The facts of the case are as follows:—By the 18th section of the Stamp Act of 1870 (34 & 35 Vic. c. 7) it is povided that, subject to certain regulations (irrelevant for the present purpose) the Commissioners may be required by any person to express an opinion with reference to any executed instrument upon the question, whether this instrument is chargeable with any duty, and if so, what amount of duty is to be charged? The appellants in this case requested the Commissioners to do these things, but were dissatisfied with the amount of the duty which the Commissioners assessed upon the instrument in reference to which they asked their opinion. The 19th section of the Statute enables any person so dissatisfied, on payment of the duty assessed, to appeal against the assessment to the Court of Exchequer, and for that purpose to require the Commissioners to state and sign a case upon which their opinion was required and the assessment made by them, which the Commissioners are bound to do What the Court may do upon the hearing of this case is the matter of importance, It may determine the question submitted, and if the instrument in question be, in the opinion of the Court, chargeable with any duty, the Court shall assess that duty. If it is decided by the Court that the assessment of the Commissioners is erroneous, any excess of duty which may have been paid under this erroneous assessment or any penalty which has been paid in respect of it shall be ordered by the Court to be re-paid to the appellants with the costs incurred by them in relation to the appeal. But if the assessment of the Commissioners be confirmed by the Court, the costs incurred by them in relation to the appeal are to be paid by the appellant. On the 21st January 1890 the Court below decided the question submitted in favour of the Commissioners. Onslow appealed, but omitted to serve notice of appeal within the time required by O. LVIII, r. 3 of the Rules of the Supreme Court of 1883. In July 1890 he applied to the Court of Appeal to extend the time for appealing, on the ground that doubts had arisen as to whether the order of the Court below was "a judgment" or an "order" within the meaning of r. 15 of the above-mentioned rules. This rule ran thus:—"No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall.. be brought..except by leave of the Court after the expiration of one year."

Lord Esher delivered the judgment of the Court. After quoting the opinion of several authorities, which, as the judgment is printed, it is not easy to distinguish from portions of his own judgment, he refers particularly to opinions expressed by Cotton, L. J., in *Ex parte Chinery, In re Chinery* (5) with which Bowen and Kay, L. JJ., had concurred. He said:

"I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established, unless there is something to show an intention to use the words in a more extended sense."

He proceeds:

"Bowen, L. J., says that there is an inherent distinction between judgments and orders, and that the words 'final judgment' have a professional meaning; by which expression I think he meant to say, as Cotton, L. J., had previously said, that a 'judgment' is a decision obtained in an action, and if that was his meaning, both those learned Lord Justices gave judgment to the same effet, and Fry, L. J., agreed with him. A 'judgment,' therefore,

(3) (1890) 25 Q. B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728.

(4) (1890) 24 Q. B. D. 584; 59 L. J. Ch. 255; 62 L. T. 108; 38 W. R. 445.

(5) (1884) 12 Q. B. D. 342; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morrell 31.

is a decision obtained in an action, and every other decision is an order..... That is, in my opinion, a proper distinction, and, therefore, in the present case the decision is an order, and not a judgment, and the appeal should have been brought.... within 21 days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing."

This decision clearly establishes that the decision and an order made by the Court under the 51st section of the Income Tax Act cannot be held to be a "final judgment" within the meaning of the 39th clause of the Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense.

Lord Lindley said :—

"I am of the same opinion. I was at first struck by the fact that the declaration of this Court upon a special case stated for the opinion of the Court of Chancery under 13, 14 Vic., c. 35, is in several sections of that Act called a 'decree' which is, of course, the equivalent to the term 'judgment' in the Queen's Bench Division. But the distinction just laid down by the Master of the Rolls is the proper one, and has my entire concurrence."

Bowen, L. J., (as he then was) also concurred. The Statute to which Lord Lindley referred, provides that the Court on the hearing is to decide the question by the special case referred and then by its decree declare its opinion upon rights involved therein, but without proceeding to administer any relief consequent upon such declaration. This declaration was, however, to have the same force and effect as if it had been made in a suit instituted by the parties by bill. It would appear to their Lordships that the ruling of the Court there was merely advisory. It is evident from this case of *Onslow* v. *Commissioners of Inland Revenue* (3) that the use of the words "determine" and "decide" or the direction that money paid in excess is to be refunded or the awarding of costs against the unsuccessful party, are not things which distinguish a judgment from an order where questions are referred to the Courts by case stated.

The word judgment is indeed popularly used in many different senses, as when one says a certain man is a man of sound judgment, meaning that he is possessed of the intellectual faculty of deciding rightly on facts or cisrcumstances, or where even in legal matters the expression of the opinion formed in a case by a Judge who dissents from his colleague is commonly called his judgment, though it can have no effect whatever on the determination of the suit or action in which it is delivered.

The decision appealed in this case is obviously not a "final decree" within the meaning of clause 39 of the Letters Patent, neither can it, on the ruling of the case of *Onslow* v. *Commissioners of Inland Revenue* (3), be rightly described a "final judgment". The question remains, is it a "final order", or only advisory, made by the Court in exercise of its consultative jurisdiction ?

One must, therefore, ask oneself what is the nature and character of the acts which section 51 of the Income Tax Act authorises and empowers the High Court to do..... It provides that if, in the course of any assessment under this Act, or in any proceedings in correction therewith (save an immaterial exception) a question arises with reference to the interpretation of any provision of the Act or any rule thereunder, the Chief Revenue Authority may, either on his own motion or on reference from any officer of subordinate authority, draw up a statement of the case, and refer it with his own opinion thereon to the High Court, and shall so refer any such question on the application of the assessee unless he be satisfied that the application is frivolous. The opinion of the Revenue Authority thus dominates and conditions the right of the assessee.

Again, it is the duty of the Revenue Official to make the assessment, and it is in the "*course*" of making it the question which may be referred must arise.

By sub-section (2) of this section, the Court may, if not satisfied with the statement contained in the case, send it back for additions or alterations. By sub-section (3), it is provided that on the hearing of this case the High Court shall "*decide*" the questions raised thereby, and shall "deliver judgment" thereon containing the grounds

on which the decision is founded, and shall send to the Revenue Authority a copy of this judgment under the seal of the Court and the signature of the Registrar and the Revenue Authority shall dispose of the case accordingly, or if the case arose from any Subordinate Revenue Officer, shall forward a copy of this judgment to such officer, who shall dispose of the case in conformity with it. This last provision merely means that the Revenue Officer, in proceeding with the work in the course of which he was engaged when the question referred arose, shall be guided by the decision given, and shall make his assessment accordingly—the ultimate result being that he assesses the tax-payer at an amount which in his instructed opinion he judges to be right. No suit can be brought to set aside or modify the assessment when so made. The amount of the tax-payers' liability is thus definitely fixed, but nothing more is done. The decision of the High Court does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word "judgment" is not here used in its strict legal and proper sense.

It is not an executive document directing something to be done or not to be done, but it is merely the expression of the opinion of the majority of the Judges who heard the case, together with a statement of the grounds upon which those opinions are based. It amounts only to a ruling that a certain deduction claimed by a tax-payer to be allowed from the sum for which he has been already assessed to income tax is not permissible.

Should the tax-payer be sued for the income tax for which he has been assessed, proof of the assessment would be but the first step in the litigation, not the final one. These circumstances would, according to the judgment of Cotton, L.J., in the *Standard Discount Company v. Oard de La Grange* (6), go to show that, however the order or decision might definitely and finally fix the amount of the assessment, it was only interlocutory. The Revenue Authorities are undoubtedly bound to act up to the decision of the Court made under section 51 of the Income Tax Act.

Bowen, L. J., in his judgment *In re Knight and Tabernacle Permanent Building Society* (7) appears to attach much importance to the fact that in a case where appeal is only made to the Court by special case to exercise its consultative jurisdiction, and make a decision or order of an advisory character, the arbitrator or other person asking for the opinion is not legally bound to act upon it, though he might be morally bound to do so. In a Scotch case of *Peter Johnston's Trustees* v. *Glasgow Corporation* (8) where the reference was precisely the same in form as in the other case the Court held that the Shariff who had stated the case for the opinion of the Court was bound to act upon its decision and would not be entitled to disregard it: It does not appear to their Lordships that the fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it necessarily determines whether the order and decision of the Court is or is not merely advisory. In order to determine whether an order made by a Court on a case stated is final or merely advisory, it is necessary to examine closely the language of the enactment, whether Statute, rule or order, giving the power to state a case.

When a case is stated for the "opinion" of the Court, that word would serve *prima facie* to indicate that the order made by the Court was only advisory. Where the case is referred for the "decision" or "determination" of a a question, there is a *prima facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive in the case of *In re Knight and Tabernacle Permanent Building Society* (7) a case was stated for the opinion of the Court as to whether this Society had power to alter its rules in a certain way. The order made on this question was held to be advisory, but in giving judgment Lord Esher dealt with the case of *Ex parte*

(6) (1878) 3 C. P. D. 67; 47 L. J. C. P. 31; 37 L. T. 372; 26 W. R. 25.

(7) (1892) 2 Q. B. 613 at p. 619; 62 L. J. Q. B. 33; 4 R. 67; 67 L. T. 403; 41 W. R. 35; 57 J. P. 229.

(8) (1912) S. C. 300.

County Council of Kent (9). In that case section 29 of the Local Government Act, 1888 (51 & 52 Vic. c. 41) provided "That if any question arises or is about to arise, as to whether any business, power, duty, or liability, is or is not transferred to any County Council or joint Committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a Chairman of Quarter Sessions or of the County Council Committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of Court may be directed by the Court, and the Court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question."

The Court in this case had only to deal with the question, which set of authorities should be charged with such and such portions of administration. Lord Esher critising this decision in the case said:

"Where a Statute provided that a case might be stated for the decision of the Court, it was held that, though that language might *prima facie* import that there was to be the equivalent of a judgment or order, yet when the context was looked at, it appeared that the jurisdiction (of the Court appealed to) was only consultative, and that there was nothing which amounted to a judgment or order."

It would appear to their Lordships that, having regard to the authorities cited, and for the reasons already stated, the decision, judgment or order made by the Court under section 51 of the Income Tax Act in this case was merely advisory and not in the proper and legal sense of the term final, and thus, so far as these considerations are concerned, that the appeal is incompetent.

Sir William Finlay, however, in the last resort contended that in any event his client had, by virtue of the Royal Prerogative, a right to appeal to His Majesty in Council. He did not show how it was open to him, as the case stands, to rely upon the Royal Prerogative.

(9) (1891) 1 Q. B. 725; 60 L. J. Q. B. 435; 65 L. T. 213; 39 W. R. 465; 55 J. P. 647.

In any view, it could not be exercised without leave granted. And without going the length of saying that this case is on a level with the case of *Attorney-General* v. *De Keyser's Hotel* (10) referred to in the argument, where the question was fully considered, their Lordships would be slow to advise His Majesty to grant special leave to appeal when the subject had been adequately dealt with in the Letters Patent.

Their Lordships will, therefore, advise His Majesty that the appeal is incompetent and must be dismissed, and that the appellants must pay the respondent's costs.

Appeal dismissed.

W. C. A.

Solicitors for the Appellants:—Messrs. *T. L. Wilson, & Co.*

Solicitor for the Respondents:—*India Office.*

(10) (1920) A. C. 508; 89 L. J. Ch. 417; 122 L. T. 691; 64 S. J. 513; 36 T. L. R. 600.

PATNA HIGH COURT.

CIVIL REVISION CASE NO. 100 OF 1923.

June 13, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

KAPLESHWAR JHA—PETITIONER

versus

RAGHUNANDAN PRASAD AND OTHERS —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115 —Another remedy open—Revision, whether competent—Land Registration Act (VII B.C. 1876), s. 55—Reference by Collector to Civil Court—Civil Court, whether has jurisdiction to decide question of title.

Where the party to whose prejudice an order has been made has another remedy, the High Court will not interfere with the order in the exercise of its revisional jurisdiction under section 115 of the Civil Procedure Code.

Where the dispute between two parties contesting each others' right to possession of certain lands was referred by the Collector to the Civil Court under section 55 of the Land Registration Act and the District Judge having tried the case came to the conclusion that a particular party's right prevailed; on an application for revision of the order to the High Court:

KAPILESHWAR JHA *v.* RAGHUNANDAN PRASAD.

Held, that the District Judge had jurisdiction to decide the matter, and as there was no irregular or illegal exercise of the jurisdiction, the High Court could not interfere in revision.

Civil revision from an order of the District Judge, Darbhanga, dated the 11th December 1922.

Messrs. *M. S. Das* and *H. P. Sinha*, for the Petitioner.

Mr. *Muhammad Hasan Jan*, for the Opposite Party.

JUDGMENT.

Mullick, J.—It is quite clear that it is not open to this Court to interfere in revision.

The opposite party Nos. 3 to 12 were applicants for registration under Act VII (B. C. 1876) before the Collector and asked for mutation on the strength of a *kabala* alleged to have been executed for consideration by the registered proprietor of the estate. There were two sets of objectors, namely, (1) Ambika Prasad and (2) Kapileshwar Jha, each of whom claimed registration on the strength of their *kabalas*; and the question before the Collector was who was in posesession. The Collector proceeded under section 55 of the Act and referred the case to the Civil Court for a decision on the question as to who had the right to possession. The case was tried by the District Judge of Darbhanga who came to the conclusion that the *kabala* of Ambika Prasad and his brother being unregistered could not prevail and that the *kabala* of Kapileshwar Jha, objector No. 2, although registered and purporting to be of a date prior to the date of the petitioner's *kabala* being collusive, the petitioner's document should prevail and that he was entitled to the right to possession. Against this order the present application has been made for the exercise of our Revisional Jurisdiction under section 115, Civil Produre Code.

Now, it is quite clear that the learned District Judge had jurisdiction to decide the matter. He had, under section 59, to determine the matter summarily and to deliver possession to the successful party and this he has done. It is said that he has exceeded his jurisdiction in holding that the *kabala* of Kapileshwar was collusive; but I cannot see that this contention is tenable for he had jurisdiction to hold whether or not the *kabala* was operative and whether he was right or wrong in his finding, it cannot be said that he has exercised any jurisdiction which was not vested in him under the law. In my opinion, there was no illegality in the exercise of jurisdiction and there is no right of revision against the order.

There is also a further reason why revision should not be allowed. It is the practice of this Court that, where there is another remedy, this Court will not interfere under section 115, Civil Procedure Code, and as the unsuccessful party in the present case has a right of suit, we ought not to interfere in the exercise of our revisional powers.

As to the general question whether decisions under section 59 of the Land Registration Act are open to revision by the Civil Court, we have been referred to *Umatul Mehdi* v. *Kulsum* (1), which was followed by a Division Bench of the same Court in *Rameshwar Singh* v. *Raghunath Singh* (2). Now, though it may perhaps be necessary upon a proper occasion to further examine that part of these decisions which deals with the right of revision by the High Court under section 115, Civil Procedure Code, it is not necessary for our purposes here to decide the point. I would only observe that if, indeed, there is any right of revision in the High Court such as the learned Judges in the cases above cited have held to exist, it does not seem clear what will be the effect of a judgment of reversal by the High Court after the District Judge has already issued a certificate to the Collector to make the necessary entries in his books. The Land Registration Act gives no power to any Civil Court to amend or alter the entry made by the Collector in his books in pursuance of the Civil Court's orders nor to interfere with the possession of the successful party. As a matter of first impression, it seems to me that section 62 of the Land Registration Act means, that there is no right of appeal or review under any enactment whatsoever against the order of the Civil Court.

(1) 35 C. 120; 12 C. W. N. 16; 8 C. L. J. 245.
(2) 35 C. 571.

MOHAMMAD MUMTAZ ALI KHAN v. MOHAN SINGH.

But, as I have said, it is not necessary to decide the question here and the present application for revision may be dismissed on the short ground that there was no irregular or illegal exercise of jurisdiction on the part of the Court.

The application is dismissed, hearing fee one gold *mohur*.

Bucknill, J.—I agree.

K. S. D. *Application dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

May 15, 1923.

Present:—Lord Buckmaster, Lord Dunedin, Lord Carson, Sir John Edge, KT., and Lord Salvesen.

Raja MOHAMMAD MUMTAZ ALI KHAN —APPELLANT

versus

MOHAN SINGH—RESPONDENT.

Adverse possession—Assertion of under-proprietary title by tenant in judicial proceedings—Limitation, commencement of.

A person who is in possession of land as a tenant cannot, by a mere assertion in a judicial proceeding and the lapse of twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the land. [p. 478, col. 2]

Consolidated appeals from the Judicial Commissioners Board.

Messrs. *De Gruyther, K. C.*, and *Parikh*, for the Appellant.

JUDGMENT.

Lord Salvesen.—The appellant in these two appeals which have been consolidated was the defendant in a separate suit brought by each plaintiff (respondent) for a declaration to the effect that he was an under-proprietor of certain land situated in the village of Badhia Farid. This village forms part of the estate called the Bilaspur estate in the Gonda District of Oudh. The Munsif's Court granted to each plaintiff a declaratory decree in terms of the plaintiffs' crave; these decrees were affirmed in appeal and the defendant obtained special leave to appeal to His Majesty in Council. There is no distinction between the two cases so far as the points in controversy are concerned and they may, therefore, be treated as one.

There has, unfortunately, been a considerable amount of litigation between the defendant and the plaintiffs who have the use or occupation of the land described. As far back as the year 1891 the defendant issued notices of ejectment under sections 54 and 55 of the Oudh Rent Act, 1886 (Act XXII of 1886) against the two plaintiffs or their predecessors in title. They thereupon instituted proceedings under section 108 (8) of this Act to contest the said notices on the ground that they were not tenants liable to ejection by notice under the Act but were under-proprietors thereunder. In these proceedings, final judgment was pronounced on 17th March 1893, by the Board of Revenue in N. W. P. and Oudh. The operative part of the judgment was that the notice of ejectment issued by the defendant be cancelled and the objections of the plaintiffs be allowed. The ground of the decision, to put it shortly, was that when, in answer to a notice of ejectment, an occupier pleads that he has an under-proprietary right in his holding, it is sufficient for him to satisfy the Board of Revenue that there is reasonable ground for presuming that he is not an ordinary statutory tenant under the Rent Act in order to obtain cancellation of the notice.

It is plain from the considered judgment of the Board of Revenue that they were of opinion that a *prima facie* case had been made out by the plaintiffs. The judgment was based on previous proceedings which had taken place between the defendant and certain persons in occupation of the land in question in whose right the present plaintiffs now are. In 1871 these persons had claimed in the Settlement Courts sub-settlement of the village. Their claim was rejected, but in rejecting it the Settlement Court of first instance gave them a proprietary decree in respect of "*sir*." This decree was appealed to the Commissioner's Court by which the decree was wholly set aside; not, however, on the merits of the title to settlement or to "*sir*" but on a

technical ground. The case was sent back for trial, but prosecution of it was dropped by the parties and no decision in favour of either was passed, but the fact that the Settlement Court of first instance had pronounced a decree in favour of the plaintiffs was held sufficient justification for cancelling the notice of ejectment, leaving the parties to constitute their claims, if they so desired, in the proper Civil Court.

No enquiry seems to have been made in this suit as to the state of the title so far as depending upon written evidence, nor as to the point which was brought before their Lordships in argument in the present case, that under-proprietors who failed to get a decree in their favour in the Settlement Court prior to a given date must be presumed to have abandoned or lost any rights which they might previously have possessed. This is scarcely to be wondered at, in view of the fact that while the Revenue Court was the only one which was competent to deal with a notice of ejectment it had no jurisdiction to determine proprietary rights.

After the decree of cancellation of the notice of ejectment, both parties remained quiescent until 1905, when the defendant instituted a suit against the plaintiffs in the Court of the Munsif of Utraula alleging that they were merely tenants and claimed possession of the lands in their occupation. The plaintiffs resisted the suit, but on 20th September 1905, the Munsif granted a decree in favour of the present appellant. An appeal was taken to the Court of the Judicial Commissioner of Oudh, which, on 8th August 1906, held that the suit being for recovery of the possession would not lie in a Civil Court and dismissed the same. This proceeding need not be further referred to beyond showing that the defendant then maintained the same position as he took up when he served notices of ejectment upon the plaintiffs.

In 1910 the tenants fell into arrears of the money payment (to use a neutral term) which they had hitherto been making in respect of the lands in question, and the defendant sued them in the Rent Court for arrears of rent, claiming interest thereon under section 141 of the Oudh Rent Act. It may be noted that one of the differences between an under-proprietor and an occupancy tenant having a more or less fixed tenure is, that the former is not liable to pay interest on arrears of rent. The plaintiffs in the present case took this point and contested their liability to pay interest. On 31st May 1910, however, the Rent Court held that the plaintiffs were not under-proprietors, and, treating them as tenants, allowed the claim for interest and decreed the suit.

The decision in this case led to the institution of the present suits which were brought in the beginning of 1913 in the Court of the Munsif of Utraula. In his petition of plaint each plaintiff narrated the previous proceedings, and prayed that a declaratory decree be passed in his favour to the effect that he was under-proprietor of the lands which he occupied in the village of Badhia Farid. He maintained his suit upon two grounds—first, that he and, his ancestors had been throughout under-proprietors and as such had been in possession of the lands for many years; and, second, even if he failed to establish this that he had continued in possession for more than twelve years after the date of the decree cancelling the notice of ejectment and had thus by prescription acquired under-proprietary rights.

The only issue in the suit was: Is the plaintiff under-proprietor of the plots in suit? The Munsif decided that the plaintiff had no under-proprietary rights but that he had become under-proprietor by prescriptive possession; he, therefore, decreed the suit with costs. The defendant appealed to the Court of the District Judge of Gonda, who agreed with the Court below and dismissed the appeal. The defendant next appealed to the Court of the Judicial Commissioner of Oudh, who affirmed the judgment on the same grounds and dismissed the appeal.

As all these Courts were of opinion that each plaintiff had failed to establish the under-proprietary rights which he claimed, and as no appeal has been taken on behalf of either, and he has not appeared before the Board in the present appeal, it is not necessary to consider the grounds upon which the learned Judges reached

a result on which they were all agreed. That this result was amply warranted appears, however, from the only document of title that has been produced in the case. That document is the *wajib-ul-arz* of the village of Badhia Farid, the date of which is stated to be approximately 1873. An extract from this document contains the following: "Paragraph 12 relating to under-proprietary rights" and states categorically: "In this village there is no under-proprietor." In view of this document, and in the absence of anything evidencing proprietary rights in favour of the plaintiff, the Board think that there cannot be any doubt as to the correctness of the decision arrived at under this heading by the Courts below. This becomes all the clearer when the history and terms of the Oudh Settlement Acts are examined. If this document had been produced in 1893 when the defendant sought and obtained the cancellation of the ejectment notice it may well be that the Revenue Board would not have reached the conclusion which they did that there was *prima facie* evidence on which they were entitled to maintain the state of possession until the rights of the parties had been declared in a competent Court.

There remains, however, the other question on which the Courts below have decided against the defendant. The essential ground of judgment is contained in a single sentence of the judgment of the Judicial Commissioner where he says: "There has been continuous possession of the land in the assertion of an under-proprietary right which is adverse to the landlord's proprietary title and I agree, therefore, with the lower Court that these plaintiffs have a good title by prescription."

The assertion relied on is, of course, that contained in the proceedings for the cancellation of the notice of ejectment in 1893, and as there has been no judicial challenge of this assertion by the landlord within twelve years and the date when it was made, it is immaterial to consider from what date prescription would run, and whether the period of limitation applicable be twelve or six years.

The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the defendant might, if he had chosen, have at once instituted proceedings for a declaratory decree that the plaintiff was not an under-proprietor, but such a course was equally open to the plaintiff. Each party had had his supposed rights judicially challeged by the other, the plaintiff by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor. The Board, however, do not consider that it was the duty of either party to institute such a suit if they were content that possession should remain on the same footing as before the notice of ejectment was served. They are unable to affirm, as a general proposition of law, that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. It is notorious that in actions for rent or enhancement of rent or for ejectment the persons in possession are prone to maintain rights which they do not possess, and if, for any reason as in the present case, no judicial determination is arrived at, but the parties continue on the original footing, the mere lapse of so short a period as six or twelve years (which might be amply explained upon other grounds) would deprive the landlord of his proprietary rights unless in the meantime he had brought a declaratory suit to settle once and for all the terms on which possession was held. The case might have been different if, in addition to the judicial assertion by the plaintiff there had been any change in the money payment which he thereafter made to his

landlord. There is, however, no suggestion that the same money payment which had been made before the notice of ejectment was not continued thereafter. The possession by the plaintiff, therefore, remained on precisely the same footing as at the time when he was held by the Court to have merely an occupancy title, the precise nature of which it is not necessary to consider in this case.

Reference was made to the Limitation Act IX of 1908 and especially to section 28 which is as follows:—

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." This section appears to have no application to the present case, for the appellant through his Counsel did not maintain that he could institute a suit for possession of the village in question, or treat the plaintiffs as if they had merely been squatters, and the Board were not referred to, and are not aware of, any other section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession.

Special leave to appeal was granted only upon the footing, *inter alia*, that the directions as to the payment of costs in the Courts below should not be varied in any event and that the appellant should pay the respondent's costs. Their Lordships will humbly advise His Majesty that the decrees be reversed, except in so far as they deal with the payment of costs. and that the suits be dismissed. As the respondents have not appeared there will be no order as to the costs of the appeals.

Solicitors for the Appellant.—Mr. *E. Dalgado.*

W. C. A. & N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1295 OF 1920.
April 20, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Lumsden.

CHET RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SPEDDING & CO. LTD., AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Releif Act (I of 1877), s. 42—Custom—Attachment of property—Declaratory suit by reversioners, whether maintainable.

An attachment infringes the rights of the judgment-debtor and has the effect of placing the property attached *in custodia legis*, but it does not by itself amount to an infringement of rights of his reversioners and does not furnish the latter with a cause of action for a suit for a declaration that the attachment shall not affect their reversionary rights, inasmuch as a mere attachment does not amount to an alienation.

Second appeal from a decree of the District Judge, Hoshiarpur and Kangra Districts, dated the 1st March 1920, affirming that of the Senior Subordinate Judge, Dharmsala, dated the 30th May 1919.

Lala *Mehr Chand Mahajan*, for the Appellants.

Mr. *M. Obedullah*, for the Respondents.

JUDGMENT.—On the 5th February 1918, defendant No. 1 attached certain property belonging to Harnamgir in execution of a decree against him. The judgment-debtor's sons, after making an infructuous objection to the attachment, have now brought a suit for the declaration that the attachment should not affect their reversionary rights after the death of their father.

Now, it was admitted in the Trial Court on behalf of the contesting defendant that the property attached was ancestral, and that the plaintiffs' family was governed by the usual Customary Law which imposes a restriction upon the power of a proprietor to alienate his ancestral property. The question for determination is, whether a mere attachment of the property entitles the plaintiffs to institute a suit for a declaratory decree. There can be no doubt that an attchment infringes the rights of the judgment-debtor and has the effect of placing the property *in custodia legis*

but it does not by itself amount to an infringement of the rights of the reversoners. It is possible, nay, it is probable that the attachment will leave to an alienation, and if the alienation is not confined to the period of the judgment-debtor's lifetime, the plaintifis will be entitled to impeach the alienation. It is, however, clear that no alienation has so far been made, and a mere attachment does not give the plaintifts a cause of action.

Mr. Mehr Chand for the appellants contends that the contesting defendant denied their reversionary rights in the property but a perusal of the plaint shows that the action is not based upon any such denial. The only ground disclosed in the plaint for bringing the action is the attachment of the property, and, as pointed out above, a mere attachment does not injure the plaintifts.

For the aforesaid reasons, we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 18 OF 1922.
September 11, 1922.
Present:—Mr. Ashworth, J. C.
MOHAMMAD ALI—PLANTIFF—APPELLANT
versus
Syed HASAN JAFAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 107—"Lease," meaning of—Contract, construction of.

The word "lease" in section 107 of the Transfer of Property Act is not to be construed in the wider sense in which it is defined in the Registration Act as including an agreement to lease. [p. 481, col. 1.]

Panchaman Bose v. *Chandi Charan Misra*, 6 Ind. Cas. 443; 37 C. 808; 14 C.W.N. 874, followed.

The question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from its entire terms and where the contract operates as an actual demise, it must be deemed to be a lease. [p. 481, col. 2.]

Purmananddas Jiwandas v. *Dharsey Virji*, 10 B. 101; 5 Ind. Dec. (N. S.) 452, followed.

Appeal from a decree of the Additional Subordinate Judge, Lucknow, dated the 18th October 1921, setting aside an order of the Probationary Munsif, Lucknow, dated the 28th February 1921.

Mr. *Niamut Ullah*, for the Appellant.
Messrs. *A. P. Sen* and *M. H. Qidwai*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for specific performance of an alleged oral contract to lease a shop. The plaint set forth that a contract was entered into between the parties on the 23rd July 1919 for the occupation by the plaintiff of a certain shop and room owned by the defendants at a rental of Rs. 2-2-6 per day. The defendants are said to have engaged to execute a formal lease and the plaintiff to give a further sum of Rs. 200 as *nazrana*. This Rs. 200 was paid up by the 31st July 1919, but the defendants never executed the formal lease and on the 28th April 1920, raised the rent by Rs. 3 per day. Defendants also instituted a suit for arrears of rent at the original rate up to 28th April 1920, and got a decree. This suit is one for specific performance of the contract to execute the formal lease. The Court of first hearing decreed the suit on the finding that the facts were as stated by the plaintiff. The lower Appellate Court also found these facts to be proved, but dismissed the suit on the ground that no evidence was admissible of the oral agreement under section 91 of the Evidence Act, read with sections 4 and 107 of the Transfer of Property Act and section 17 of the Registration Act. It was the opinion of Subordinate Judge that an agreement to lease property could only be effected by a registered document. His reasoning was as follows:—Section 107 of the Transfer of Property Act requires that a lease of immoveable property for a term exceeding one year (in this case the term was three years),

..n be made only by a registered instrument. Section 4 of the Transfer of Property Act proivides that section 107 shall be read as supplemental to the Indian Registration Act, 1877. The Subordinate Judge construed this to mean that definition of lease in the Registration Act, which includes an agree ent to lease, should be imported into section 107 of the Transfer of Property Act with the consequence that that section would require an agreement to lease to be only by registered instrument. This reasoning is plainly wrong. The only effect of the provision in section 4 of the Transfer of Property Act that section 107 shall be read as supplemental to the Indian Registration Act (*i.e.*, to section 17 of the Registration Act) is that the proviso to the provision (that leases of immoveable property from year to year or for any term exceeding one year or reserving yearly rent shall be registered) contained in section 17 of the Registration Act shall be read as amplified by the proviso to section 107 of the Transfer of Property Act. It has not the effect of requiring us to construe the word "lease" in section 107 of the Transfer of Property Act in the wider sense in which it is defined in the Registration Act. An authority for this reference may be made to a Full Bench case of the Calcutta High Court in *Panchanan Basu* v. *Chandi Charan Misra* (1). At the same time, although the reasoning of the Subordinate Judge was wrong, I consider, that his decision was right. Under section 91 of the Evidence Act no evidence may be given in proof of the terms of an contract which the law requires to be embodied in a document. Under section 107 of the Transfer of Property Act a lease for a period of over three years must be by an instrument. The contract alleged in the plaint is said to have been "that the plaintiff might occupy the shop and room." It is also proved that he did occupy it from the date of the agreement. The agreement was, therefore, something more than an agreement to lease. It was an actual demise. Accordingly, no evidence of the oral agreement is admissible. Nor, again, can we separate off from that agreement as a separate agreement the engagement by the defendants to execute a formal lease. There was no separate consideration for the execution of the formal lease. The consideration for such execution was bound up with the consideration for the demise; that is to say, it was the payment of the rent and premium. It was held in the case of *Purmananddas Jiwandas* v. *Dharsey Virji* (2) that the question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole and that where the contract operates as an actual demise it must be deemed to be a lease. In that case, it is true, what was to be construed was a document and not an alleged oral lease but the same reasoning will apply.

Accordingly, I dismiss the appeal with costs.

K. S. D. & N. H. *Appeal dismissed.*

(1) 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874.

(2) 10 B. 101; 5 Ind. Dec. (N. S.) 452.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1398 OF 1921.
April 5, 1923.

Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Gokul Prasad.

PANNA LAL, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BOHRA PANNA LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement—User, permissive.

A right of easement cannot be acquired on the basis of user which in its origin was permissive. [p. 482, col. 1.]

Second appeal from a decree of the District Judge, Mainpuri, confirming a decree of the Additional Subordinate Judge.

Messrs. *Baleshwari Prasad* and *Badri Narain*, for the Appellants.

Mr. *Girdhari Lal Agarwala*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants arising out of a suit brought

by some Managers of the Ram Lila Committee for a declaration of a right of easement and for the demolition of certain buildings erected by defendant No. 2 with the permission of defendant No. 1 on a plot of land No. 607. The plaintiffs also claimed an injunction.

The point raised by the plaintiffs was that the Hindus of Karhal used to hold *Bharatmilap* and, in order to get to plots Nos. 604 and 606, they used to pass over plot No. 607, and that, because of that user, they had acquired a right of easement of passage over plot No. 607.

The contention of the defendant was that *Bharatmilap* processions, after passing over the public road, passed over plot No. 608 and from that to the *Chabutra* in No. 604. The defendants did not contest the plaintiff's right to celebrate the *Bharatmilap* on plot No. 604 or 606; what they said was that the plaintiffs or their predecessors had not acquired any right of easement over plot No. 607, but that there was already a passage which they could use for the procession.

The suit has been decreed by both the Courts below. The defendants come here in second appeal. The dispute in this suit was a very small one, *i.e.*, about the passage of the *Bharatmilap*, and we thought that this was eminently a case which should be settled amicably and we gave the parties time for the purpose. Although several adjournments were obtained, nothing was done, and we have, therefore, to decide the appeal on the merits. As regards plot No. 607 over which the plaintiffs-respondents assert a right of way for the passage of the *Bharatmilap*, the finding of the lower Appellate Court is that the way of the *Bharatmilap* procession lay through plot No. 607. This was not the case of either of the parties and it is tantamount to a denial of the right of passage over plot No. 607 claimed by the plaintiffs. It has also been found that when the procession first passed over defendant's land it was with the permission of the defendant. No question of any right of easement can, therefore, arise; the user, if any, was permissive. Therefore, the plaintiff's claim on the ground of easement customary or otherwise, fails and, on this ground, the claim should have been dismissed. The defendant No. 1, *Shrimati* Rameshari Debi, is the *zemindar* of the plots and the plaintiffs have, in our opinion, failed to prove any right in them to limit her user of plot No. 607. The suit ought to have been, strictly speaking, one on behalf of the Hindu community. The Courts below have allowed the plaintiffs to proceed as if the suit had been one of that nature. We do not think it necessary to enter into that question. Mr. Baleshwari Prasad, the learned Vakil for the defendants-appellants, has, however, stated to us that his client, the *zemindar*, is willing to give the plaintiffs a fifteen feet wide passage over plot No. 608 for going from plot No. 609, the public road, to Nos. 604 and 606. This, we think, is a very reasonable offer and the plaintiffs would have done well to have accepted it. However, as the defendant-*zemindar* is still willing to make that concession in favour of the plaintiffs, we allow this appeal in part and discharge the decrees of the lower Courts. We make the above reservation in plaintiff's favour. In other respects, we dismiss the plaintiff's suit and we make no order as to costs.

Z. K. *Appeal partly allowed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 8, 1923.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge, KT., and Mr. Ameer Ali.

THE MIDNAPUR ZEMINDARY COMPANY, LIMITED—PLAINTIFF—APPELLANT

versus

UMA CHARAN MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Construction of document dealing with origin of holding—Question of fact—Appeal, when permissible.

A document relating to the origin of a particular holding is not to be treated as involving issues of law merely because it has to be construed. The matter involved is a question of

fact, and, unless it can be shown that the lower Court has misdirected itself in point of law in dealing with the question there is no ground for appealing from its decision, and the Appellate Court is not entitled to criticise the merits or otherwise of the conclusion of fact. [p. 483, col. 1; p. 484, col. 1.]

Appeal from the Calcutta High Court.

Messrs. *DeGruyther, K. C.* and *Kenworthy Brown,* for the Appellant.

Mr. *Dube,* for the Respondent.

JUDGMENT.—Their Lordships do not desire to hear the respondents. The point arising for decision on this appeal is a short one. In the group of suits, which the appellants brought in India, the question which, for the purposes of to-day, was the material one to be considered was this:—At what date is the under-tenure, of which they had become purchasers at a sale under a decree for rent, to be taken to have originated?

It was in connection with a prayer to have encumbrances cleared off that this question arose, and according to the date fixed, earlier or later, they would be able to clear off more encumbrances or fewer. Now, to ascertain the date at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or Statutes, or otherwise the direct foundation of rights.

The Subordinate Judge who tried a number of these suits, came to the conclusion that the date at which the under-tenure purchased by the plaintiffs had first arisen was the 6th March 1884. Some others were heard by the Munsif, who came to a contrary conclusion. They were all consolidated and came before the District Judge, and the finding of the District Judge affirmed that of the Subordinate Judge not in every respect upon the same grounds in detail, but substantially upon the same lines.

The case was then appealed to the High Court. When first it came before the High Court, that Tribunal contented itself with observing that the issues which are now before their Lordships raised questions of some nicety, and proceeded to dispose of the appeal upon a different ground which need not be further enlarged upon. That judgment of the High Court was brought before their Lordships and was reversed, and so the case came to be remitted to India to be finally disposed of, and on the second occasion the High Court dealt with the issues now in question, which they had previously said little about, and briefly concurred in the view taken by the District Judge.

Now, if the question before the District Judge was one of fact, admittedly there is an end of the matter. The District Judge, having to fix a date, fixed this particular date as being the date at which a certain *ruffinama* or compromise was arrived at, under circumstances which are not very clear, for no oral evidence was called, but which he thought he could sufficiently infer from the contents of the *ruffinama* and from some previous documents of earlier date. He came to the conclusion that there was at that time a dispute, the gist of which was, whether the tenant was right in claiming that all the land of which he was in possession was held on *ghatwali* tenure, or whether the *zemindar* was right in contending that but a small portion of that land was held on *ghatwali* tenure and the rest was really *mal* land. This is the dispute which was compromised in the *ruffinama*; and the conclusion which the District Judge, agreeing therein with the Subordinate Judge, arrived at was that upon that occasion the parties solved this dispute by deciding that the amount of *ghatwali* land was less than it was claimed to be; and that, in addition to what was admittedly *mal* land, some further land should be regarded as and held as *mal* land, and so the matter ended. Thereupon, he held that it was from that date, and in consequence of that compromise, that the present under-tenure relating to some of these *mal* lands, of which the plaintiffs were the purchasers, came into existence a sa separate tenure. There

had been produced a series of documents of earlier date, which it is not necessary to go through—they are of varying characters, and it must be admitted that they are scarcely luminous as to their purport. It cannot really be suggested from these previous documents when the alleged separate *ghatwali* tenure or the alleged separate *mal* tenure came into existence. As to the latter it is hypothetically said to begin about 1834, and as to the former, it is said to have been in existence at least as early as 1799; but these documents are only fragments, and by no means copious fragments, of a long chain of documents of various kinds, which must have existed at one time or another, and they, like the *ruffinama*, are documentary evidence of the point in dispute from which the District Judge had to draw his own conclusions.

It is clear, therefore, that, unless it can be shown that he has misdirected himself in point of law in dealing with this question of fact upon this evidence, there is no ground for appealing from his decision upon the question of fact, and from the judgment of the High Court upon it. The suggestion is that it can be made to appear clearly from the construction of the documents prior to the *ruffinama* that the present tenure can be dated earlier than the 6th March 1884. That appears to their Lordships to be nothing but a contention that a different conclusion of fact might have been drawn from those documents.

The other way of putting the matter is to say that on the construction of the *ruffinama* itself, it negatives the view taken that this under-tenure was first created at that date. Their Lordships do not wish to be understood as agreeing with that view of the contents of the *ruffinama*, but again the construction of it is merely the weighing of a particular piece of evidence expressed in that particular form. Their Lordships are unable to see that there has been any error in law on the part of the District Judge and of the High Court, and that being so they neither desire nor are entitled to criticise the merits or otherwise of the conclusion of fact.

The result being that this is a pure question of fact which has been determined in India by Tribunals whose judgment must be final, nothing remains but to dismiss these appeals with costs, and their Lordships will humbly advise His Majesty accordingly.

W. C. A. & N. H. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Burton, Yeates* and *Hart.*

Solicitors for the Respondent:—Messrs. *Watkins* and *Hunter.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1351 OF 1920.
March 19, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

KHAZANA MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAGAN NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Manager, debt contracted by—Benefit of family—Presumption.

There is no presumption that a debt contracted by the manager of a joint Hindu family is contracted for the benefit of the family. [p. 485, col. 1.]

Brij Lal v. *Jaishi Ram*, 30 Ind. Cas. 500; 106 P. W. R. 1915; 172 P. L. R. 1915, dissented from.

Ganpat Rai v. *Munni Lal*, 13 Ind. Cas. 341; 34 A. 135; 9 A. L. J. 54, *Bhura* v. *Banarsi Das*, 30 Ind. Cas. 481; 113 P. W. R. 1915; 174 P. L. R. 1915, *Paras Ram* v. *Gian Chand*, 50 Ind. Cas. 36; 48 P. W. R. 1919 and *Ram Dhan Das* v. *Ramji Das*, 50 Ind. Cas. 215, relied on.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 1st March 1920, reversing that of the Senior Subordinate Judge, Kangra at Dharmsala, dated the 31st July 1919.

Lala *Mehr Chand Mahajan*, for the Appellants.

Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—The plaintiffs sued Jagan Nath and the sons of Jagan Nath's deceased brother Ram Saran for money due on book accounts, alleging that Jagan Nath and Ram Saran were members of a joint Hindu family and had dealings with

them. Jagan Nath pleaded that he was separate from Ram Saran and had had no dealings with the plaintiffs. The First Court passed a decree against all the defendants, but on Jagan Nath's appeal the District Judge dismissed the suit as against him finding that, although Jagan Nath had not proved his separation from Ram Saran, the plaintiff's dealings had been only with Ram Saran, Jagan Nath not having signed any of the entries in the plaintiff's books, and holding that the plaintiffs had to prove that the debts were contracted for the benefit of Jagan Nath which they had failed to do. The plaintiffs have preferred a second appeal.

On the question of onus the ruling of Sir Donald Johnston in *Brij Lal* v. *Jaishi Ram* (1) is, no doubt, in the appellants' favour, but the other authorities are against them. In *Ganpat Rai* v. *Munni Lal* (2) it was held that there is no presumption that a debt contracted by the manager of a Hindu family is contracted for the benefit of the family, and the rulings of the High Courts of Calcutta and Bombay referred to in that judgment were to the same effect. The Allahabad ruling has also been followed in *Bhura* v. *Banarsi Das* (3), *Paras Ram* v. *Gian Chand* (4) and *Ram Dhan Das* v. *Ramji Das* (5). Counsel for the appellants has, in fact, not disputed the correctness of the view taken by the High Courts, but has contended only that as no issue was framed on the question whether the debts were incurred for the benefit of the family his client should have been given an opportunity of proving that they were so incurred. There does not appear to be any force in this contention for, as the plaintiffs alleged that their dealings had been with both Ram Saran and Jagan Nath, no occasion arose for a separate issue on the question whether the debts were incurred for the benefit of the family. Moreover, the point was really covered by the second issue, which was, whether the plaintiffs had advanced the amounts in suit to the family of the defendants. The plaintiffs knew that they had to prove such facts as would render Jagan Nath liable, and when it was found that they had not proved them, the suit was rightly dismissed. We cannot agree that the plaintiffs were entitled to a remand and we accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 30 Ind. Ca . 500; 106 P. W. R. 1915; 172 P. L. R. 1915.
(2) 13 Ind. Cas. 34; 34 A 135; 9 A. L. J. 54
(3) 30 Ind. Cas. 481; 113 P. W R. 1915; 174 P. L. R. 1915.
(4) 50 Ind. Cas. 36; 48 P. W R. 1919.
(5) 50 Ind. Cas. 215.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 459 OF 1922 IN FIRST CIVIL APPEAL NO. 68 OF 1922.

December 22, 1922.

Present :—Mr. Dalal, A. J. C., and Mr. Daniels, A. J. C.

Raja Seth SWAMI DAYAL—DEFENDANT—APPLICANT

versus

MUHAMMAD SHER KHAN—PLAINTIFF—OPPOSITE PARTY.

Procedure—Redemption suit—Appeal from preliminary decree—Final decree passed—Appeal, whether can be treated as from final decree.

When an appeal is preferred from a preliminary decree in a redemption suit before the passing of a final decree, the appeal cannot, after the final decree in the suit has been passed, be treated as an appeal against the final decree also. [p. 486, col. 1.]

Application against the decree of the Subordinate Judge, Kheri, dated the 9th October 1922.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Applicant.

Messrs. *Wazir Hasan* and *Ghulam Hasan*, for the Opposite Party.

JUDGMENT.—This is an application that an appeal against a preliminary decree in a redemption suit may be treated as an appeal from the final decree also. The preliminary decree was passed on 9th October last; the appeal against it was filed on 19th October last and final decree was passed on 2nd November. In supporting the application the applicant's learned

Counsel has also asked us to pronounce that an appeal from a final decree is unnecessary. His object is to avoid an *ad valorem* fee twice over in the same matter. It is impossible for us to give a ruling on this point on the present application. The appeal is not before us and any opinion which we might express on this application would not be binding on the Bench which might hear the appeal. In support of the prayer actually contained in his petition Counsel cites two unreported cases in one of which an appeal against a preliminary decree was allowed to be converted into an appeal against a final decree, and in the other to be treated as a combined appeal against both decrees. In both these cases the final decree had already been passed when the appeal against the preliminary decree was preferred. Even if the decisions are correct, as to which we feel some doubt, that would not justify us in treating the appeal now pending as an appeal against a decree which had not been passed on the date on which it was filed. We, therefore, dismiss the application. No order as to costs.

Z. K. & N. H. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 38 OF 1922.

May 29, 1923.

Present:—Mr. Justice Kanhaiya Lal.

KEDAR NATH—PLAINTIFF—APPELLANT

versus

NANAK AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Appeal filed without copy of order appealed against—No order drawn up on date of appeal—Time spent in obtaining copies of judgment and decree, whether excluded.

In cases in which the formal order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone and time can run from the date of the judgment; but where a separate order is drawn up copies of both the judgment and formal order ought to be attached to the memorandum of appeal, and the appellant is entitled to deduct the time spent in obtaining copies thereof. [p. 487, col. 1.]

Kamala Dasi v. *Tarapada Mukerji*, 14 Ind. Cas. 1006; 15 C. L. J. 498, followed.

Mool Raj v. *Nladar Mal*, 55 Ind. Cas. 315; 18 A. L. J. 208; 2 U. P. L. R. (A.) 54; 42 A. 260, distinguished.

Mangal Singh v. *Hirda Ram*, 49 Ind. Cas. 673; 19 P. R. 1919, referred to.

An appeal was filed on the 4th February 1921 against an order passed on the 7th January 1921, but without any copy of the decree, as no decree had been passed till then. On the 10th February, the appellant applied for a copy of the decree, on the 15th the formal order was drawn up, and a copy of it was ready on the 17th and delivered to him on the 19th. On the 23rd February, he filed a copy of the formal order:

Held, that as no formal order had been prepared on the date on which the appeal was originally filed the appellant was entitled to a deduction of the time spent in obtaining copies. [p. 487, col. 1.]

Second appeal against the decree of the District Judge, Moradabad, dated the 5th of August 1921.

Mr. *S. A. Halder*, for the Appellant.

Mr. *Durga Prasad*, for the Respondents.

JUDGMENT.—The question for consideration in this appeal is, whether the appeal filed in the Court below was filed within time. The order appealed against was passed on the 7th January 1921 but by a mistake of the office, no formal order was prepared. On the same day the plaintiff applied for a copy of the judgment and that copy became ready for delivery and was delivered to him on the 14th January 1921. He filed an appeal on the 4th February 1921 accompanied by a copy of the judgment, but without any copy of the decree, for no decree was then in existence. The Appellate Court brought to his notice that a copy of the decree should also have been filed. On the 10th February 1921, he applied for a copy of the decree. On 15th February 1921, the formal order was drawn up and a copy of that formal order became ready on the 17th February 1921 and was delivered to him two days later. The reason for the delay in delivery is not ascertainable. On the 23rd February 1921 he filed the copy of the formal order in the appeal; but the Court below held that it was filed

too late and the appeal was barred by time. Under section 12 of the Indian Limitation Act (IX of 1908), the appellant is entitled to have excluded the time spent in obtaining a copy of the decree and also that of the judgment. Deducting the time spent in obtaining the copy of the judgment, the limitation for filing the appeal did not expire till the 4th February 1921. Before that date he had applied for a copy of the formal order. He could not have applied earlier with any benefit because the formal order was prepared while the application for a copy of it was pending. And adding the time spent in obtaining the copy of the formal order the appeal was clearly within time. As pointed out in *Kamala Dasi* v. *Tarapada Mukherji* (1), in cases in which an order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone and time can run from the date of the judgment; but where a separate order is drawn up, copies of both the judgment and the formal order ought to be attached to the memorandum of appeal and the appellant is entitled to a deduction of the time spent in obtaining copies thereof. In *Mangal Singh* v. *Hirda Ram* (2) it was held that, where no formal order has been prepared, the Appellate Court should adjourn the appeal until the copy of the decree is forthcoming. The decision in *Mool Raj* v. *Niadar Mal* (3) does not apply because there the period of limitation for filing the appeal had run out and there is nothing to show whether a copy of the decree was or was not obtainable. The appeal must, therefore, be allowed and the case is remanded to the lower Appellate Court with a direction to reinstate it to its original number and to dispose of it according to law. The costs of this appeal will abide the result.

M. A. A. & M. D. J. *Appeal allowed.*

(1) 14 Ind. Cas. 1006; 15 C. L. J. 498.
(2) 49 Ind. Cas. 673; 19 P. R. 1919.
(3) 55 Ind. Cas. 315; 18 A. L. J. 208; 2 U. P. L. R (A.) 54; 42 A. 260.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 115 OF 1922.

May 25, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

FIRM OF SHYAM LAL-GOKUL CHAND —PLAINTIFF—APPELLANT

versus

JAMIL AHMAD—DEFENDANT—RESPONDENT.

Administration—Decree for administration of estate —Subsequent decree on mortgage—Decree directing sale of mortgaged property after discharge of debts by Receiver—Execution of mortgage-decree, whether can proceed at once.

One *F.* executed three deeds of gift in favour of two of her sons and one of her daughters. These gifts were set aside after her death on the suits of her remaining heirs for recovery of possession of their legal shares in the estate and a preliminary decree for administration of the estate was made and a Receiver appointed for the purpose. One of the sons in whose favour one of the deeds of gift was executed mortgaged some of the property. The mortgagee brought a suit on the mortgage and obtained a decree directing sale of as much of the mortgaged property as was found after the liquidation of debts to be the property of the mortgagor. The decree-holder took out execution of the decree:

Held, that the execution of the mortgage-decree could not be taken out so long as the debts due by the estate had not been paid off. [p. 488, col. 2.]

Appeal from an order of the Subordinate Judge, Patna, dated the 18th March 1922.

Messrs. *P. N. Sinha* and *N. C. Ghosh*, for the Appellants.

Mr. *Nurul Hussain*, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the decree-holders against an order of the Subordinate Judge of Patna, dated the 18th March 1922, dismissing their application for execution of a mortgage-decree. It appears that *Musammat* Bibi Fasihan, a rich Muhammadan lady, died possessed of considerable landed properties. Before her death she had executed three deeds of gift in favour of two of her sons and one of her daughters. After her death, the remaining heirs of Bibi Fasihan brought several suits for setting aside the gifts and for recovery of possession of their legal share in the estate. In those

suits all the three deeds of gift were set aside and a preliminary decree for administration of the estate of Bibi Fasihan was made and a Receiver was appointed by the order of the District Judge of Patna to administer the estate of Bibi Fasihan. It appears that the defendant No. 2, Sheikh Muhammad Kalimuzaffar, who was one of the sons of Bibi Fasihan in whose favour one of the deeds of gift was executed, mortgaged some of the properties which he obtained under the gift, to the decree-holders under a mortgage dated the 1st March 1912. The decree-holder brought a suit on that mortgage and he impleaded the Receiver appointed by the District Judge of Patna as a party defendant in the mortgage suit. The decree passed in that mortgage suit runs in the following terms:—

"Suit be decreed *ex parte* with costs against defendant No. 2 (Kalimuzaffar) and on contest against others. Defendant No. 2 to pay decretal money in six months from to-day, in default, the mortgage property or as much of it as is found to be the property of defendant No. 2 after liquidation of debts by the Receiver as directed by the Hon'ble High Court shall be sold for satisfaction of the decree."

It appears that the estate of Bibi Fasihan has not been fully administered yet and a portion of the debts due from the estate of Bibi Fasihan has still to be paid by the Receiver. The decree-holder filed this application for execution of the decree and an objection was made by the Receiver to the effect that under the terms of the decree so long as the debts of Bibi Fasihan have not been paid off, the property mortgaged by Kalimuzaffar could not be sold. The learned Subordinate Judge has given effect to this objection and has dismissed the execution case. Against this order of the learned Subordinate Judge the decree-holders prefer this appeal to this Court.

It is evident that, so long as the debts due from the estate of Bibi Fasihan have not been liquidated, it cannot be ascertained what the share of Kalimuzaffar in the mortgaged properties is, and under the terms of the decree nothing can be sold so long as it is not ascertained as to what the share of Kalimuzaffar is in the estate.

The learned Vakil for the decree-holder states that almost the whole of the debts due from the estate of Bibi Fasihan has been paid except the debts of two creditors namely, Girdhar Das and Dulhin Sona Kuar. But it appears that litigations are going on as regards these two debts and it is not certain as to whether the estate of Bibi Fasihan will or will not ultimately be made liable for these debts. I am, therefore, of opinion that the learned Subordinate Judge was right in his order that the execution of the mortgage-decree cannot be taken out so long as the debts have not been paid off. It is, no doubt, very desirable that the administration should be completed as quickly as possible. It is manifestly unjust to the heirs of Bibi Fasihan that the administration should be prolonged, but as matters stand I do not see how the decree-holders can be allowed to execute their decree at present. If the decree-holders make an application to the District Court by whom the estate is being administered, the District Court, if it thinks proper, may make arrangements for payment of the debts due from the estate of Bibi Fasihan to the decree-holder either wholly or in part, or it may make some arrangements which, under the circumstances of the case, may seem to it proper to release a portion of the estate in favour of Kalimuzaffar, so that the decree-holders can execute their decree against that portion of the estate. However, as the matter now stands, we are not in a position to give any direction to the District Judge who is administering the estate. It would be for the decree-holders to make such application to the District Court as he thinks proper, and I am sure that on such application being made the District Judge will pass such orders as may be proper.

This appeal is dismissed with costs.

Miller, C. J.—I agree.

K. S. D. *Appeal dismissed.*

UJAGAR SINGH *v.* SUCHA SINGH.

LAHORE HIGH COURT.

FIRST APPEAL No. 947 OF 1917.

July 18, 1922.

Present :—Mr. Justice Scott-Smith and Mr. Justice Brasher.

UJAGAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUCHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Compromise—Reversioners, whether bound.

A compromise entered into in good faith binds the heirs of the parties, but the latter are entitled to challenge a compromise on the ground that it was not entered into in good faith. [p. 489, col. 2.]

Buta v. *Khuda Bakhsh*, 97 P. R. 1906; 134 P. L. R. 1906; 102 P. W. R. 1906, referred to.

First appeal from a decree of the Senior Subordinate Judge, Gujranwala, dated the 8th December 1916.

Mr. *Beni Pershad Khosla*, for the Appellants.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—This first appeal was heard along with Civil Appeal No. 735 of 1917 and we shall have occasion to refer to the printed paper-book in that case, which we call paper-book "B," the paper-book in the present case being marked as "A". The pedigree-table of the parties is given on page 89 of paper-book "B". Plaintiffs are the sons of Arjan Singh and defendants are the descendants of Gulab Singh. Gulab Singh was originally entitled to 1-3rd share of the joint land belonging to the descendants of Jamait Singh. In 1863 Gulab Singh's heirs sued and got a decree for their 1-3rd share conditional on payment of Rs. 415 (see page 69 of the paper-book "B.") This money was never paid. In 1882 Gulab Singh's descendants again sued for their father's share but the suit was dismissed, it being held that the decision in the 1863 case barred a fresh suit and that the defendants had held adverse possession since 1863. In 1897 Gulab Singh's descendants sued Arjan Singh and Surjan Singh for one-half of their father's share of the land, *i.e.*, for 1-6th of the whole property, saying that they had already got possession of 1-6th. Their suit failed. On the 21st of January 1909 Arjan Singh sued the defendants for possession of 1-6th share of the property, *i. e.*, for half of Gulab Singh's original share. The defendants pleaded long possession. Arjan Singh said that they had taken forcible possession subsequent to the previous suit, *i. e.*, the 1897 suit. He said that they used to pay a share of the produce that they paid it for nine years and that they ceased to pay it for the previous two years; in the other words, he admitted that they had been in possession for eleven years. Issues were framed on the 15th of April 1909, but on the 3rd of May, the date fixed for evidence, the parties asked for an adjournment as they wished to compromise: 28th of May was then fixed and on that date the suit was compromised, Arjan Singh giving up his claim upon receipt of Rs. 200. The present suit has been brought by Arjan Singh's sons for a declaration that the compromise effected by their father in the 1909 case should not affect their reversionary rights after their father's death. The lower Court, without going into the merits of the compromise, held that it did not amount to an alienation which could be contested by reversioners. It, therefore, dismissed the suit.

Plaintiffs have filed an appeal to this Court and it is contended on their behalf that they can certainly bring a suit to contest the compromise under section 42 of the Specific Relief Act. Their Counsel admitted that, having regard to *Buta* v. *Khuda Bakhsh* (1) and other authorities, a compromise entered into in good faith binds a man's heirs, but urged that they are entitled to challenge the compromise on the ground that it was not entered into in good faith.

This point was not contested by Dr. Nand Lal on behalf of the respondents, and it is quite clear to us that the lower Court was wrong in dismissing the suit on this preliminary point. We have, therefore, heard arguments as to the merits of the compromise and as to whether it was entered into in good faith or not.

As already pointed out, Arjan Singh admitted in the 1909 suit that the defendants had been in possession of the 1-6th share claimed by him for eleven

(1) 97 P. R. 1906; 134 P. L. R. 1906; 102 P. W. R. 1906.

years. The suit was instituted on the 21st of January 1909, which means that the defendants were in possession at all events in January 1898. Now, the previous suit brought by them in which they said they were in possession of 1-6th and claimed the other 1-6th was dismissed on the 19th of June 1897. How they got possession of this 1-6th we have no means of knowing, but it seems at least probable that the 1-6th which Arjan Singh claimed in the suit instituted in January 1909 was the same 1-6th of which the defendants said they were in possession in the suit brought by them in 1897.

If this were so, Arjan Singh might very well have thought that he would not succeed in his suit. The onus was on him to prove that the defendants had been paying produce to him, or, in other words, he had to prove his own possession within twelve years of the suit; we have no doubt that, having regard to this, he compromised the suit upon the receipt of Rs. 200. That he did receive Rs. 200 has been held to be proved by the lower Court and the point has not been pressed before us. The allegation that he compromised it owing to the pendency of a criminal case has also been shown to be false.

In our opinion, the only fair conclusion from the facts on the record is that Arjan Singh entered into this compromise in good faith, believing that he had no real chance of succeeding in his suit. Under these circumstaces, the plaintiffs' suit cannot succeed and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS CASE NO. 219 OF 1923.

June 18, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

MUHAMMAD BAKSH AND ANOTHER—PETITIONERS

versus

MUHAMMAD ABDUL BAQI KHAN AND OTHERS—OPPOSITE-PARTIES.

U. P. Municipalities Act (II of 1916), s. 16 (3) (c)—"Place of profit," meaning of—Contractor, position of.

The proper meaning which should be ascribed to the words "place of profit" in section 16 (3) (*c*) of the U. P. Municipalities Act is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of master and servant. [p. 492, col. 1.]

A contractor who receives remuneration for the supply of articles cannot be said to hold a place of profit, and is not, therefore, disqualified from standing for election to the Municipal Board. [p. 492, col. 1.]

Astley v. *New Tivoli, Ltd.*, (1899) 1 Ch. 151; 68 L. J. Ch. 90; 79 L. T. 541; 47 W. R. 326; 6 Manson 64, referred to.

Civil reference made by the Commissioner, Allahabad Division.

Mr. *Kailas Nath Katju*, for the Petitioners.

Dr. *Surendro Nath Sen*, Messrs. *Harnandan Prasad* and *Sarkar Bahadur Joharl*, for the Opposite Parties.

JUDGMENT.—At the Municipal election held in March last in Allahabad one Khan Bahadur Muhammad Abdul Baqi Khan was a candidate, and was subsequently declared to have been duly elected. For some years he, with other members of his family, had held a contract for the supply of kerosine oil in bulk to the Municipal Board. He was a member of the Board, whose term of office came recently to an end, and he had some three years ago disclosed the existence of that contract to the Commissioner and had been duly given permission to hold the same. He sat as a duly elected member throughout the period of the last Municipal Board. When he deemed himself to have been duly elected this year, he again sought and obtained the permission of the Commissioner to carry out the contract notwithstanding his membership of the

Board. A petition to unseat him is now in course of hearing by the Commissioner; and, amongst other grounds, it is alleged that he was disqualified from becoming a candidate for election, and that his election is consequently of no effect because he was at the time a person who, under section 16 (3) (*c*), held a "place of profit in the gift or disposal of the Municipal Board."

The Commissioner has referred this point to us for our determination. The argument put forward by the petitioners is that the words "place of profit" were deliberately chosen as a compendious, all-embracing phrase to cover every recognised ground of disqualification such as are to be found in the Indian Acts *in pari materia*. In support of that argument Dr. Katju has referred us to the Bombay Municipal Act (III of 1901) where, amongst other provisions, disabilities attach to "a Municipal Officer or servant, a licensed Surveyer, or plumber, or one who has directly or indirectly by himself or through his partner any share or interest in any contract or employment with or under, or by, or on behalf of the Municipality." Section 39 of the Calcutta Municipal Act has exactly similar disqualifying provisions. The Madras Municipal Act also affirms the inability of a person seeking election who has interest in any contract made or work done for the Corporation.

Therefore, had this question, which we are called upon to decide, arisen in any election to which the Bombay, Calcutta or Madras Acts applied, the position would be clear. The respondent would, by the very words of either of these Acts, have been disqualified for election. Here, however, we have to consider the words of the Local Municipal Act which are said to include the case of a man having a contract or interest in a contract with the Board. The question which we have to decide is whether it would be a fair construction of section 16 (3) (*c*) to say that on a reasonable rendering of the words "place of profit in the gift or disposal of the Municiapl Board" cover an ordinary commercial contract. The words "place of profit" have a definite historical association and when coupled with the word "office" are familiar to all students of constitutional history. The Act of Settlement, 12 and 13, William III, Chapter II, section 3 provides that upon the accession of the House of Brunswick, no person holding any office or place of profit under the King should be capable of serving as a member of the House of Commons. The phrase recurs in the Act of Settlement of 4th Anne and in 6th Anne, Chapter XLI.

The object of these Acts was to insure that the members of the House of Commons should be, as far as possible, free from any possibility of influence, or under any likelihood of the exercise of authority by the monarch and should be free to give effect to their political opinions and should not be merely puppets. The office or place of profit to which these enactments apply vary from posts which were merely sinecures in the Royal Household to positions demanding arduous duties as great Officers of State. An examination of them failed to disclose that they were in any way connected with commercial contracts into which, after all, a King as well as a commoner has to enter for the supply of commodities.

As far as we are aware, there is only one case in which the term "office or place of profit" has been the subject of a judicial decision. In *Astley* v. *New Tivoli, Ltd.* (1) the plaintiff sought an injunction to restrain the defendant Company and the other Directors from preventing him from acting as a Director of the Company. The defendants alleged that the plaintiff had ceased to be a Director because he had accepted from the Company the trusteeship of a covering deed relating to Debentures on terms of payment by the Company to him for his services. They insisted that these circumstances caused his Directorship to be determined inasmuch as one of the Articles of Association prescribed that the office of a Director should be vacated if he held "any other office or place of profit under the Company." Mr. Justice North decided that the position of trustee for the Debenture holders was

(1) (1899) 1 Ch. 151; 68 L. J. Ch. 90; 79 L. T. 541; 47 W. R. 326; 6 Manson 64.

"a place of profit," the object of the Articles of Association being to prevent the Directors from doing anything by which a Director continues to be a Director and yet accepted or held an additional office or place of profit under the Company.

It will, therefore, be seen that the meanings which have been attached to the words "office or place of profit" do not lend any assistance to the petitioners and they are thrown back upon their original general statement that the draughtsman meant by that phrase to include, and the Local Government by its acceptance meant to enact, that it should cover the special disabilities specifically set out in the Bombay, Calcutta and Madras Acts. We are unable to accept that argument. We find it, for instance, difficult to give any meaning to the words in section 40 "continued to hold.....any interest in a contract" of those in section 82 "continued to have" ..... Unless the Act contemplated the possibility of a candidate for election having in fact at the time an interest in a contract and being given by section 40 an opportunity of obtaining permission from the Commissioner on his election to carrry out the contract notwithstanding his election. A contractor who receives remuneration for the supply of articles cannot, in accordance with the ordinary meaning of the word "place", be said to hold a place of profit. In Murray's Dictionary "place" is defined in this connection as 'office, employment, situation.' We are of opinion that the proper meaning which should be ascribed to the words "place or profit" in section 16 (3) (c) is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of that of master and servant. That is, a position in relation to the Board in which the Board can require a person to obey its command and do certain work or render personal services in return for remuneration. Instances of this kind readily occur to one, *e.g.*, a Consulting Engineer who for a retaining fee holds himself at readiness to give expert opinions and furnish reports; a whole or part time Medical Officer with defined duties towards the Municipal Board; and each and every Municipal servant of any grade. This rule is necessary because members of a Board should not be in the false position of being masters and servants at one and the same time. We appreciate that the position of a contractor sitting on a Board may be a delicate one, and may give rise at times to difficult and embarassing situations, but the question which we are called on to decide is whether on fair construction of the words "place of profit" a contractor could be included. We think not, and though it may have been the intention of the local Legislature to follow along the lines of the disqualifications which had found favour in the enactments of Bombay, Calcutta and Madras, the fact, according to our view, is that they have failed to do so. That being so, we are of opinion that the holding of the kerosine contract by Khan Bahadur Muhammad Abdul Baqi Khan did not prevent him standing as a candidate and does not invalidate his election; and this is the answer we return to the Commissioner.

K. S. D. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FOM THE MADRAS HIGH COURT.

June 26, 1923.

Present:—Lord Buckmaster, Lord Dunedin, Lord Carson, Sir John Edge, KT., and Lord Salvesen.

A. S. S. SUBBAIYA PANDARAM—APPELLANT

versus

MAHAMAD MUSTAPHA MARACAYAR (SINCE DECEASED) AND OTHERS—RESPONDENTS.

Trust—Sale of trust property in execution of decree against trustee—Purchaser in uninterrupted possession—Suit to recover property—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 134, 144.

Certain trust property was sold in execution of a decree against the trustee, and delivery of

possession of the property was made to the purchaser who, and those claiming under him, continued in uninterrupted possession. More than 12 years afterwards, on the appointment of a new trustee, the present suit was brought to recover the property:

Held, that the suit was barred by limitation under either Art. 134 or Art. 144 of Schedule I of the Limitation Act, the possession of the purchaser being adverse. [p. 494, col. 1.]

Limitation for a suit to recover trust property sold in execution of a decree against the trustee does not begin to run afresh as each new trustee succeeds to the office. [p. 494, col. 1.]

Appeal from the Madras High Court.

Mr. *Kenworthy Brown*, for the Appellant.

Messrs. *De Gruyther*, *K. C.*, and *Dube*, for the Respondent.

JUDGMENT.—The real question in this appeal is whether the suit is barred by the operation of the Statute of Limitation.

It was instituted by the appellant to recover, as against a purchaser under an execution sale and those who claimed under him, certain property which had by two deeds, dated the 21st February 1890 and the 13th December 1894 been devoted to charitable purposes. The first of these two documents declared that the heirs of the settlor in the order of primogeniture should be trustees and conduct the said charities. The settlor died in 1895, leaving him surviving his widow and Arunachellam, his only son. Arunachellam is the father of the present appellant. He was trustee of the charity and having become involved in debt one of his creditors sued him and obtained a decree in execution of which the endowments of the charity were attached. The settlor's widow, on behalf of the appellant who was then an infant, filed an objection to the attachment, but it was dismissed on the ground that during the lifetime of the appellant's father he had no *locus standi*. In the same year another suit was instituted by the minor acting through the same next friend seeking to establish the validity of both the deeds, and while this suit was pending, the property was brought to sale under the decree against Arunachellam on the 22nd March 1898. It was purchased by Maracayar who is since deceased, and whose legal personal representatives are the respondents Nos. 4 to 8 of this appeal; the sale was confirmed on the 11th August 1898, and delivery of possession was made to the purchaser, the settlor's widow being removed from possession. From that day until the institution of these proceedings, the purchaser and those claiming under him have been in uninterrupted possession of the property.

On the 31st December 1900, it was declared in the second suit of 1897 that the properties, including those seized under the execution sale, formed a trust estate for the purpose specified in the deed. On the 9th November 1911, the appellant, who had come of age on the 6th August 1910, petitioned the District Court asking for leave to bring a suit to remove Arunachellam from the office of trustee, and such leave was granted; the suit for removal was accordingly instituted and on the 21st July 1913, a decree was obtained removing Arunachellam, and the appellant succeeded as trustee. The present suit was then brought on the 23rd July 1913, to recover the property. Both the learned Judge, before whom the matter first came, and the learned Judges of the High Court have decided against the appellant but on different grounds; the result of the decisions was, however, in their Lordships' opinion, correct.

There is no doubt that, whatever period of limitation be assigned, the full period had run before these proceedings were instituted, unless it could be alleged that by virtue of the proceedings to which reference has been made, there was some interruption in the period.

Now, the real argument in favour of the appellant was that in the presence of the purchaser it was declared that the trust had been validly created and that the property was, in fact, trust property, and it is suggested that this effects *res judicata* as against the respondents and prevents them from now asserting that the property is their own. Their Lordships do not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and, therefore, ought not to have been seized, did not disturb or affect the quality of his possession; it merely em-

phasised the effect that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late.

A further argument has been put forward to the effect that the Statute of Limitation begins to run afresh as each new trustee succeeds to the office, and on support of that view reliance was placed in the case of *Iswar Shyam Chand Jiu* v. *Ram Kanai Ghose* (1), and on the case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (2), but these authorities do not assist the appellant. In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent *mokurari* lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life, and a grant made for a longer period is good, but good only to the extent of his own life-interest. It follows, therefore, that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the Statute would only run against him as from the time when he assumed the office. Such an argument has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout. Their Lordships are, therefore, of opinion that this suit is barred either under Articles 134 or 144 of the First Schedule to the Limitation Act. The former fixes the period as 12 years where the suit is to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration; and the latter assigns the same period where the claim is for possession of immoveable property or any interest therein not thereby otherwise specially provided for.

This is not, in fact, a transfer by the trustee himself for a valuable consideration, though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, but disregarding that Article Article 144 covers the exact case. Further, section 10 of the Limitation Act appears also to contemplate the exact position: it is in these terms:—"10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time," and it shows that, where it is sought to follow trust property, as in the present case, on the ground that the person in possession knew that it was trust estate, the claim is not barred, excepting in a case of assigns for valuable consideration, and the exception shows that in that event the claim may be defeated by adverse possession. The purchaser in the present case is clearly within the terms of the exception, and consequently he is not prevented, by reason of the fact that the property was to his knowledge trust property after the date of the decree, from relying on the provisions of the Statute which limits the time within which suits must be brought for recovery.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

W. C. A. & N. H. *Appeal dismissed.*

Solicitor for the Appellant.—Mr. *Douglas Grant.*

Solicitor for the Respondent.—Messrs. *T. L. Wilson & Co.*

(1) 10 Ind. Cas. 683; 38 I. A. 76; 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 281; 21 M. L. J. 1145; 38 C. 526 (P. C.).

(2) 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

SHAM BEHARI LAL v. RAM KALI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 354 OF 1920.

June 12, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

SHAM BEHARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM KALI—DEFENDANT—RESPONDENT.

Hindu Law—Succession—Stridhan—*Daughter's daughter* v. *son's son.*

According to the Mitakshara School of Hindu Law, a daughter's daughter has preferential rights of succession to *stridhan* property over a son's son.

A Hindu daughter taking the *stridhan* property of her mother by inheritance does not take it as her own *stridhan*, but she takes it as a limited estate with the remainder after her death to the heirs of her predecessor.

First appeal from a decree of the Subordinate Judge, Shahjahanpur.

Messrs. *Gulzari Lal, Jang Bahadur Lal* and *Shiva Prasad Sinha,* for the Appellants.

Messrs. *Baldeo Ram Dave* and *Uma Shankar Bajpai,* for the Respondent.

JUDGMENT.—This was a claim to certain property by inheritance. It was at one time the *stridhan* property of *Musammat* Sahodra, and descended after Sahodra's death to *Musammat* Ram Piari, her daughter. Ram Piari is now dead and the defendant in possession is Ram Kali, daughter of Ram Piari. The plaintiffs are the sons of one Ganga Din, who was a son of *Musammat* Sahodra. As the Trial Court has rightly remarked, it is now quite settled law that *Musammat* Ram Piari, taking this property by inheritance from her mother, did not take it as her own *stridhan*, that she took it with a limited estate, with the remoter after her death to the heirs of her predecessor.

The question for determination then is whether the defendant, *Musammat* Ram Kali, as the daughter's daughter of *Musammat* Sahodra, is a nearer heir to *Musammat* Sahodra than the two plaintiffs who are the son's son of that lady.

On behalf of the respondent it is contended that, under the Mitakshara School of Law, there can be but one answer to this question, and that the daughter's daughter has the preference. In principle two other High Courts have undoubtedly affirmed the view that, in such a case as the present, we have to look to the *stridhan* heirs of the female in whose hands the property was held as *stridhan; vide Subramanian Chetti* v. *Arunachelam Chetti* (1) and *Hurl Doyal Singh Sarmana* v. *Grish Chunder Mukerjee* (2). Moreover, in the case of *Sheo Partab Bahadur Singh* v. *Allahabad Bank* (3), there is a very significant remark by their Lordships of the Privy Council inserted as a comment upon a dictum of the learned Judges of this Court who dealt with the same litigation at an earlier stage. Their Lordships had to deal with property which had been the *stridhan* of a lady named Kailash Kunwar, and had passed from that lady to her daughter, Janki Kunwar. The main question which they had to determine was whether Janki Kunwar took that property from her mother with a limited estate, or whether the property itself remained *stridhan* in the hands of Janki Kunwar. Incidently, however, their Lordships discussed the question of the devolution of the property after Janki Kunwar's death, and they quote a dictum of the learned Judges of this Court, to the effect that, when Janki Kunwar died childless, the succession necessarily went "to the heirs of her father." After quoting this remark their Lordships add, "presumably as the *stridhan* heirs of her mother in the absence of lineal heirs of the latter." It seems to us quite clear from this passage that if their Lordships had had to determine the devolution of the property then in suit upon the death of Janki Kunwar, they would have looked for the *stridhan* heir of her mother Kailash Kunwar, and enquired who those heirs would be according to the School of Law to which the parties in that litigation were subject. If these were the only authorities before us, the point would seem almost too clear for argument. A certain difficulty has

(1) 28 M. 1 (F. B.).
(2) 17 C. 911; 8 Ind. Dec. (N. S.) 1152.
(3) 25 A. 476 at p. 489; 7 C. W. N. 840; 13 M. L. J. 336; 5 Bom. L. R. 833; 30 I. A. 29 (P. C.).

been created by an argument strongly pressed upon us by the learned Counsel for the appellants, based upon the decision of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (4). The main question which their Lordships then had to decide was whether property inherited by a female from her mother was or was not *stridhan* in the hands of the female who so inherited it. That question, as we have already noticed, they answered in the negative. At page 471 of the report their Lordships say: "the precise question, therefore, arising for decision is whether under Hindu Law of the Benares School property which a woman has taken by inheritance from a female is her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males." That was the only question really determined in the judgment. It must, however, be admitted that the defendants in that litigation were setting up, by way of *jus tertii*, the rights of a daughter of the female who had received the property in suit by inheritance, and, therefore, a daughter's daughter of the female who last held that property as *stridhan* with full rights of ownership over the same. Their Lordships decided the case against the alleged *jus tertii* of this daughter's daughter. The learned Judges of the Madras High Court, in the case which we have already referred to, *Subramanian Chetti* v. *Arunachelam Chetti* (1), discussing this point, assumed that the decision in *Sheo Shankar Lal* v. *Debi Sahai* (4), proceeded upon a very limited pleading. They assumed that the right set up by way of a *jus tertii* was the right of the daughter as such and that nothing was ever pleaded, and nothing was ever decided, about the rights of that same female as a daughter's daughter. Mr. Mayne, on the other hand, in his commentary of the Hindu Law, state with full knowledge of the facts, for he had himself argued the case before their Lordships of the Privy Council, that as a matter of fact the difficulty suggested above was brought to the notice of their Lordships, but was met by himself in argument by a plea based upon a suggested differentiation in the line of descent between different kinds of *stridhan* property. It seems sufficient for us to say that the judgment of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (4) is really silent on the particular issue which we have now to determine. The question which their Lordships set out to decide we have already quoted from the judgment itself and the decision of that question does not determine the appeal before the Court. The further question raised regarding the result of the appeal in the case of *Sheo Shankar Lal* v. *Debi Sahai* (4) may be explicable either on the lines suggested by the learned Judges of the Madras High Court, or on the basis of the settlement made by Mr. J. D. Mayne in his commentary. We do not think that the argument based upon the decision in this case can be allowed to outweigh the considered opinion expressed upon the same point in the case immediately following, that of *Sheo Partab Bahadur Singh* v. *Allahabad Bank* (3), or that we ought, on the grounds taken by the learned Counsel in support of the appeal, to dissent from the opinions of the learned Judges of the Madras and of the Calcutta High Courts in the cases we have already quoted. In our opinion, therefore the decision of the Trial Court was right; and we dismiss this appeal with costs.

K. S. D. & N. H. *Appeal dismissed.*

(4) 25 A. 468; 13 M. L. J. 330; 5 Bom. L. R. 828; 7 C. W. N. 831; 30 I. A. 202; 8 Sar. P. C. J. 465 (P. C.).

UMRI *v.* SHAH MUHAMMAD.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 89 OF 1919.

December 12, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

Musammat UMRI—DEFENDANT—APPELLANT

versus

SHAH MUHAMMAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 151, *O. XLI, r.* 23—*Remand, when can be made.*

Although under r. 23 of O. XLI of the Civil Procedure Code a remand can only be made on the grounds set forth therein, an Appellate Court is not confined to those grounds, and has inherent power to remand a case for a fresh trial on any other ground, if in the interests of justice, it considers it necessary to do so. Various circumstances may arise under which an Appellate Court may not be able to decide a case completely and a remand may become necessary in the interests of justice.

Abdul Karim Abu Ahmed Khan Ghaznavi v. *Allahabad Bank, Limited,* 41 Ind. Cas. 598; 44 C. 929 (F.B.); 21 C.W.N. 877; 26 C.L.J. 49, relied on.

Miscellaneous second appeal from an order of the District Judge, Lyallpur, dated the 20th December 1918, reversing that of the Munsif, First Class, Lyallpur, dated the 10th June 1918.

Dr. *Nand Lal,* for the Appellant.

Mr. *Aziz Ahmad,* for the Respondent.

JUDGMENT.—Shah Muhammad, respondent, obtained a decree for restitution of conjugal rights against *Musammat* Umri, the appellant before us. The decree was put into execution and *Musammat* Umri objected that as she had embraced Christianity the marriage tie had been put an end to. The Executing Court dealt with the matter somewhat summarily and disallowed the application for execution. Thereupon the decree-holder preferred an appeal to the lower Appellate Court. The learned Judge of the Court below, considering the judgment of the First Court to be wholly inadequate, made an order of remand under O. XLI, r. 23. Against that order the present appeal was preferred. At the hearing a preliminary objection was taken that no appeal from the order of remand in this case was competent. The question was referred to a Full Bench. It has now been finally decided* that an appeal does lie from the order of remand in such cases. The appeal has now come up for decision before us on the merits.

Dr. Nand Lal, Counsel for the appellant, *Mussammat* Umri, has contended that the present order was not justified by the terms of r. 23 of O. XLI, inasmuch as the judgment of the First Court had not been set aside on any preliminary point by the Court below. It has been held more than once that an Appellate Court is not confined to the grounds mentioned in rule 23 and that if for the ends of justice it is necessary to remand a case for a fresh trial it may do so on any other good ground. In the case of *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahbad Bank Limited* (1) a Full Bench of the Calcutta High Court laid down the rule that the power of remand under section 107, Civil Procedure Code, is limited to the case described in O. XLI, r. 23, but nothing in that section restricts in any manner the application of the principle of inherent power recognised by section 151 of the Code.

Dr. Nand Lal has cited a number of rulings given under the old Code and some pronounced since the coming into operation of the new Code, but it will serve no useful purpose to discuss all those authorities here. No one can deny the fact that, so far as r. 23 of O. XLI is concerned, a remand may be made on the grounds set forth therein but rule 23 is not exhaustive. Various circumstances may arise under which an Appellate Court may not be able to decide completely a case and it may think it necessary to order a remand in the interests of justice. In this case the learned Judge of the Court below has given satisfactory reasons for making the order of remand.

Dr. Nand Lal has also cited some authorities on the question whether the alleged apostacy in this case had taken place or not. We do not think it is necessary to deal with this question at this stage. The whole question will be gone into by the Court of first instance to which the case is remanded under O. XLI, r. 23.

We see no force in this appeal and we accordingly dismiss it with costs.

Z. K. & W. C. A. *Appeal dismissed.*

*See 68 Ind. Cas. 849 (F. B.)—[*Ed.*].

(1) 41 Ind. Cas. 598; 44 C. 929 (F. B.); 21 C. W. N. 877; 26 C. L. J. 49.

BAIJNATH RAI *v.* GOKUL RAI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 236 OF 1921.
June 14, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman

BAIJNATH RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOKUL RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof—Alienation of ancestral property, suit to set aside—Plaintiff member of joint Hindu family—Defendant, duty of—Practice.

Where in a suit by a son to set aside an alienation by his father of ancestral property on the ground that the transaction was without legal necessity it is either admitted or proved that the plaintiff is a member of a joint Hindu family, and that the ancestral property had been transferred without the plaintiff's consent and not apparently in lieu of any antecedent debt, or at an auction-sale, the burden lies on the defendant transferee to justify the alienation. [p. 499, col. 1.]

Jamna v. *Nain Sukh*, A. W. N. (1887) 116; 9 A. 493; 5 Ind. Dec. (N. S.) 766 and *Sukhdeo Jha* v. *Jhapat Kamat*, 54 Ind. Cas. 946; 1 P. L. T. 49; (1920) Pat. 67; 2 U. P. L. R. (Pat.) 39; 5 P. L. J. 120, discussed and distinguished.

First appeal from a decree of the Subordinate Judge, Ghazipur.

Messrs. *Surendra Nath Sen* and *Uma Shanker Bajpai*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for setting aside three sale-deeds two of which were executed on the 4th of December 1920 and the third on the 30th of July 1913, by the fathers and grandfathers of the present plaintiffs on the ground that these alienations of ancestral property were without any legal necessity. There was no suggestion in the plaint that the debts had been contracted for any illegal or immoral purposes.

The defendants-transferees contested the claim mainly on the ground that the debts had been incurred for family necessities and were binding on the plaintiffs. It was also pleaded that the claim was barred by time inasmuch as the plaintiffs were not born at the time of the first transfers.

The Court below found that the plaintiff No. 1 was alive at the time when the transfers of 1901 took place and that the two remaining plaintiffs were born before the execution of the third sale-deed. It accordingly held that the plaintiffs were entitled to maintain the suit. It, however, dismissed the suit on the ground that the burden lay on the plaintiffs to prove that the transactions were without any legal necessity and inasmuch as the plaintiffs had failed to discharged that burden, the claim stood dismissed. It relied mainly on two authorities, namely, the case of *Jamna* v. *Nain Sukh* (1) and a judgment of the Patna High Court, *Sukhdeo Jha* v. *Jhapat Kamat* (2).

The plaintiffs have come up in appeal to this Court, and, on their behalf, it is strongly contended that the burden of proof was wrongly laid on them.

Both the cases referreed to by the learned Subordinate Judge were cases in which the mortgagees were suing to enforce their mortgage and were, therefore, not parallel cases. In the first of these two cases all that Sir John Edge, C. J., remarked was that where a son comes into Court to ask relief against a sale effected by his father *for an antecedent* debt, it would be for the son to make out a case for the relief asked.

In the Patna case, however, at page 948, there is an observation by Sultan Ahmad, J., to the effect that the Courts have always drawn a distinction between a case where the property has passed out of the hands of the family by mortgage, sale or other alienation by the father, and the son sues for the recovery of the same, and the case where the mortgagee seeks to enforce the mortgage executed by the father against the sons who are in possession of the property. In the former case the son must show the grounds on which he seeks to set aside alienation by the father. In the latter, it is the mortgagee who has to show how he claims for the re-payment of the debt of the father.

If the learned Judge intended to lay down a general proposition of law that in every case where a Hindu son brings a suit to recover possession of properties from transferees, the burden lies on him to prove that the transfer was without any legal necessity, then we would be inclined not to agree with that view. Of

(1) A. W. N. (1887); 5 Ind Dec. (N. S.) 766.
(2) 54 Ind. Cas., 946; 1 P. L. T. 49; (1920) Pat. 67; 2 U. P. L. R. (Pat.) 39; 5 P. L. J. 120.

course, in every case the burden *prima facie* lies on the plaintiff to establish his case; but where it is either admitted or proved that the plaintiff was a member of a joint Hindu family, that the property transferred was an ancestral property, that it had been transferred without the plaintiff's consent and not apparently in lieu of any antecedent debt or at an auction-sale, the burden would lie on the defendant-transferee to justify the alienation.

It is, however, not necessary for us to remand the case, for both the parties produced all the evidence which they intended to produce, and no evidence has been shut out. We, therefore, propose to consider the case on its merits, and, in the circumstances, we are of opinion that the evidence which the defendants have been able to produce is quite sufficient; we, therefore, hold that the defendants have discharged the burden of proving that these were good transfers. The result is that the decree of the lower Court must be upheld. The appeal is dismissed accordingly.

K. S. D. & W. C. A. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 4, 1923.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

ANANDA MOHAN ROY — APPELLANT

versus

GOUR MOHAN MULLICK AND OTHERS —RESPONDENTS.

Hindu Law—Transfer of Property Act (IV of 1882), s. 6—Spes successionis, transfer of, validity of.

The transfers of expectations of inheritances—*spes successione*—are invalid both under the Transfer of Property Act and the Hindu Law, and contracts for the transfer of such expectations in the future, cannot be validly entered into. [p. 502, cols. 1 & 2.]

Mr. *De Gruyther, K. C.* and Dr. *Majid*, for the Appellant.—No prohibition against contract *re*-expectancy. Expectancy can be dealt with under the Mitakshara as well as under the Dayabhaga [*Ram Niranjun Singh* v. *Prayag Singh* (1); *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (2)]. No prohibition according to Hindu Law, (Colebrook Vol. I, pages 315 and 401). Contracts to sell in future covered by *Tilakdhari Lal* v. *Khedan Lal* (3). Conveyance of non-existent, thing viewed *Baldeo Pershad Sahu* v. *A. B. Miller* (4); *Rajah Sahib Perhlad Sein* v, *Maharajah Rajender Kishore Sing* (5); *Holroyd* v. *Marshall* (6); *Edward Tailby* v. *Official Receiver* (7). In any case *cypres* doctrine should apply (See Fry on Specific Performance). Contract in respect of sale of land to be acquired in future valid (section 54 of Transfer of Property Act and section 32 of Contract Act). Widow can relinquish her estate to reversioners (*Hem Chunder Sanyal* v. *Sarnomoyi Debi* (8), *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (9), *Bajrangi* v. *Manokarnika* (10). A gift or sale by a widow to one reversioner is valid [*Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (11); *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (12)], Reversioners' right can be sold like other persons' property. (Colebroke Book, IV Ch, II, section 1 (25) and (27), pages 315 and 311).

Sir *George Lowndes, K, C.*, and Mr. *Raikes*, for the Respondents were not called upon.

(1) 8 C. 138 at p. 145; 10 C. L. R. 66; 4 Ind. Dec. (N. S.) 88.

(2) 30 M. 486 at p. 492; 2 M. L. T. 443; 17 M. L. J. 505.

(3) 57 Ind. Cas. 465; 47 I. A. 239; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101; 48 C. 1 (P. C.).

(4) 31 C. 667 at p. 674.

(5) 12 M. I. A. 292 at p. 307; 2 Suth P. C. J. 225; 2 Sar P. C. J. 430; 20 E. R. 349.

(6) (1862); 10 H. L. C. 191; 33 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171; 11 E. R. 999.

(7) (1888) 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

(8) 22 C. 354 at p. 361; 11 Ind. Dec. (N. S.) 238.

(9) 10 C. 1102 (F. B.); 5 Ind. Dec. (N. S.) 737.

(10) 35 I. A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 30 A. 1; 5 A. L. J. 1 (P. C.).

(11) 8 M. I. A. 529 at p. 551; 2 W. R. P. C. 61; 1 Suth P. C. J. 476; 1 Sar P. C. J. 820; 19 E. R. 631.

(12) 13 M. I. A 209 at p. 228; 12 W. R. P. C. 47; 3 B. L. R. P. C. 57; 2 Suth P. C. J. 275; 2 Sar P. C. J. 518; 20 E. R. 529.

JUDGMENT.

Lord Sumner.—Three points have been argued on these appeals, one by Mr. De-Gruyther, the leading Counsel for the appellant, and two others by Dr. Abdul Majid the junior Counsel.

The plaintiff, the present appellant, had agreements with three persons, who are the respondents, only two of whom, however, appear by Counsel, under which he purported with great elaboration to purchase from them their expectations under the Will of their uncle, or alternatively their rights as his nephews expectant upon the termination of the surviving widows' rights in the property of the uncle, and among many other purposes, which are recited in this agreement, for which advances are agreed to be made, one, and apparently the principal one, was that an appeal might be prosecuted ultimately to His Majesty in Council for the purpose of establishing a Will which the deceased was said to have made. Unfortunately their Lordships, affirming the decision in the Court below, found that that Will was a forgery. That, therefore, reduced the expectations of the three respondents to their interest in the proprty after the widows' rights should come to an end, and as a matter of fact after a time one widow died and a compromise was entered into with the approbation of the Court in respect of the rights of the other widow, the effect of which was to accelerate the time when the nephews became entitled to the inheritance.

In the present suits in India the Trial Judge stated ten issues. The first four of those issues were argued and dealt with by him. The point in substance upon which those four issues turned was whether or not the agreements were illegal or void on the ground that they dealt with an expectancy. There were a number of others—as a matter of fact, eleven in all—but the remaining seven were not dealt with by the learned Judge. An application was made to him that he should pronounce a decree giving effect to his determination of the first four issues, which he declined to do upon the ground that there remained some issues in the case which had not been dealt with, one of them for example, being an issue whether the plaintiff was entitled to a refund of the amounts which he had in fact paid or any of them, and another wheher his rights were barred by limitation.

The present appellant was advised that his best course was to obtain an immidiate decree upon the four issues, which had been dealt with and appeared at that time to be the only substantial ones, in order that he might prosecute his appeal to the High Court, and ultimately to His Majesty in Council, and he, therefore, elected to abandon all the other issues, whatever they might be; in fact, he never called any evidence in support of them, and a formal order was made upon his petition disposing of them all in that way. We are told, and very likely it may be so, that at that time the advice was largely influenced by the consideration that it was still thought to be an open question before their Lordships whether, apart from the Transfer of Property Act, it might be held competent to these heirs, accordig to the ordinary Hindu Law, to contract to transfer, and ultimately to transfer their expectation, such as it was, and no doubt, if that was the real point of the litigation it was worthwhile to abandon minor points in order to get that issue determined. Between the time when the decree was asked for and obtained and the present time there has been a decision of their Lordships' Board in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (13) and although, as it appears to their Lordships, it simply re-states what had frequently been stated before, the appellant now recognises that the last word has been said, so far as he is concerned, about the possibility under Hindu Law of such an interest being transferred.

Under these circumstances an application, was made to their Lordships by Mr. De-Gruyther to allow the petition which had been presented to the High Court to be recalled, and the decree that was made upon that petition to be set aside and so to allow in some shape or form discussion, if not proof, of the remaining issues in the case, the object being to show

(13) 71 Ind. Cas. 629; 50 I. A. 69; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. (P. C.) 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 35 A. 179; 27 C. W. N. 949; 18 L. W. 383 (P. C.).

that there were, or might be, circumstances in which it possibly could be held that the time of the discovery of the illegality of the contracts was not the time when the contracts were made and the parties knew the law or must be presumed to have known it, but at a later date (what date their Lordships are not exactly told). It was urged that, if such circumstances could be suggested here, a view similar to that which the Board took in the case above mentioned might be taken in favour of the present appellant also. In that case, however, there were special circumstances, wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself. There has been no suggestion anywhere in the course of the present proceedings that any such facts occured as could alter the view which must normally be taken of the meaning of the word "discovery" and of the time at which that discovery must be held to have occurred. Not only so, but it was by the deliberate act of the appellant himself, for considerations which at the time were very likely wise considerations, that he closed the doors to any investigation of that issue at all. Their Lordships are content to dispose of the first point by saying that the additional issues cannot be gone into now and that upon the face of the matter the appeal must be dealt with upon the question whether, either under the Transfer of Property Act or under the Hindu Law applying to purchases of expectations of inheritances, there is any ground upon which these contracts can be supported.

Dr. Abdul Majid has developed these points, and his points appear to be two, setting aside for the moment the Transfer of Property Act, upon the ground that it deals with an actual transfer or conveyance and not with a contract to transfer. It is contended that there is nothing in the reason of the thing to prevent two parties, who are concerned in the way in which these parties were concerned, from entering into a contract for the future sale of future expectations. It is admitted that there is no authority to be found anywhere which supports the view that such a contract is possible, and it is admitted that there is authority in India to the contrary, the authority in question being the case of *Sri Jagannada Raju Garu* v. *Sri Rajah Prasada Rao* (14) which so satisfied the learned Judge at the trial that he expressed his assent to the reasoning, without further discussion, and the High Court in its turn was satisfied also. The reasoning of that decision may well be summed up first in a quotation from the judgment of Chief Justice Wallis, and, secondly, in a quotation from that of his colleague Mr. Justice Tyabji.

The learned Chief Justice says, at page 558* :—

"On this question, looked at a part from authority, I should not entertain any doubt as it seems futile to forbid such transfers of expectencies if contracts to transfer them are to be enforced as soon as the estate falls into possession. In these circumstances it seems to me that it is our duty to give effect to what we consider plain provisions of our Statute Law instead of following a course of English decisions, which would appear to have been based, from the very first on a regard for long established practice rather than on principle, and to have failed to commend themselves to Lord Eldon."

Then Mr. Justice Tyabji, at page 559* says :—

"The Transfer of Property Act does not permit a person having expectations of succeeding to an estate as an heir, to transfer the expectant benefits; when such a transfer is purported to be made, an attempt is in effect made by the two persons to change with each other their legal positions, and an attempt by the one to clothe the other with what the Legislature refuses to recognise as rights, but styles as a mere chance incapable of being transferred. It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving

(14) 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626.

* Pages of 39 M.—[*Ed.*]

to the agreement the form of a promise to transfer not the expectations but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which the Legislature has chosen to apply to it for the purpose of condemning it. When the Legislature refuses to the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed."

Their Lordships think that they are only following out numerous other passages which have been referred to in earlier judgments of this Board when they accept that reasoning and that conclusion. It is impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the contract while permitting the contract to stand as a contract, or to see how by appealing to section 65 of the Indian Contract Act, or to the nature of the bargain as a mere bargain *de futuro*, they could uphold it as a contract when it is a contract as to which, not only must specific performance be refused under the Transfer of Property Act, but as to which damages can never be recovered, because the contract is not performable contract until the realisation of the expectation occurs.

There is another way in which the learned Counsel for the appellant puts the point, namely, that there is here a contract wholly distinguishable from any contract as to *spes successione*, because, after carefully providing for all eventualities, the documents deal with the possibility of the widows, or one of them, relinquishing their life-interests either jointly or severally, or selling them to the reversionary heirs, in which event from the date of the relinquishment or sale, the heirs would become the present owners of the estate by right of inheritance. It is suggested that this provision ought to be read as relating to a transaction with strangers, embedded in the middle of a much longer contract with the parties to this appeal and relating to their hopes of inheritance; in other words, that it should be treated as though it read: "Further, if we can obtain by purchase from total strangers to the family a portion of our late uncle's property, then we undertake to sell it to you on the same terms as those upon which we have undertaken to sale our *spes successione*." It is not necessary to discuss how far such a contract might be supportable, because it is quite plain upon the documents that this is not such a contract, and, therefore, the point, ingenious though it is, is sufficiently dealt with by dismissing it.

The result, therefore, is that on all the points the appeals fail. As they have been consolidated in India and before their Lordships there will be one set of costs only, and the two successful respondents who appear by Counsel will get that set of costs, and their Lordships will humbly advise His Majesty accordingly.

W. C. A. *Appeals dismissed.*

Solicitor, for the Appellants:—Messrs. *Chapman Walker* and *Shephard*.

Solicitors, for the Respondents:—Messrs. *Watkins* and *Hunter*.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 44 OF 1923.

June 19, 1923.

Present:—Mr. Justice Daniels.

RABI PRATAB NARAIN SINGH—DEFENDANT—APPLICANT

versus

Mahanth RAM PRASAD BHARTHI—PLAINTIFF—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s. 36—Rent, whether includes produce of grove—Suit by grove-holder for value of fruit wrongfully appropriated by zemindar—*Jurisdiction.*

The produce of a grove which the grove-holder is liable to render to the *zemindar* comes within the definition of rent.

Raghubir Rai v. *Madho*, 41 Ind. Cas. 908; 15 A. L. J. 623; 39 A. 605, followed.

Plaintiff, a grove-holder, sued the *zemindar* claiming the value of fruit wrongfully appropriated by the latter:

Held, that the intention of the framers of the Tenancy Act was to include a case like the present within the jurisdiction of the Revenue Court.

Gureeboollah Puramanick v. *Fukeer Mahomed Kholoo*, 10 W. R. 203; 11 B. L. R. XIII *s. n.*, referred to.

Civil revision from an order of the Judge of the Court of Small Causes, at Deoria.

Mr. *Haribans Sahai*, for the Applicant.

Mr. *Narmadeshwar Prasad Upadhiya*, for the Opposite Party.

JUDGMENT.—This application raises a question of jurisdiction. The plaintiff

is a grove-holder and the defendant the *zemindar*. The suit was brought on the allegation that the defendant being entitled to one-fourth of the fruits of the grove had wrongfully appropriated one-half of the fruits. The suit was filed in the Small Cause Court claiming the value of the fruits wrongfully appropriated. The defence was that the suit was congnisable only by the Revenue Court, being a suit contemplated by section 36 of the Tenancy Act, and that, therefore, the jurisdiction of the Civil Court was ousted by section 167 of the same Act. Section 36 covers claims by a tenant from whom any sum or produce had been exacted by his landlord in excess of the amount recoverable from him as an arrear of rent. The learned Judge of the Court below framed an issue on the question of jurisdiction but omitted to decide it. The plaintiff's answer to the objection, however, is that the verb "to exact" implies something which the tenant has been compelled to pay against his will and does not apply to a case in which the landlord has gone to the grove and gathered the produce for himself. It is not disputed that the produce of a grove which the grove-holder is liable to render to the *zemindar* comes within the definition of rent, this having been held in more than one case, *e.g., Raghubir Rai* v. *Madho* (1). The dictionary meaning of the verb "to exact" is in accordance with the interpretation placed on it by the respondent. The primary meaning as given in Murray's Oxford Dictionary is "to demand and enforce payment of". It does not cover the direct appropriation of produce on the spot. I have been referred to an old decision in *Gureeboollah Puramanick* v. *Fukeer Mahomed Kholoo* (2) in which the same view was taken. I have little doubt that the intention of the framers of the Tenancy Act was to include such a case as the present within the jurisdiction of the Revenue Court, and if section 36, as framed, does not cover it, it is merely because the possibility of such a case was not thought of at the time when the section was drafted. I must, however, interpret the section as it stands.

In the course of the argument an alternative plea has been put forward to the effect that the suit was excluded from the jurisdiction of the Small Cause Court by Art. 35 (*ii*) or Art. 43A of the Second Schedule to the Provincial Small Cause Courts Act. This plea is an after-thought and was not taken in the grounds of revision. Moreover, after reading the plaint, I do not find that the allegations made therein clearly amount to a criminal offence. The revision, therefore, fails and I accordingly dismiss it with costs.

K. S. D. *Revision dismissed.*

(1) 41 Ind. Cas. 908; 15 A. L. J. 623; 39 B. 605.

(2) 10 W. R. 203; 1 B. L. R. XIII s. n.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 63, 65 AND 66 OF 1921.

March 13, 1923.

Present:—Mr. Dalal, A. J. C., and Mr. Simpson, A. J. C.

BALDEO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE DEPUTY COMMISSIONER, KHERI, MANAGER OF JHANDI ESTATE AND OTHERS—DEFENDANTS, GULAB SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS

Pre-emption — Decree, form of—Equities of case— Vendee paying off encumbrances—Pre-emptor, whether liable to pay—Merger—Sale in favour of mortgagee—Mortgage, whether extinguished.

A pre-emption decree may be moulded in accordance with the justice of the case. [p. 508, col. 2; p. 509, col. 1.]

Hazari Lal v. *Ram Narain*, 27 Ind. Cas. 420; 17 O. C. 379, followed.

The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession. [p. 509, col. 1.]

Where, therefore, property subject to the right of pre-emption is sold and after the sale, the vendee pays off encumbrances on that property, the pre-emptor will have to pay not only the purchase money, but also the amount paid by the vendee on account of the encumbrances. [p. 508, cols. 1 & 2.]

Moulvie Mohamed Shamsool Hooda v. *Shewakram*, 2 I. A. 7; 22 W. R. 409; 4 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.), followed.

BALDEO SINGH *v.* DEPUTY COMMISSIONER, KHERI.

In a case where the ownership of mortgaged property comes into the hands of the mortgagee and the latter wishes to hold up his mortgage as a shield against some person who is entitled to a decree for possession of the property, the question is whether the mortgagee kept the mortgage alive at the time when he came into possession of the equity of redemption or whether he allowed it to become extinguished. Ordinarily, where the Court finds that it was to the interest of the mortgagee to keep the mortgage alive, it may assume that he intended to keep it alive. [p. 511, col. 1.]

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, 10 C. 1035; 11 I. A. 126; 8 Ind Jur, 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), followed.

Where, however, a mortgagee became the owner of the mortgaged property under a decree for specific preformance of an agreement to sell and the Court that passed the decree decided that the true construction of the agreement between the parties was that the mortgage should be extinguished, and the sale-deed drawn up under the decree contained no proviso that the mortgage was to be kept alive; in a suit for pre-emption:

Held, that it could not be presumed that the intention of the mortgagee was to keep the mortgage alive as a shield against a possible pre-emptor. [p. 511, col. 2.]

Bindeshuri Singh v. *Pandit Balraj Sahai*, 10 O. C. 49, distinguished.

Appeals from the decree of the First Subordinate Judge, Sitapur, dated 29th August 1921.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Messrs. *M. Wasim* and *Rai Nagendra Nath Ghoshal Bahadur*, for Respondent.

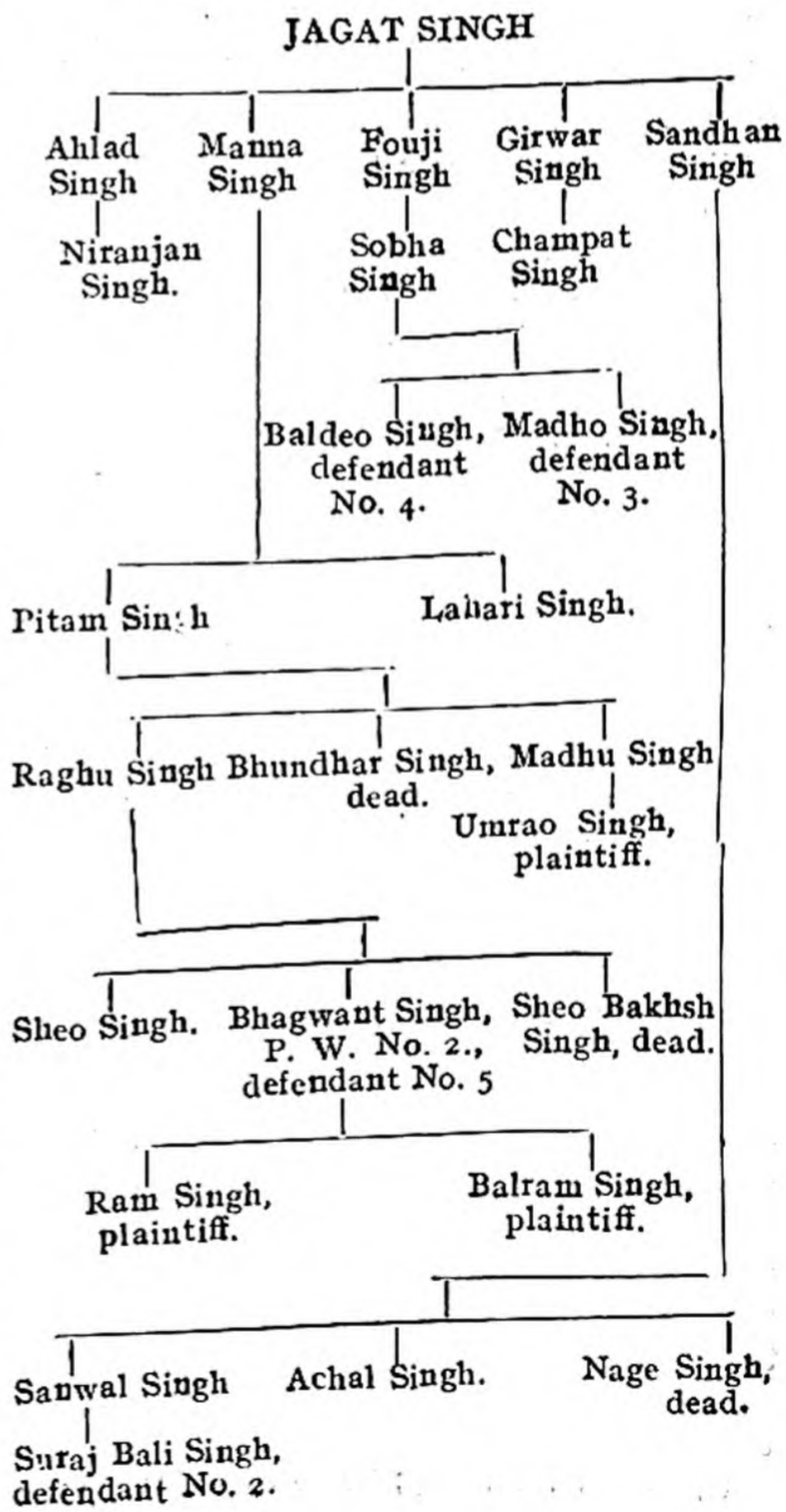
JUDGMENT.

Simpson, A. J. C.—This judgment deals with three appeals. There were four suits in the Court below, which were dealt with in a single judgment. The facts of the case are very complicated, but nevertheless they raise in a singularly clear and simple form an important question of law, which may be stated thus:—

A property subject to a right of pre-emption is sold. After the sale the vendee pays off encumbrances on that property. Ought this payment to be included in the purchase-money specified in the decree for pre-emption?

Apparently, the question is one of first impression. No case directly in point has been cited at the Bar. Our decision is that it ought to be so included.

Coming to the facts of the case, four suits were brought for pre-emption. One has been dismissed, and that dismissal has not been appealed. In the case of the other three, appeals have been filed by the plaintiffs. They obtained a decree for pre-emption, but they were called on to pay not only the price mentioned in the sale-deed, which is Rs. 90,000, but an additional sum in respect of the encumbrances satisfied by the vendee, the total amount of which in all three appeals amounts to Rs. 75,584-9-8. The appeals relate to this added money only. The sale-deed was executed on 12th November 1919. It was executed by the Court itself, the Subordinate Judge of Sitapur, on behalf of eight persons in execution of a decree for specific performance of a contract of sale. In order to understand the facts of the case it is necessary to look at this pedigree:—



Of the eight persons, on whose behalf the sale-deed was executed and who are consequently the vendors, four appear in the pedigree, namely, Suraj Bali Singh D. No. 2, Madho Singh D. No. 3. Baldeo Singh. D. No. 4, and Bhagwant Singh D. No. 5. The other four were the three sons and the widow of Durga Bakhsh Singh, an assignee. Their names are Madho Singh, Ratan Singh, Ganga Bakhsh Singh and *Musammat* Avadh Kuar. The vendees under that sale-deed were Raj Raghubar Singh, the *taluqdar* of Jhandipurwa, and the Deputy Commissioner of Kheri as Manager, Court of Wards of Majgain estate, the property of Raj Mangal Singh. In order to understand how this sale-deed came to be executed it is necessary to go back to 14th January 1867. This is the date of a mortgage executed by Achal Singh, Sobha Singh and Champat Singh (all of whom will be found in the pedigree) in favour of one Bhagwant Singh. This mortgage-deed comprised the whole of the property in suit with unimportant exceptions. The amount of the mortgage-money was Rs. 3,000. The rate of interest was 2 per cent. without specification whether this rate was payable monthly, yearly, or for the entire period, during which the mortgage might remain in force. The mortgagee entered into possession of the mortgaged property, we do not know exactly when. He was entitled to do this under his mortgage and to obtain both the usufruct of the property and the interest in addition.

In 1897 a suit for redemption was instituted by the representatives of the original mortgagors. The plaintiffs found it necessary to raise a loan to meet the expenses of the suit and also the redemption money which they would have to deposit. Therefore, on the 3rd March 1898, the earliest mortgage-deed in favour of Durga Bakhsh Singh was executed. It was for Rs. 7,000 and the property hypothecated was the entire village of Mustafabad. On the 14th September 1898 the Subordinate Judge granted the plaintiffs a decree for redemption. There were three successive appeals from this decree. The first was decided on 30th January 1900; the second on the 11th April 1902 by the Judicial Commissioner; and the third on the 27th July 1906, by the Privy Council. The Judicial Commissioner had decided that the 2 per cent. rate of interest was annual. Very shortly after his decision, the plaintiffs executed a deed of gift in favour of Durga Bakhsh Singh from whom they had borrowed Rs. 7,000 four years earlier. It will be convenient to state here exactly what property belonged to the original mortgagors of the mortgage of 1867. Champat Singh, Achal Singh, and Sobha Singh were the proprietors of ⅓rd of the Tihar estate. Apparently, there had been some ancient partition and their ⅓rd share was represented by—

One-third of village Tihar,
The whole of village Narharpur,
Do. do. Mustafabad, including the hamlet of Richhauna,
One-half of do. Pipra.

This is what was conveyed by the sale-deed now under pre-emption. At the time the deed of gift was executed, only Champat Singh of the three original mortgagors was still alive. Achal Singh was represented by Suraj Bali Singh, Sobha Singh was represented by his two sons, Madho Singh and Baldeo Singh. But Baldeo Singh was not a party to this deed of gift. Therefore, what was gifted was ⅓rd of 14 annas of Tihar, 14 annas of Mustafabad, 14 annas of Narharpur and what is called 14 annas of Pipra, the ½ share being apparently treated as 16 annas. Although this is a deed of gift, there is no reason to suppose that the intention of the executants was to benefit Durga Bakhsh Singh at their own expense. Their object was to save some par of the property. Accordingly, it was provided that the donee was to pay off the mortgage of 1867 and should then restore the ⅓rd share of Tihar to the donors. The rest of the property he was to keep. Durga Bakhsh Singh proceeded to mortgage the property by means of some of the deeds with which we are directly concerned. There are eight of these deeds and they were called A, B, C, D, E, F, G and H in the written stat ment. This lettering has been followed in the judgment at pages 73 and 83, where the details of these documents are given. The following table comprises these two tablets:—

Claim reference in D 1's written statement and Exhibit No.	Date of mortgage.	Name of mortgagor.	Name of mortgagee.	Amount of mortgage money.	Amount now claimed	Village charged.	Amount of charge.
A Ex. A. 5 p. 45 (a)	30-5-1904	Durga Bakhsh Singh.	Raja Ram Ajudhia Prasad and Data Din	5,000	11,265-3-8	Mustafabad, Pipra	9,279-13-9 1,985-5-11
B. Ex. A. 15 p. 26 III	26-6-1902	do.	Hari Ram	2,400	6,336-8-0	Narharpur	6,336-8-0
C. Ex. A. 16 p. 37	6-2-1903	do.	do.	400	2,000-0-0	do.	2,000-0-0
D. Ex. A. 18 p. 48	19-8-1905	do.	do.	3,000	11,507-0-0	Narharpur Mustafabad	6,776-4-9 4,730-11-3
E. Ex. A. 19 p. 50	6-1-1906	do.	do.	600	2,191-8-0	Narhapur Mustafabad	1,290-8-8 900-15-4
F. Ex. A. 20 p. 52	31-7-1906	Champat Singh Madho Singh and Baldeo Singh	do.	2,250	7,725-0-0	Tiha:	7,725-0-0
G. Ex. A. 26 p. 46	14-12-1904	Champat Singh.	Tika Ram	300	1,413-0-0	do.	1,413-0-0
H. Ex. A. 2 p. 31	7-7-1902	Durga Bakhsh Singh.	Raj Mangal Singh Raj Raghubar Singh, Raj Debi Bakhsh Singh.	8,948-13-0	33,046-6-0	Mustafabad Pipra	27,222-4-11 5,824-1-1

It will be seen that six of these documents were executed by Durga Bakhsh Singh, the earliest on 26th June 1902, the latest on 6th January 1906. The other two mortgages F and G, related to the village of Tihar, which the original owners had retained. All these deeds with the exception of G were executed between the decree of the Judicial Commissioner dated 11th April 1902, and the decree of the Privy Council dated 27th July 1906, and even the deed G must have been executed before the decision of the Privy Council was known, because it is dated only four days after it. The decree of the Privy Council was that a great deal more money ought to be paid for redemption. It followed that the property had not been validly redeemed, and the mortgagees resumed possession. Durga Bakhsh Singh, Raj Raghubar Singh, and Raj Mangal Singh then borrowed Rs. 40,000 from the Allahabad Bank and deposited this sum in Court. But it was held by the Judicial Commissioner that this payment

was not sufficient, and it became necessary to institute a regular suit, which ended in a decision by the Privy Council in May 1912, that the deposit should be accepted. While this litigation was pending Durga Bakhsh Singh, together with Champat Singh, who was still alive, Suraj Bali Singh, who represented Achal Singh, and Madho Singh and Baldeo Singh, sons of Sobha Singh, executed an agreement for sale in favour of Raj Raghubar Singh and Raj Mangal Singh.

On 1st May 1915 a suit for sepecific performance was filed on foot of this contract and on 28th August 1917 a decree was passed for specific performance, which was confirmed by the Judicial Commissioner on 8th July 1919. The sale-deed now in suit was executed in execution of this decree on 12th November 1919. By that time Raj Mangal's estate was in charge of the Court of Wards, and the Court of Wards proceeded to clear off these mortgages. It will be remembered from the table that Hari Ram was the principal creditor. His receipt given to the Court of Wards in respect of deeds, B, C, D, E, F, is printed at page 169. The Court of Wards was responsible for only ½ of these debts. The other half was paid by Raj Raghubar Singh, who executed a mortgage for that purpose. This is printed at page 166. As regards the deed A a suit was brought on foot of this deed and a decree for sale was obtained on 25th July 1911. The property was saved at the last moment by a payment under O. XXI, r. 89, which provides for setting aside the sale by paying up the decree-money. The Court of Wards paid off the whole amount due on both A and G in cash. The deed H was not paid, because it was due to the vendees themselves.

We are now in a position to take up the main question for decision, which is one of law. The learned Counsel for the appellants divided his argument into two parts. In the first place, he took his stand absolutely on the Statute, Pre-emption in Oudh is regulated by Chapter II of the Oudh Laws Act (XVIII of 1876). Section 10 provides that, when any person proposes to sell any property in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell such property. Section 13 provides that any person entitled to a right of pre-emption may bring a suit to enforce such right on the ground that no due notice was given. Section 14 provides that if the Court finds for the plaintiff, the decree shall specify a day on or before which the purchase-money shall be paid. The argument is that a pre-emptor has an absolute right to get a decree for pre-emption on payment of the actual sale-price and that the Court has no power to make any addition whatsoever to this price. Against this position the respondents set up the justice of the case. For example, let the property be worth Rs. 12,000 and let there be an encumbrance of Rs. 8,000 upon it. The market-value of the property so encumbered is Rs. 4,000. A vendee purchases the property for Rs. 4,000. He then pays off the encumbrance. It is manifestly unjust that a pre-emptor, on payment of Rs. 4,000 should be given possession of the property unencumbered worth Rs. 12,000. *Moulvie Mohamed Shamsool Hooda* v. *Shewukram* (1) is perhaps the leading case in India, which embodies this principle (The decision of the Calcutta High Court in the same case is reported as *Syud Mahomed Shumsool Hooda* v. *Shewuk Ram* (2)). One *R* had an only son, who predeceased him, leaving him surviving a widow *D* and two daughters. One of the daughters married *A* and died childless, the other married *L*, who died leaving an only son Sewak Ram, the plaintiff in this suit. The widow *D* sold a part of the estate to Shamsool and the suit was brought for declaration that the sale is not binding on the plaintiff. There was a deed, which was construed to be a Will, and it was held that this gave the widow *D* a life-estate. The suit was brought during her lifetime for a declaration that the plaintiff would be entitled to the property on her death. The Court of trial gave the plaintiff a declaration but on condition of his paying the whole of the purchase-money. The High Court decided that this condition could not be supported. But, and this is the point which concerns us here, it was held, that

(1) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.).
(2) 14 W. R. 315.

the plaintiff must re-pay the sum of Rs. 14,000 representing a mortgage, which was made in order to discharge the encumbrance created by *H*, the last male owner, and some bonds, because this mortgage was redeemed by money paid into Court by the defendant. Both the parties appealed to the Privy Council. It was said in that judgment: "The only question that remains, then, is whether the plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the Rs. 14,000. On the whole, their Lordships are of opinion that the judgment of the High Court was right; that this mortgage of Rs. 14,000, subsisting upon the estate at the time of the sale, and having been paid by the purchaser, it is equitable that, when the plaintiff reclaims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the plaintiff himself would have to meet."

We attach importance to the wording of this decision. It appears to lay down a broad principle of equity, and it is free from the complication of a salvage lien, which figures in some of the other cases. This decision has been frequently followed. The cases are collected in the footnote at page 369 of Ghose's Mortgage, 4th Edition. *Nilo Pandurang* v. *Rama Patloji* (3) and *Syamalarayudu* v. *Subbarayudu* (4) may be instanced as extreme cases of the application of the rule.

The existence of the principle is not disputed by Counsel for the appellants nor has he denied that the payment of these mortgages may have created a liability, which will rest on him after he has obtained possession of the property under the pre-emption decree. But he argues strenuously that any such equity between himself and the vendee must be worked out in a separate suit. He says that no equitable doctrine can oust the Statute, that his statutory right is to obtain a decree for pre-emption on the payment of the purchase money and nothing more. The answer to this contention is that a decree for pre-emption is a decree for possession [as appears from O. XX, r. 14 (1) (*b*)], and that all decrees for possession are subject to the same equitable rule, which we have quoted from *Moulvie Mohamed Shamsool Hooda's case* (2). We do not attach any such sanctity to the pre-emptor's right to be given possession as would be involved in saying that the Court in granting a pre-emption decree is precluded from moulding the relief according to the justice of the case. For this at least there is some authority *Hazari Lal* v. *Ram Narain* (5). That was a suit for pre-emption. It was a case of foreclosure, not of sale, but we do not think that that makes any difference. In that case, the amount, which was found to be due in respect of the mortgage at the time the decree was made absolute, was Rs. 1,883-11-3. The pre-emptor claimed to pre-empt upon payment of that sum only. But the defendants claimed two other items. One was a payment, which they had had to make to the superior proprietor after foreclosure on account of arrears of rent. It was said "Apart from the language of section 12 it appears to me clear that these pre-emptors were under an obligation to reimburse to Manni Ram's representative any sum paid by Manni Ram on account of the arrears of rent accruing for any period prior to the time of his getting possession after foreclosure."

It was said, "The plaintiffs-pre-emptors, who are claiming by this suit to find themselves placed in the situation in which Manni Ram stood at the time he obtained foreclosure, cannot avoid any liability to which Manni Ram was then subject." It was also pointed out that the payments were in the nature of salvage, because the superior proprietor had a decree, and had applied for execution by sale of the under-proprietary tenure itself. These arrears of rent were added to the mortgage-money. Of course, they cannot be regarded as forming part of the mortgage-money, because the expenditure was incurred after foreclosure in the capacity of owner, not of mortgagee in possession. This case, therefore, is authority for the proposition that the pre-emption decree may be

(3) 9 B. 351 5 Ind. Dec. (N. S.) 24.
(4) 21 M. 143 7 Ind. Dec. (N. S.) 457.
(5) 27 Ind. Cas. 420 17 O. C. 379.

moulded in accordance with the justice of the case. If this is once conceded, the only remaining question is, whether justice ought to be done, once for all, as a condition precedent to the pre-emptor's obtaining possession of the property, or whether he ought to get a decree for possession at the price mentioned in the sale-deed, the vendee being relegated to a separate suit in which he would appear as a plaintiff asserting his right as a mortgagee under the doctrine of subrogation. It seems unnecessary to lay down any hard and fast rule on this point. The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession, which otherwise the plaintiff himself would have to meet. There may be cases in which a Court would hold that the vendee had paid off encumbrance in bad faith or improvidently, and would refuse to add this payment to the money payable under the pre-emption decree. Or the interests of third parties may be involved. But we are satisfied that the general rule does apply to pre-emption decrees like other decrees for possession of property.

After this decision it becomes unnecessary to discuss the doctrine of salvage. All that remains is to condsider each item of the defendants-respondents' claim in order to see whether it is equitable that the pre-emptor should be called upon to reimburse the vendee.

Taking the mortgage-deeds in order :—

A. This is very clear, because if the Court of Wards had not paid up this decree the property would have been sold.

B. The point taken with regard to B is that, when the mortgagee sued for possession, the matter was settled by compromise, and that the compromise was entered into after the suit had been brought for specific performance. The suggestion is that the mortgagors had no real interest left in the property that they had contracted to sell, and, therefore, it is not to be assumed that their compromise was a proper one. It is suggested that the decree might have been resisted by the Court of Wards on that ground. There appears to be no force in this contention. A suit for specific performance is not a conveyance any more than the contract itself, which it seeks to enforce. The defendants in that case were the only possible defendants, and it is to be noted that both parties in the present appeal claim under these defendants. It would have been impossible for the Court of Wards to impugn a compromise entered into by their predecessor-in-interest and it would have been impossible for the pre-emptor to do so if he had received a notice in time and had promptly pre-empted the sale.

C. Here there was not an actual suit but there was a notice of suit and the interest was compound. But, apart from these considerations, we have already held that any payment of an encumbrance, which the pre-emptor would have had to pay, ought to be added to the pre-emption money.

D. This is a suit of further charge on documents B and C. They could not be redeemed unless this was redeemed.

E. In this case there was a decree for sale.

F. Here the mortgagee was in possession and could not be got out except by paying him off.

G. It is argued here, that the Court of Wards could have disputed the decree, because the mortgagor had won in the First Court on 30th January 1917. The judgment for specific performance was given on 28th August 1917. The mortgagor did not appear in the Appellate Court and a decree was given against him on 1st November 1917. We do not think that there is any thing in this contention. There was a decree absolute under the mortgage. The Court of Wards could not have attacked that decree on any ground except fraud, which is not to be presumed. There is another feature, however, about this payment. It may appear singular that there are no reported cases of a vendee claiming to add the payment of encumbrances to the pre-emption price but no doubt, as a rule, the vendee with the possibility of pre-emption hanging over him is in no hurry to clear off the encumbrances he waits until his title has become indefeasible, or until a suit for pre-emption has

actually been brought, and in the latter case he abstains from paying off the encumbrances.

The facts of the present case are very unusual. This sale-deed was executed by the Court itself, in execution of a decree for specific performance of the contract of sale, and the vendee was the Court of Wards. The vendee might well have imagined that a sale-deed executed by the Court contained no flaw and that it would be safe to act upon it. It seems probable that the idea of pre-emption had not occurred to the Court of Wards. The pre-emption suits were instituted just in time, nearly a year after the date of the sale-deed, and all the payments, with the exception of this one G, were made before the notice of the suits. But the Court of Wards admittedly received notice on 20th July 1920 (see paragraph 11 of the written statement on page 6) and this payment was made on 31st July 1920. We do not think, however, that this fact stands in the way of the equitable principle. Things move slowly in the Court of Wards and no doubt, the wheels had been set in motion for many weeks before the actual payment took place, and continued to revolve sufficiently long after the receipt of notice to result in this payment.

Lastly, H. This stands on a different footing from the other encumbrances, because it is due to the vendees themselves. It has not been paid off. It is dated 7th July 1902. It was for Rs. 8,948-13-0, an amount which has now swelled to Rs. 33,046-6-0. It was executed in favour of the two vendees and their brother, Raj Debi Bakhsh Singh. This brother is dead and the vendees are his heirs. The rate of interest was 12 annas per cent. per mensem compound interest with yearly rests. The period was 5 years. That period expired on 7th July 1907 and accordingly the suit by the mortgagees on foot of this mortgage became barred on 7th July 1919. The date of the sale-deed is 12th November 1919. The suit brought by the mortgagees on foot of this mortgage would have been barred by limitation. Again, looking to the sale-deed (it is Exhibit A 35 at page 161) it will be seen that there is no mention of this mortgage. If the vendees wished to keep this mortgage alive as a shield against the pre-emptor or against any other mortgagee one would expect them to say so in the sale-deed itself. But there was a reason why this should be omitted from the sale-deed. That reason is to be found in the judgment in the suit for specific performance. The passage I refer to is printed on page 110 of Part III—"The plaintiffs (the present vendees-respondents) also claim the principal and interest due on the mortgage-deed dated the 7th July 1902, which is for Rs. 8,948-13-0, executed by Durga Bakhsh Singh in favour of plaintiff No. 2 (Raghubar Singh) and latter's brothers. This deed,.....was already in existence on the date of the agreement. It cannot be included in any of the six items constituting the price, Rs. 90,000, enumerated above in quoting the words of the agreement. The omission of any reference to this mortgage-deed in the agreement is a clear indication of the intention of the parties to the agreement that it was not to form any part of the price Rs. 90,000. Of course, the parties must have known that, as soon as the plaintiffs became absolute owners as purchasers of the property in suit, the mortgage would be extinguished. I, therefore, decide that nothing can be allowed to plaintiffs on account of this mortgage towards the price Rs. 90,000."

The item is referred to in the appellate judgment of the Judicial Commissioner in these words,—"The plaintiffs also claim Rs. 8,894-13-0, and interest on account of a mortgage made by Durga Bakhsh Singh in favour of Raja Debi Bakhsh Singh, Raja Mangal Singh and Raj Raghubar Singh on the 7th July 1902, (Exhibit 96). That mortgage was not, however, recited in the agreement of the 30th August 1908, as a subsisting debt due by Durga Bakhsh Singh. It is not clear whether any portion of its consideration, if paid, was applied to the redemption of the mortgage or to meet the expenses connected with the litigation arising out of the claim for redemption. The mortgage of the 7th July 1902, was evidently treated as a separate transaction. Had the plaintiffs intended to take credit for the money due on that mortgage out of the sale consideration payable to the defendants-vendees it is not unreasonable to presume that they would

have expressly said so in terms not capable of being misunderstood. The cash payments referred in the agreement were payments made in connection with the litigation arising out of the claim for redemption and the expense incurred directly or indirectly by the persons claiming redemption and the mortgage-deed above referred to has rightly been excluded from the account." It was in execution of the decree belonging to this judgment that the sale-deed was executed. The judgment may rightly be looked at in construing the sale-deed. It must be held that the learned Subordinate Judge, when he executed this sale-deed, intended to draw it up in accordance with the judgment of the Judicial Commissioner's Court and to exclude this item. The respondents, therefore, are in this position. When they brought their suit for specific performance they claimed to have the sale-deed included. They demanded that the amount of their mortgage-money should be deducted from Rs. 90,000, which was the price of the property. This relief was refused to them on the ground that it was not a part of the contract of sale. In refusing this relief, the Court of Trial came to a finding that the intention of the parties was that the mortgage should be extinguished. The remarks in the judgment of the Judicial Commissioner are not so clear, indeed we find some difficulty in construing them, but this much is clear that it was held that this deed was rightly excluded from the account. This is a case where the ownership of the property itself has come into the hands of the mortgagee and the mortgagee wishes to hold up his mortgage as a shield against some person, who is entitled to a decree for possession of the property. In all such cases the question is whether the mortgagee kept the mortgage alive at the time when he came into possession of the equity of redemption [*Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (6)] or, whether, he allowed it to become extinguished. In England, where the rules of conveyancing are very strict, it is the invariable practice to have the mortgage assigned to trustees for the express purpose of keeping it alive. This is never done in India and the Courts have usually looked to see whether it was to the interest of the mortgagee to keep his mortgage alive, and, if they found it to be to his interest, they have assumed that he did intend to keep it alive. But there is no room for such an assumption here. The sale-deed was executed after a Court had decided between the parties that the true construction of their contract was that this mortgage will be extinguished. The Appellate Court had said nothing to the contrary. The sale-deed was then drawn up containing no proviso that this mortgage was to be kept alive. We hold that the mortgage was extinguishd.

We come to no decision as to the effect of the fact that the mortgagees' remedy was barred by limitation at the time of the sale. But it may well be that, if he had tried to keep the mortgage alive, he would have failed to do so for that reason. The Court of Trial in dealing with this item has not given any reason beyond referring to *Bindeshuri Singh's case* [*Bindeshuri Singh* v. *Pandit Balraj Sahai* (7)]. The facts of that case were that the Deputy Commissioner, as Manager of the Court of Wards, sold to the defendant certain villages, one of which was previously held by him under a usufructuary mortgage, the amount of which was deducted from the sale-price. The plaintiffs, as under-propriertors, claimed pre-emption. The vendee set up various defences and one of them was that he was entitled to hold possession as usufructuary mortgagee. The question was said to be one of difficulty. There was nothing in the sale-deed about the prior mortgages held by the vendee. But it was not denied that, when the property was sold, he had three mortgages; one this possessory one. It was decided that there had been no intention to keep this mortgage alive, and that the vendee could not set up the usufructuary mortgage in answer to the claim for possession made by the pre-emptors. So far the decision certainly gives no support to the learned Subordinate Judge. But it is true that the judgment in *Bindeshuri Singh's case* (7) went on to decide how much the pre-emptor was to pay. The sale-

(6) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

(7) 10 O. C. 49.

deed gave the sale-price at Rs. 1,25,771 out of which Rs. 67,469 was left to the vendee for payment of certain encumbrances, which were set forth in the sale-deed. The balance was not paid in cash, because the nominal sum due after satisfying the encumbrance was accepted by the vendee as a discharge from any claim, which he had on the property. It is not clear why the sum was called nominal. The difference between Rs. 1,25,771 and Rs. 67,469 is Rs. 58,302. It was held that the pre-emptor must pay more than Rs. 1,25,771 because the intention of the parties was that the vendee should pay off whatever might be due on the other encumbrances and should receive whatever was due on his own mortgages. It appeared that the amount due both on the other encumbrances and on his own had been calculated up to the same date in 1902, probably 6th August 1902, the day on which the sale was sanctioned by the Board of Revenue. As a matter of fact, the sale-deed was not signed until the 5th January 1904. It was decided that the pre-emptor would have to pay the amount actually paid by the vendee for redemption of four prior mortgages together with the amount due to the vendee under his own mortgages upon the date of which he got possession of the property. It might appear at first sight that this decision is directly in point with regard to the main question of law, which is decided in the earlier part of this judgment. Perhaps it does lend some support to our conclusion. But the reason we have not referred to it as an authority is this. The decision in *Bindeshuri Singh's case* (7) proceeds on an ascertainment of what was the true sale-price agreed on between the parties. The sale-deed gave the price as Rs. 1,25,771 made up of two items, namely, Rs. 67,469 due on certain encumbrances and the balance due to the vendee on his own mortgage. It was held that on a proper construction, the price was whatever was actually due on these encumbrances and the mortgage at the date of the sale-deed. In the present case our decision proceeds on a different ground, namely, that the pre-emptor is bound to recoup the vendee for any payment made by him to discharge any encumbrance on the property, which the pre-emptor would otherwise have had to pay himself.

Coming back to the question of deed H and the distinction between that deed and *Bindeshuri Singh's case* (7), the distinction is this, that in *Bindeshuri Singh's case* (7) it was the intention of the parties that the vendee sholuld retain in his own hands a sufficient sum out of the sale-consideration for the satisfaction of his mortgage. The contrary was the intention in the case before us. In both cases the parties intended that the mortgage should be extinguished. But in *Bindeshuri Singh's case* (7) the extinction was to take place by the vendee paying himself out of the sale-consideration, and, consequently, the pre-emptor who was taking the property free of encumbrance, had to pay that part of the sale-consideration. In the case before us the intention of the parties was that the mortgage should be extinguished without any payment, and, consequently, the pre-emptor is not called upon to pay off this encumbrance. It may appear hard on the vendees that their mortgage should be extinguished without their having received any payment for it, but it appears to us that this was what they tried to obtain and failed to obtain in the suit for specific performance, and that they are now barred by something of the nature of *res judicata*. This at least is clear that this item cannot be regarded either as a part of the price or as a subsisting encumbrance of which the vendee can claim payment.

There remains another point. The mortgages B, C, D, E, and F were paid half by the Court of Wards in cash and half by Raj Raghubar Singh by means of a mortgage in favour of Hari Ram, who was himself the mortgagee under these deeds. This mortgage has not been paid off. It is Exhibit A-22 dated 29th January 1920 at page 166 of Part III. The result of the decree of the Court below is that the pre-emptor is saddled with the payment of Rs. 14,881, which Raghubar paid to Hari Ram, while he also finds his property encumbered with the mortgage Exhibit A-22. One of two things must be done. Either it must be declared that the pre-emptor takes the property free of the mortgage Exhibit A-22 or he must be relieved from

the payment of Rs. 14,881, which were borrowed on the security of this mortgage and which were employed in paying off half of the deeds B, C, D, E and F. The mortgagee, Hari Ram, is not a party to this appeal, so it is impossible for us to declare that the property is free of his mortgage. The decree must, therefore, be modified by relieving the pre-emptors of this payment.

The appeals succeeded in respect of the whole of the deed H and in respect of half of the deeds B, C, D, E and F. It entirely fails in respect of the deeds A and G.

Appeal No. 63, which relates to suit No. 72, is allow d to the extent of Rs. 30,038-2-3, and the pre-emption decree in that suit is conditional on the deposit of Rs. 38,375-5-4. The Appeal No. 65, which relates to Suit No. 71, is allowed to the extent of Rs. 12,064-2-9 and the pre-emption decree in that suit is conditional on the deposit of Rs. 71,575-2-0. The Appeal No. 66, which relates to suit No. 70, is allowed to the extent of Rs. 5,824-1-1 and the pre-emption decree in that suit is conditional on the deposit of Rs. 7,607-12-5. All these deposits must be made in Court for payment to the defendant No. 1 within six months from the date of this decree. As regards costs in the Court of Trial, the order of that Court is maintained. Parties will pay and receive costs in this Court according to their success and failure.

Dalal, A. J. C.—I agree.

Appea s partly allowed; and partly dismissed.

K. S. D. & Z. K.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 173 OF 1921.

June 21, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

KAPUR CHAND—OPPOSITE-PARTY—APPELLANT

versus

KANHAIYA LAL—APPLICANT—RESPONDENT.

Execution of decree—Decree against partners—Successive applications, whether permissible—Limitation on the right.

There is nothing to prevent a succession of execution applications directed against persons who are ascertained to be, or believed to be partners in the particular venture out of which the decree has arisen. But if there has been a previous application, in which there has been a definite decision affecting a particular piece of property, or a particular person, and from that decision nothing has been done by way of appeal or institution of suit, if either of these methods were available, that decision is a final decision between the parties; and if in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision, and the matter cannot be re-opened. [p. 516, col. 2.]

Letters Patent Appeal from a judgment of Mr. Justice Wallach (differing from that of Mr. Justice Walsh), and published as 65 Ind. Cas. 295, confirming a decree of the Subordinate Judge, Banda.

Mr. *A. P. Dube*, for the Appellant.

Mr. *Lalit Monan Banerji*, for the Respondent.

JUDGMENT.—On the 9th of April 1915 a firm, Bhairon Prasad and Mahadeo, borrowed Rs. 2,500 on a promissory-note, the money having been lent by one Gajadhar. On the next day the firm borrowed a similar amount from another firm, and both these notes subsequently were purchased by Kanhaiya Lal, the respondent in this matter. On the 10th of August 1916 Kanhaiya Lal brought a suit for the recovery of the Rs. 5,000 and interest. On the 28th of November 1916 the suit was compromised by one Mangli Prasad. At that date Mangli Prasad had a younger brother, Phul Chand, and a still younger brother, by name Suraj Karan, who was a minor. Mangli Prasad, purporting to act as a member of the firm, agreed in writing to pay Rs. 6,120 in certain instalments, assented to the insertion of the usual default clauses, in the compromise and set aside certain immoveable property which he declared to be hypothecated to the due discharge of this debt. In the document of compromise he stated that Phul Chand and Suraj Karan were his brothers, and he spoke of them as joint owners with himself in the property specified at the foot of the deed, and also as members of the firm. That compromise

was embodied in a decree of the 28th of November 1916. Kanhaiya Lal, no doubt, was confident that he had got a decree which, if default were made, could readily be put into execution. Default was made and on the 30th of July the respondents applied for execution. On the 8th of August they asked for an injunction restraining the transfer of or creation of charges over this property, and on the 18th of August this property was attached. On the 8th of September, and again on the 12th of September, Phul Chand for himself and his younger brother filed two applications. The first application was to set aside the decree. The second application was to set aside the attachment on the ground that the property sought to be attached, and which was the subject of hypothecation in the compromise decree, was wholly and entirely the property of Phul Chand and Suraj Karan, and the firm had no concern with it at all, and that they, the two younger brothers, were separate from Mangli Prasad. Objections were lodged by the respondent on November 3rd and 10th and amongst these objections the present respondent stated that it was not necessary in the suit to disclose the names of all the persons who were the partners. He further stated that Mangli Prasad had acted throughout as *karta* of the joint Hindu family; that he and his two brothers were joint; that the business was the business of the family, and the property compromised in the compromise decree also property of the joint family. The grounds of the application of the 12th of September alleged, as we have stated, a separation by Phul Chand and Suraj Karan from Mangli Prasad, it gave no date of that separation and no particulars other than the assertion that as the result of that separation Mangli Prasad had been given a block of property elsewhere as his share, whilst they had got other property comprising *inter alia* the property sought to be taken in execution.

It appears from the very scanty record that lies before us, that the learned Subordinate Judge apparently grouped the two applications of the 8th and 12th of September together. We have studied with great care, and with the assistance of Mr. Dube and Mr. Lalit Mohan Banerji, the order that he passed, because it is agreed that, if it should transpire that he in fact decided as a relevant matter that which at a later stage (in May 1919) the learned Subordinate Judge was again asked to decide, the decision of Mr. Justice Walsh, to which we will refer later, will be the decision to be preferred.

The exact text of the order sheet is to be found at page 931 of 19 A. L. J. [*Phulchand* v. *Kandhya Lal* (1)].

The order sheet of the 6th of September 1918, runs as follows:

"The decree-holder has obtained a simple money decree against defendant No. 1, that is, firm Bhairon Prasad and Mahadeo. The present objectors were not parties to the decree. Mangli Prasad appeared for the firm. These objectors are brothers of Mangli Prasad. They were never disclosed in the plaint as partners. The property attached has not been proved to be the property of the firm. Under the circumstances, attached property must be the property of the objectors as well as that of the judgment-debtor. Mangli Prasad representing the firm. Ordered 2/3rds share in the property attached be released; parties to bear their own costs."

Now it is necessary to consider what the parites were contending for. Kanhaiya Lal, the decree-holder, wanted the attachment of property which under the compromise decree had been hypothecated by the eldest of the three brothers on the assertion that it was property which belonged to the firm and that the three brothers constituted a joint family. The order of the Judge involves, first of all, a finding by him that the status of the family had undergone a change. He evidently accepted the story of Phul Chand and Suraj Karan that there had been a separation. He appears to have believed whatever evidence was put before him that there status had altered from that of joint tenants to tenants-in-common, because he treated this property not as the objector wished it to be treated, as belonging wholly to them,

(1) 65 Ind. Cas. 295; 19 A. L. J. 923; 44 A 130; (1922) A. I. R. (A.) 247.

but treated it on the basis that each brother had an equal one-third share. He must have decided that the two younger brothers were not partners in the firm, and he also decided clearly that it was not proved that the property, though represented by Mangli Prasad to be the property of the firm, was not in truth the property of the firm. It is on those findings, erroneous as they may have been, that the order of September 6th, 1918 was based, and its propriety cannot be challenged now. The decree-holder, dissatisfied as he may well have been, did not appeal from that order, nor did he, under O. XXI, r. 63, make this question as to whether that property comprised in the compromise decree belonged to the firm or not, a matter for a suit. It is said that the decree-holder could not have appealed; but we are by no means satisfied with that. We cannot decide that matter because it is conceded that he certainly had a right to proceed under O. XXI, r. 63. Instead of taking a course in which there would have been regular pleadings and definitely formulated issues, he, on the 14th of September, applied to the Judge for review and submitted to the Judge that the order of the 6th of September was an erroneous one and asked for a reconsideration of the matter. The learned Subordinate Judge is said to have taken no steps in this matter until the 3rd of May 1919, on which day he passed an order saying that he had already decided that the objectors were not parties to the decree, and the property not proved to be the property of the firm, that there was no new ground disclosed for a review, and that there was no mistake apparent on the face of the record. On those grounds he dismissed the *ex parte* application. Thereupon, two days later, the decree-holder made an application asking that the liability of the opposite parties might be determined, and that leave might be given to execute the decree against them. On the 23rd of June 1920 the Subordinate Judge disposed of that application, holding that the order of the 6th of September 1918 did not operate as a bar to this application, and that it might be entered upon and decided. He went into the evidence on either side and made an order favourable to Kanhaiya Lal, the present respondent. The objectors appealed to this Court and the matter was considered by Mr. Justice Walsh and Mr. Justice Wallach, on August 9th 1921. There was a difference of opinion between them, Mr. Justice Walsh coming to the conclusion that the order of the 6th of September 1918 had involved issues on which decisions had been given and that by the application of the 5th of May 1919 the respondents were seeking to re-open questions which had become final. Mr. Justice Wallach was of opinion that the order of the 6th of September 1918, did not exclude an application under O. XXI, r. 50 (2).

It is in these circumstances that the matter has come up before us, and the question for our determination is, ought the Subordinate Judge to have entertained the application of the 5th of May 1919; or ought he, without going into the evidence on the merits, to have held himself precluded by virtue of the previous struggle between the parties which was concluded by the order of September 6th 1918.

We are of opinion that the judgment of Mr. Justice Walsh is to be preferred, for these reasons. The position of the respondent when he first sought to obtain execution was as follows:—He could have limited his execution to the partnership property, relying upon the fact that service had been duly effected upon Mangli Prasad, a partner. He might also have proceeded personally against Mangli Prasad. So that he had a dual remedy by the mere fact of service on Mangli Prasad, that is, a remedy against the whole of the property of the partnership; and a remedy against the personal property and person of Mangli Prasad. Because of the form of the compromise decree the respondent naturally sought the property therein pointed out that he proceeded under O. XXI, r. 50 (1); and we regard his application as being limited exclusively to property which he believed, on the representations of Mangli Prasad, to be partnership property, certain of being attached. When, in reply to the attachment of the 18th of August, Phul Chand and Suraj Karan filed applications, the Judge before allowing execution had to be satisfied that the property sought to be attached was the property

of the partnership. Having regard to the form which the applications of the 8th and 12th of September took and the form of the objections of November 3rd and 10th by the plaintiff, it would appear that, incidentally, but nevertheless necessary to the determination of this question whether the property was the property of the partnership, was the question of the status of the family and the membership of the firm, and the Judge by the terms of his order sheet and by the statement made by him when dismissing the application for review, does undoubtedly show that he dealt with all those three matters.

As regards the order of the 6th of September 1918, as we have already said, nobody in either Court has had a good word to say for it. It appears to us to be erroneous; but the decision may have been a right one, inasmuch as it must have been dependent upon evidence produced before the Subordinate Judge, which is not before us. The respondent complains that, by that erroneous order of the 6th of September 1918, he has been grievously injured, and that having paid money for the promissory-notes which formed the basis of the action, and having obtained a compromise into which no other business man would have entered, has been by trickery and process of law deprived of this recourse against what he still undoubtedly believes to be partnership property, and property of a joint Hindu family. Mr. Justice Walsh, in his judgment, took the line that the respondent was himself largely to blame for this and we feel there is some force in that observation, because it was unwise of him, having got what he considered to be plainly a perverse decision of the 6th of September to apply for a review to the same Judge. His proper course, if he took the view that the order of the 6th of September was not appealable, was to institute a suit and have the matter carefully and properly thrashed out. He did not do that, and such issues as can fairly be presumed to have necessarily been before the Subordinate Judge and to have been decided by him, have been finally decided, whether such issues were rightly or wrongly decided. That was the position on the 9th of May, and we have already said that we are of opinion that on that day the learned Subordinate Judge in going into the matter on the application under O. XXI, r. 50 (2), was going over, as regards some of the issues, the same ground which the previous Judge had decided.

It is quite true, as the respondent has pressed upon us, that successive steps may be taken in execution; that is to say, there is nothing to prevent several applications being made, directed against and linked into partnership of private property. There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. The limitation, however, that is imposed on all these applications is that, if there has been a previous application, in which there has been a definite decision affecting a particular piece of property, or particular person, and from that decision nothing has been done by way of appeal or institution of suit, if either of these methods were available, that decision is a final decision between the parties; and if, in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision, and the matter cannot be re-opened. To that extent, and that extent only, is there limitation on the successive applications in execution. We think that the objection which was taken to the learned Subordinate Judge going into this matter on the 9th of May, which was that he was going to cover, as regards material matters, points which had been discussed and settled finally between the parties in September 1918, was a right objection, and he ought not to have entertained the application of May 9th.

The result, therefore, is that we set aside the order of this Court and also the order of the Court below, and in lieu thereof we dismiss the application presented by the respondent Kanhaiya Lal under O. XXI, r. 50 (2). Under the circumstances, we leave the parties to bear their own costs throughout.

K. S. D. *Application allowed.*

YAQUB BEG *v.* RASUL BEG.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 55 OF 1920.
November 10, 1922.

Present:—Mr. Daniels, A. J. C. and Mr. Dalal, A. J. C.

Mirza YAQUB BEG AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mirza RASUL BEG AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Waqf—*Deed of* waqf, *construction of*—Waqif *old and infirm*—Waqf *of cash, whether valid*—*Suit to set aside* waqf—*Limitation Act (IX of* 1908), *Sch. I, Art.* 91—*Limitation bar apparent on the face of it*—*Duty of plaintiff.*

The principles of law applicable to a *pardanashin* woman cannot be extended to a man on the ground that he happens to be old and not in robust health. [p. 526, col. 1.]

Asghar Ali v. *Delroos Banoo Begum*, 3 C. 324; 3 Sar. P. C. J. 749 3 Suth. P. C. J. 444; 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 794 (P. C.). referred to.

According to Muhammadan Law a *waqf* of cash is valid. [p. 528, col. 1.]

Ameer Ali, Vol. I, p. 246 (4th Edition) and Tyabji, pp. 574; 578 and 579 (2nd Edition), followed.

Abu Sayid Khan v. *Bakar Ali*, 24 A. 190; A. W. N. (1902) 1, referred to.

When a suit or an application is, on the face of it, barred, it is for the plaintiff or applicant to satisfy the Court of the circumstances which could prevent the Statute from having its ordinary effect. [p. 527, col. 2.]

Purna Chandra Mandal v. *Anukul Biswas*, 2 Ind. Cas. 844; 36 C. 654 at p. 657, followed.

In a suit to set aside a *waqf* it was found that the executant of the deed of *waqf* was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing. On an interpretation of the deed, it appeared that the executant had appointed himself *mutwalli*, that his possession of the *waqf* property continued with him as be ore and that he had declared that he would in his lifetime perform every *waqf* duty and not incur any such expenses or make any such private transfer for household pu poses in respect of the *waqf* property as might tend to reduce it:

Held, (1) that the deed of *waqf* was not vitiated by undue influence and was binding on the plaintiffs; [p. 527, col. 1.]

Wajid Khan v. *Ewaz Ali Khan*, 18 C. 545; 18 I. A. 144; 6 Sar. P. C. J. 46; Rafique & Jackson's P. C. No. 123; 9 Ind. Dec. (N. S.) 364 (P. C.), *Sital Prasad* v. *Parbhu Lal*, 10 A. 535; A. W. N. (1888) 221; 6 Ind. Dec. (N. S.) 360, *Bai Manigavri* v. *Narondas Callianadas*, 15 B. 549; 8 Ind. Dec. (N. S.) 371, *Lakshmi Doss* v. *Roop Laul*, 30 M. 169; 17 M. L. J, 19; 2 M. L. T. 4 (F. B), distinguished.

(2) that not having been executed under undue influence, the period to set it aside started from the date of execution and the suit was, therefore, time barred; [p. 127 col, 1.]

(3) that the *waqf* was not invalid for want of possession because the executant's declaration in the deed was sufficient to prove a change in the nature of possession. [p. 527, col. 2.]

Ameer Ali, Vol. I, pp. 236, 237 (4th Edition), referred to.

Appeal from the decree of the Subordinate Judge, Lucknow, dated 31st August 1920.

Messrs. *M. Wasim*, *H. Hussain* and *Har Dayal*, for the Appellants.

Messrs. *Niamatulla* and *Muhammad Ayub*, for the Respondents.

JUDGMENT.—The plaintiffs, Rasul Beg and Saif Beg, sued in the Court of the Subordinate Judge of Lucknow on 7th June 1918 for the recovery of their share of the assets of one Habibullah Beg, who was their brother. The suit was partly decreed and in consequence the defendants have appealed to this Court.

Habibullah Beg had several brothers and sisters, but for the purpose of this suit it is sufficient to mention that he had three brothers, Karim Bakhsh, elder than himself, and the plaintiffs, Rasul Beg and Saif Beg, younger than himself. The present defendants are the sons and grandsons of Karim Bakhsh. Karim Bakhsh, Habibullah Beg and Rasul Beg carried on a joint business up to 1902, which was closed till 1910 when the three brothers separated under the terms of a compromise filed in Court in a partition suit instituted by Karim Bakhsh and Habibullah Beg against Rasul Beg. As regards this business the case of the plaintiffs was that Rasul Beg seperated and Karim Bakhsh and Habibullah carried on the business and that, therefore, Habibullah had a share in the business at the time of his death on 8th February 1918. Karim Bakhsh had died on 2nd July 1914. The learned Subordinate Judge held that Habibullah had a share in the business, but refused to include any share of the business assets in the decree granted by him to the plaintiffs on the ground that the plaintiffs had not proved the amount of Habubullah's share in the business. No cross-objection has been made on behalf of the respondents against this finding, so it is not necessary to enquire in this appeal whether Habib-

ullah continued to be a partner in the firm of Karim Bakhsh & Co., or not after 1910.

There are four lists attached to the plaint; List A of the immoveable property of Habibullah; List B of the stock in trade at the shop; List C of articles in Habibullah's house at Nayagaon, and List D of cash of Habibullah under the control of the defendants.

The suit was dismissed with regard to the properties in lists B and C. As regards the property in List A, the defence contained in paragraph 37 of the written statement was that the immoveable property mentioned by the plaintiffs in that list had been endowed by Habibullah (with the exception of properties entered at Nos. 6, 7 and 8) with cash amounting to Rs. 50,000 under a deed of *waqf* dated 29th July 1911 and registered on 31st July 1911, for religious and charitable purposes. As regards the houses described at Nos. 6, 7 an 8 of List A, the defence was that they were made over by Habibullah to his wife, *Musammat* Bano Khatun, in lieu of her dower-debt. The suit was originally filed on 7th June 1918 when *Musammat* Bano was alive. She died on 21st March 1919 and her brother Mirza Babban Beg was substituted as a defendant in her place. He was subsequently made a plaintiff to the suit at his request. The lower Court decreed possession of these houses to Babban Beg and grounds of Appeal Nos. 32, 33 and 34 attack this portion of the lower Court's decree.

During arguments, however, at the request of the appellants' Counsel, the following proceeding was recorded by Court. Counsel for the appellants stated: "Properties Nos. 6, 7 and 8 in List A were the subject of a gift by Habibullah to his wife *Musammat* Bano. We now admit that we have no claim to them and grounds Nos. 32 to 34 of the petition of appeal may accordingly be considered dropped." The appeal, therefore, as regards these three houses will fail against Babban Beg.

The questions in appeal have thus narrowed to the effective character or otherwise of the *waqf* of 29th March 1919 and to the liability of the defendants to account for the income of Habibullah's properties. No mention of the *waqf* was made in the plaint and the liability of the defendants, Mirza Yaqub Beg and Ismail Beg, to account for the income of Habibullah's properties was alleged on grounds mentioned in paragraphs 10, 11 and 12 of the plaint;

"10. (*a*) That the said Mirza Habibullah Beg's age exceeded 100 years at the time of his death, he having become blind of weak intellect and almost deaf from a long time. He was absolutely illiterate.

"(*b*) That Mirza Yaqub Beg and Mirza Ismail Beg remained in one and the same house with Mirza Habibullah Beg, up to the time of his death. They had a joint mess with him and a *mukhtarnama* also had been executed in their favour.

"(*c*) That prior to the decision of the Court in 1910 and after the said decision Mirza Habibullah Beg was entirely in the power and under the control of the afore-named persons who also continued to be his advisors.

"11. That the income accruing from the immoveable property owned by Mirza Habibullah Beg, and the profit of his share arising from the trading firm used to come into the hands of Mirza Yaqub Beg and Mirza Ismail Beg. The money in cash owned by the said Habibullah Beg was also brought under their control and taken possession of, in various ways and on various occasions, by the said two persons. On account of the aforesaid three items a considerable sum owned by Mirza Habibullah Beg used to be under the possession, custody and charge of the said *mukhtars*, who have on the strength of their position as *mukhtars*, misappropriated the same on the pretenc of spending the same over the firm and meeting other expenses.

"12. That as general agents, the said persons were liable under law to render account of the profits arising from the firm, the incom accruing from the immoveable property, and the cash and to pay up whatever be found due from them."

In short, it was alleged that Yaqub Beg and Ismail Beg, who died on the 24th October 1918 during the pendency of the suit, were agents of Habibullah Beg and as such liable to render accounts to the plaintiffs Rasul Beg and Saif Beg, who were heirs of Habibullah Beg to the extent of 12 annas as brothers and to Babban Beg to

the extent of 4 annas as heir of the widow of Habibullah Beg.

After the *waqf* was set up as a defence in the written statement the plaintiffs in the replication denied the fact of the property being *waqf* and denied the validity of the *waqf* on grounds contained in paragraphs 56 to 59 of the replication :—

"Paragraph 56. At the time when the deed of endowment is said to have been executed, Mirza Habibullah Beg had no capacity for understanding a transaction. He was quite illiterate, old, blind, and of weak intellect. He was almost deaf. The said Mirza used to live with the defendants. Mirza Yaqub Beg and Mirza Ismail Beg, and had a common mess. The said defendants were ever present with him and they had brought him entirely under their control. Under the circumstances, if the defendants having forged or got affixed by Mirza Habibullah Beg his mark on any deed, got the same registered, then neither Mirza Habibullah Beg was nor the plaintiffs are bound thereby.

"Paragraph 57. The deceased ancestor was ever under the control and in the power of the defendants, Mirza Yaqub Beg and Mirza Ismail Beg, and they were his general agents and advisors. The said ancestor had no capacity for taking any advice nor did he ever get any independent advice.

"Paragraph 58. Mirza Habibullah Beg so long as he lived remained in proprietary possession of the entire property in suit. He never acted in any way as might show that the property had been endowed, nor had he any capacity for doing any work.

"Paragraph 59. Even if the deed of *waqf* set up by the defendants, be proved, still it does not create any *waqf*."

Upon these considerations it will be found that three of the issues framed and decided by the learned Subordinate Judge arise for decision by this Court.

"Issue No. 4. Had the defendants Yaqub and Ismail control over the property and cash of Habibullah as his agents? If so, are they accountable to the plaintiffs, or his heirs and to what extent?

"Issue No. 5. Did Habibullah execute a deed of endowment of his free will and accord on the 29th July 1911? If so, is it valid and binding upon the plaintiffs?

"Issue No. 7. Is the suit barred by limitation?

As already noted, Habibullah separated from his brothers, and possessed separate property, on 4th April 1910, and if it is proved that a valid *waqf*, was made by Habibullah on 29th July 1911 there would be no assets left of Habibullah at his death for which the defendants Yaqub Beg and Ismail Beg would be accountable. For this reason the question of importance to decide is that of the binding character or otherwise of the *waqf*.

The respondents' learned Counsel, Mr. Namatullah, in opening his case stated that the respondents did not allege that Habibullah was under any disability or that he was incapable of executing the deed with full understanding of its contents. What the respondents urged was that he was surrounded by the defendants and that they had complete mastery over his affairs, and in consequence of this and of his physical infirmities and to some extent has mental weakness he depended entirely on them, and, therefore, if any deed was executed by him, it must have been obtained from him by the excercise of undue influence and cannot be, therefore, upheld. The learned Counsel declared this to be the interpretation of paragraphs 56 to 59 of the replication quoted above. As regards burden of proof, Counsel relied on section 111 of the Evidence Act which lays down that where one person stands in a position of active confidence to the other the burden of proving the good faith of any transaction between them lies on him. This, however, only applies so far as the transaction was between the parties and was intended to benefit the defendants. The case for the plaintiffs was argued very much as if this deed were a gift of the property to Yaqub Beg and Ismail Beg. It will be necessary to examine later on how far this is the case. It was suggested that the form of a *waqf* was given to a transaction which was really a gift either to conceal its real nature or because Yaqub Beg and Ismail Beg could not have pursuaded Habibullah Beg to make a gift in their favour. The latter suggestion is purely an assumption not supported by reference to anything in the record. In fact the case put forward by the plaintiffs has been that

Habibullah was so much a puppet in the hands of these two nephews of his that they could have induced him to agree to anything. If the principle of section 16 of the Contract Act applies, the burden of proving good faith will lie on the defendants only if the transaction is considered by the Court to be unconscionable. The argument on behalf of the plaintiffs was, that this section was not applicable because the transaction was not a contract but a gift. Apart from the fact that the principle of section 16 has been applied to gifts, [*Kali Bakhsh Singh* v. *Ram Gopal Singh* (1)] it will be seen, when the transaction is examined, that it does not amount to a gift. The learned Counsel for the respondents conceded that in practice much difference between section 111, Evidence Act, and section 16, Contract Act, cannot be insisted upon because if the transaction was a natural one and such as it would be reasonable and natural for a person situated as Habibullah was to enter into the Court would in either case uphold it.

After examining the evidence on the record we have come to the conclusion that in 1911 Habibullah was between 65 and 70 years of age with the infirmities mental and physical incident to that age but capable of moving about and understanding business. Witnesses on both sides have given vague approximation of his age. There are, however, two statements one of Karim Bakhsh and another of Rasul, which lead to the probability that Habibullah was born in 1844. In 1907 Karim Bakhsh stated during his examination in Court that about six or seven years after the Mutiny Habibullah and he started a shop (Exhibit A-560). Possibly, Habibullah was about 20 years old at the time, because Karim Bakhsh stated that Rasul Beg was six or seven years old at the time and in this Court Rasul Beg stated that Habibullah was about ten years older than him (page 221). In 1884 when Rasul Beg was examined as a witness in a case he gave his age as 26 (Exhibit A-561). So it will be a fair approximation to say that Habibullah was about 67 in 1911 when the deed of *waqf* was executed. About his general state of health we believe that Nazir Hasan (D. W. 22, page 180), who was believed by the lower Court, has given the most correct description: "The physique of Habibullah was of a normal kind and power. He had the disease of asthma, but otherwise he had not bad health generally. During the last four years or so of his life I did not see him walk or go from one place to another (he died in February 1918). Before that he did not require the aid of anybody else in standing or walking except for the defect in his eyesight for some time. He was found by me to possess the power of understanding and brain at different periods of life which other persons ordinarily possess in their lives. According to the age of the time the condition is considered. Habibullah was hard of hearing at the end of his life to the extent to which people generally are at his age but not more. He was hard of hearing for about eight or ten years of his life at the end. After the operation on his eye he could see with that eye but not with the normal natural vision which remained defective. The other eye was also affected after the operation." It appears from the testimony of Imdadudin (D. W. 3, page 124) that an operation for cataract was performed on Habibullah's in 1908. Mr. Janson (D. W. 24, page 183) has stated that Habibullah intelligently discussed the business of renting a shop to him in 1916 (lease Exhibit 203). We do not think that the strictures passed on this witness by the lower Court (page 382) are justified. He frankly stated that a photo of Habibullah was shown to him by some one acting on behalf of the defence but this fact is not sufficient for the lower Court's conclusion that this witness "was approached by the defendants," meaning presumably that he was bought over and tutored.

Some of the plaintiffs' witnesses have also deposed to Habibullah doing a certain amount of business. Sarfaraz Ali (P. W. 10, page 248) stated: "Sometimes Habibullah used to stand with the help of a stick, come out of the gate and sit in a chair just below the place where construction

(1) 21 Ind. Cas. 985; 16 O. C. 378; 18 C. W. N. 282; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 O.L.J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147; 36 A. 81; 41 I. A. 23 (P. C).

were going on..... To some extent he had a bad sight." Ram Dayal (P. W. 12, page 257) deposed to seeing Habibullah seated at the shop when the constructions were going on after 1911. There is thus no warrant for the plaintiffs' contention that Habibullah should be treated as a *parda-nashin* woman, being incapable both physically and mentally.

We shall now proceed to consider whether the deed of *waqf* was an unconscionable transaction or whether it was a natural one and such as on the basis of the history of the family and the relations between the parties Habibullah would be likely to enter into. The plaintiffs, Rasul Beg and Saif Beg, are brothers of Habibullah, and Yaqub Beg and Ismail Beg are the sons of another brother of Habibullah, Karim Bakhsh, to whom admittedly Habibullah was greatly attached. Habibullah and Karim Bakhsh lived jointly from youth to 1914 when Karim Bakhsh died at an advanced age. A business was started by the two brothers in Lucknow in which Rasul Beg joined when he attained the age of discretion, but he was not able to pull on amicably with his elder brothers. As far back as 1896 he left Lucknow after a quarrel with his brothers and the letter (Exhibit B-75), which he wrote from Delhi to his brother Karim Bakhsh, shows his bitter feelings not only against Yaqub Beg but against Habibullah as well. In this letter he appraises the value of Habibullah at 2 annas per month and then goes on:—

"If he wants to separate me then God would mete out the same fate to him as was Phroah's and may I too meet the same end, if it be my intention to deprive anybody of his rights. Habibullah and Yaqub act collectively and they will see what punishment God gives them therefor."

In 1902 the ill-feeling between Rasul Beg and his brothers reached such a pitch that the business had to be stopped. It was discovered by the elder brothers that Rasul Beg had deposited in the Allahabad Bank in the name of himself and his son Rs. 11,000 belonging to the firm (see letter Exhibit A-843 from the Allahabad Bank). The plaintiffs desire to make out that the business was stopped because of a claim made by Saif Beg to a share in the partnership. But this explanation is not correct as is clear from the fact that the litigation with Saif Beg came to an end in 1906. The business of the shop was not started again till 1910 when the three brothers, Karim Bakhsh, Habibullah and Rasul Beg, partitioned their properties by a compromise in a partition suit instituated by Karim Bakhsh and Habibullah. Relation between Habibullah and Rasul Beg continued strained until Habibullah's death on 8th February 1918. Rasul Beg himself has stated (page 223): "After the separation I used to visit Habibullah not very frequently, but used to go to him whenever I heard that he was ill or when he would sometimes send for me when I stayed for 10 or 15 minutes and came away." Then at page 229: "Karim Bakhsh died in the *kothi*. I took his dead body from the house, but did not go inside the house at the time. I attended the funeral in the grove. Habibullah also died in the *kothi*. I did not go inside the *kothi* at the time of his death. I did not join several marriages which took place after 1902 in the family of Karim Bakhsh." When in 1910 after the partition Rasul Beg occupied a house allotted to Karim Bakhsh he executed a rent-deed (Exhibit W 4) in favour of his brother. It is clear, therefore, that Habibullah would not be desirous of any portion of his property passing to his younger brothers on his death. On the other hand, he was deeply attached to his brother Karim Bakhsh, and would like, if he made a *waqf*, to leave the management of the *waqf* to the family of that brother. Relations between him and Karim Bakhsh's sons, Yaqub and Ismail, were very cordial. Habibullah and Karim Bakhsh were married to sisters and Yaqub's wife was a daughter of a sister of *Musammat* Banno, wife of Habibullah. It may be noted here that under clause 11 of the *waqf* the succession of *mutwalli* has been confined to the descendants of Karim Bakhsh and not to the descendants of Yaqub and Ismail.

We may examine the terms of the deed (Exhibit A-1) with a view to discover whether it is really a *waqf* or some other kind of transaction in disguise. In the preamble there is a declaration that the property is made a *waqf*. As often happens

in these Provinces, where the deeds are prepared by men of small intelligence, the terms of the deed under discussion are somewhat confused. It is clear, however, on a general understanding of all the terms, that Habibullah appointed himself *mu-walli* during his lifetime to manage the *waqf* in consultation with Yaqub and after his death Yaqub and Ismail were to act as manager and supervisor. Out of the income of Rs. 2,130 the *mutwali* and supervisor were to receive Rs. 354 per annum. For this payment they have to exert themselves in carrying out the objects of the *waqf* which were :—

(1) Expenses of *Maulud Shariff* in the month of *Rabi-ul-Auwwal* or *Rajab*.

(2) Expenses of *Gyarhwin Sharif*.

(3) Expenses of the Hazratgunj mosque.

(4) Expenses of the Newazgunj mosque.

(5) Pay of the *Hafiz* at the grave-yard in Nayagaon.

(6) Expenses of *Haj* to be paid annually to one of the relations of the brotherhood.

(7) Help to relations who may be in reduced circumstances. For the present Rs. 120 a year to the donor's younger brother Saif Beg.

(8) For the expenses of marriages and deaths in the families of poor relations.

(9) For the expenses of *Fatiha* for the benefit of the souls of certain deceased relations mentioned by name.

In addition to this charitable bequest, certain sums were set apart for legal expenses, rates and taxes, repairs of the *waqf* property and miscellaneous expenses of the manager.

The attack on behalf of the plaintiffs on the charitable bequest was two-fold to make it out to be illusory :—(1) that such a large discretion was given to the manager that there was every opportunity of embazzlement, and (2) that the expenses were such as Yaqub and Ismail would have been compelled to incur if not provided for in the *waqf*. These arguments are unconvincing. In the case of any alleged breach of the trust any Muhammadan would have a right to take action under section 92, Civil Procedure Code, and remove the manager. As observed by their Lordships in answering a similar contention in the case reported as *Ramanadan Chettiar* v. *Vava Levval Marakayar* (2), Yaqub and Ismail were not bound under any law to incur the expenses prescribed in the *waqf*. It was pointed out that on an increase in the income of the *waqf* property the manager and supervisor could draw salary of Rs. 1,056 per annum and spend in addition Rs. 240 on carriage hire. There is, however, a provision in the deed that the salary of the manager and supervisor is to increase only proportionately and when the income of the *waqf* has increased to Rs. 6,400 it is not unreasonable that two managers should receive an allowance of Rs. 1,056 and be paid Rs. 240 for carriage hire. The payment is not out of proportion to the extent of the *waqf* properties and the work expected from the two managers. In this connecton it may be mentioned that when the deed was executed in 1911 Karim Bakhsh was alive and entitled to succeed to a one-third of Habibullah's property on the death of the latter and there was not certainty that Karim Bakhsh would pre-decease his brother as in fact he did subsequently.

A great deal has been said about the dishonest intentions of Yaqub and Ismail on behalf of the plaintiffs, so it is due to them to point out that on the same date that the deed of *waqf* was executed by Habibullah, Karim Bakhsh executed a Will (Exhibit A 2.) by which he left a share of his properties contrary to the law of intestate succession among Muhammadans to the son of a pre-deceased son of his, Yusuf Beg. Yaqub and Ismail would not have permitted such an indulgence by Karim Bakhsh in favour of a minor if they had been so covetous as is represented by the plaintiffs.

An examination of the terms of the deed will further show that it is such a deed as Habibullah, in the circumstances in which he was placed, would naturally have executed and not such as would be likely to have been executed if the deed was really procured by the defendants Yaqub Beg and Ismail Beg for their own personal benefit. The deed commences by a recital

(2) 39 Ind. Cas. 235; 40 M. 116 at pp. 123 124 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. J. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R, 401; 44 I. A. 21 (P. C.).

of the fact that life is uncertain and that the executant, having no issue male or female, is desirous while in the full possession of his senses to make a *waqf* in his lifetime for the benefit of his soul. He then proceeds to appoint his eldest nephew, Muhammad Yaqub Beg, who has been performing the executant's work with honesty and probity, as *mutwalli*. He also appoints Yaqub Beg's next younger brother, the defendant Ismail Beg, to assist him and to supervise his work as *mutwalli*, with the idea, no doubt, that there was less chance of misfeasance with two trustees than with one. This reason is indeed explicitly stated in paragraph 11 of the deed. In the next clause he appoints himself during his lifetime to "perform every *waqf* duty as *mutwalli* in consultation with the aforesaid *mutwalli*." After the deaths of the two defendants the *mutwalli*-ship was to pass to their younger brothers and then to the eldest and next eldest of the grandsons of Karim Bakhsh provided he was competent to perform the duties. Then follows a specification of the objects of the *waqf*, which are all such as the executant would be likely to have wished to see carried on. Indeed, several of them are for ceremonies on which money was admittedly already in the habit of being spent by Karim Bakhsh and the executant. A salary of Rs. 200 a year or Rs. 16-8-0 a month was provided for the *mutwalli* and Rs. 154 a year or a little over Rs. 12-8-0 a month for the assistant *mutwalli*. These salaries are certainly not exorbitant having regard to the position in life of the parties. There is, as already noted, a provision for their being increased to a more liberal scale in the event of the income of the *waqf* property increasing. The *mutwallis*, in case the income under any head is found insufficient, are authorised to supplement it from the other income of the *waqf*. They are also empowered to increase the expenditure when the income of the property increases. The *mutwalli* is, however, expressly forbidden to spend any amount on himself except the amount specifically allowed to him under the provisions of the deed. This prohibition is to be found at the end of paragraph 7 of the deed, and is repeated again still more emphatically in paragraph 12. The *mutwallis* are required to keep regular accounts of income and expenditure and if at any time the family of Karim Bakhsh and his brother becomes extinct the property is to be devoted to the relief of the poor.

The endowed property consisted of house property in Lucknow City and a sum of Rs. 50,000 in cash. The latter sum, however, was not to be retained as cash but was to be utilized in erecting a block of new houses on a portion of the *waqf* property. It is proved by unimpeachable evidence that between the date of the deed and Habibullah Beg's death not merely Rs. 50,000 but a sum of Rs. 1,22,000 was spent in erecting houses in accordance with the condition of the deed. It is further to be noted that Habibullah Beg did not by the deed by any means divest himself of all his property or leave himself penniless. Four houses, details of which are given at the end of the deed, were endowed but three houses specified in paragraph 8 of the deed were reserved for the personal expenses of Habibullah Beg and his wife. In addition to this, a sum of Rs. 8,000 in cash was set aside for the personal and *Haj* expenses of Habibullah Beg and his wife and a sum of Rs. 1,000 for their funeral expenses.

The mechanical execution of the deed of *waqf* by Habibullah is admitted on behalf of the plaintiffs. They urge that he had no intelligent appreciation of what he was doing. The evidence on the record has satisfied us that Habibullah fully understood the terms of the deed. Zulfikar Hussain (D. W. No. 7) who was not cross-examined stated that the deed was being read out to Habibullah when he reached the place where the deed was executed. He himself attested the deed. He found Habibullah in full possession of his senses and understanding at the time. Qadir Beg (D. W. No. 8) was another attesting witness who also stated that Habibullah put his mark on the deed in his presence and was in full possession of his senses and understanding at the time. According to this witness, Karim Bakhsh was present and executed a will at the same time, but none of the sons of Karim Bakhsh was present. Babu Gokul Chand, Government Pleader (D. W. No. 4), identified Habibullah when the deed was registered. He

has deposed: "At the time I asked Habibullah whether he had executed the deed and had understood it, he said that he had understood it." The learned Judge of the lower Court has accepted the defence case that there was an intelligent execution of the document by Habibullah. He says (page 371): "Execution of the deed by Habibullah has been proved beyond any question. It has been deposed to by Zulfikar Hussain, (D. W. No. 7), a very respectable witness, being an Honorary Magistrate, Honorary Assistant Collector and Village Munsif, and a *zamindar* paying a revenue of Rs. 16,000 jointly with his uncle, Aulad Hussain..... Not a single question was put to this witness by way of cross-examination on the plaintiff's behalf. All allegations of Habibullah not having set his hand to the deed and of his mental capacity to form any judgment on transactions of business fall to the ground by the evidence of this witness on the points on which he has depose going unchallenged." The lower Court's argument was different and to the effect that, even if Habibullah executed the document intelligently and with full knowledge, these conditions were produced by the undue influence of the defendants and that, therefore, the document would be inoperative. The learned Judge has observed at page 382: "Even if Habibullah knew perfectly well what he was doing this decided frame of mind was produced by the confidence and trust which he reposed in others;" and at page 391: "The circumstances are such that evidence even of Habibullah fully comprehending at the time of the execution of the deed what he was doing is not of much help to the defendants." The deed was executed nearly seven years prior to the death of Habibullah and during that period neither Habibullah nor either of the plaintiffs questioned the validity thereof.

Another argument on behalf of the plaintiffs was that the deed was never acted upon and Habibullah remained under the impression that the property belonged to him just as before. Much has been made by the plaintiffs of an attempt made by the defence to prove that Habibullah was described as a *mutwalli* after the deed was executed. A large number of receipts, and bills were produced on behalf of the defence containing the word "*mutwalli*" in describing Habibullah (Exhibit A-503; A-504 mentioned at page 387 of the lower Court's judgment) while the plaintiff produced an equally large number of documents in which no such word was used (Exhibit 1-138). It is not necessary to determine whether the word was interpolated in the documents produced by the defence or not. Even honest litigants stoop to such practices to support a case which would be sound without such help. As to the knowledge of Habibullah that a *waqf* was created there cannot be any doubt. In clause 5 of the deed a sum of Rs. 50,000 is set apart for the construction of certain buildings and it is admitted that buildings of the value of merely a lac and twenty thousand were constructed after the execution of the *waqf* (See the report of the Commissioner, Exhibit 113). The defence witnesses Nazir Hasan (D. W. No. 22) and Niaz Ahmad (D. W. No. 6) have stated that Habibullah spoke to them about the *waqf*. The reliability of the deceased witnesses was questioned by the plaintiffs on the ground that they were friends of Yakub. They were also friend of Habibullah and persons to whom Habibullah would be likely to speak of the *waqf*. By a comparison of dates mentioned by Niaz Ahmad in his statement it was urged that what he stated could not possibly be true. We are of opinion that the confusion was due to lapse of memory as the witness was deposing to events which occurred more than seven years prior to the date of his statement. The lower Court has considered Nazir Hasan to be a trustworthy witness (page 380) paragraph 2). We are of opinion that the statements of these witnesses are true. As noted above, the plaintiff Saif Beg was to be paid Rs. 10 a month under the terms of the deed and receipts (Exhibits A-860 and A-861) were granted by Saif Beg on receipt of the stipend on two dates in 1914 and 1918, respectively. Saif Beg did not come forward to deny the genuineness of these receipts. *Maulud Shariff* used to be performed by Karim Bakhsh prior to the deed of *waqf* but after its execution invitations were issued in the name of Habibullah even

during the lifetime of Karim Bakhsh, (Exhibits 502-3, A. 502-1 and A. 502-5).

It is true that Yaqub Beg and Ismail were *mukhtars* (general agents) of Habibullah Beg (Exhibit 197 dated 15th September 1908), had control over Habibullah's money and carried on all the business of Habibullah. They stood in the position of fiduciary relationship to Habibullah. We, however, hold that the transaction of the *waqf* was not unconscionable and was one which Habibullah, under the circumstances of the family, would be likely to enter into. He had no children to succeed him and the plaintiffs' contention does not sound reasonable that only a very devout Muhammadan would create a *waqf* of his entire property. He belonged to a family which was religiously inclined: religious acts like *Maulud*, *Gyarhwin* and *Fatiha* were perfomed by its members and it had made a *waq*, of a piece of land for a cemetery (paragraph 11 of a plaint, Exhibit 215). It was also argued that the transaction deprived Habibullah entirely of all control over his property and was, therefore, not one which a reasonable person would enter into. Though he created a *waqf* of the property Hbibullah remained manager thereof and, as mentioned in detail above, did not reduce himself to penury by his act. He was about 67 years of age at the time of the execution of the deed and considering the age of the Indians would not be hopeful of surviving many more years. When an Indian has no children he has a natural desire to make a charitable bequest of his property and when in search of a manager Habibullah would naturally appoint himself as manager during his life and the descendants of his favourite brother Karim Bakhsh after him. His displeasure against Rasul Beg and Saif Beg, plaintiffs, would be an incentive to him to prevent the inheritance going to them. We are satisfied that the transaction was not unconscionable; so no burden lay on the defendants to prove want of undue influence under the provisions of section 16 (3) of the Contract Act. We further hold that the defendants were not to be benifited by the *waqf*. As the transaction is not in disguise a gift to Yaqub and Ismail, no question of good faith of the defendants arises in this case. The evidence produced by the plaintiff and the lengthy cross-examination of the defendants with a view to establish the great age and infirmity both physical and mental of Habibullah were not directed to prove that Habibullah was incapable of executing the deed with full understanding of its contents. The aim of the plaintiffs was to put forward considerations why the good faith of the defendants should be questioned. In our opinion no such question arises. The transaction was a natural one and entered into by Habibullah with a full understanding thereof.

There is a considerable volume of Indian Law applicable to the facts of this case, so, bearing in mind the caution conveyed by their Lordships of the Privy Council in *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3), against deciding a case in India in accordance with what an Indian Court supposes to be English equitable doctrine, we do not feel called upon to examine the English cases cited by the respondents's learned Counsel. While examining a deed of gift executed by a *parda-nashin* lady in favour of the son of a paramour their Lordships of the Privy Council observed in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (1) that "upon review of the facts—which include the nature of the.....grantor, as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand."

In *Hodges* v. *Delhi & London Bank, Limited* (4) the Privy Council refused to extend to a woman who is not a *parda-nashin* the same protection of law that regulates the making of contracts by a woman of that class.

In *Asghar Ali* v. *Delroos Banoo Begum* (5) while discussing the previleges accorded in law to a *parda-nashin* woman

(3) 28 A. 570; 4 C. L. J. 1; 1 M. L. T 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; 33 I.A. 118 (P. C).

(4) 23 A. 137; 27 I. A. 168; 2 Bom. L. R. 967; 5 C. W. N. 1; 10 M. L. J 279; 7 Sar. P. C. J. 767 (P. C.)

(5) 3 C. 324; 3 Sar P. C. J. 749; 3 Suth P. C. J. 444; 2 Ind. Jur 601; 1 Ind. Dec. (N.S.) 794 (P.C.).

their Lordships observed at page 329 "Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has affixed his name." These observations of their Lordships of the Privy Council make it clear that the principles of law applicable to a *parda-nashin* woman will not be extended to a man on the ground that he happened to be old and not in robust health. In the present case Habibullah did not confer any special benefit on his agents who were his nephews beyond making them *mutwallis* of a *waqf*. But even in a case where an agent was the object of the bounty of his principal the Allahabad High Court held in *Phul Chand* v. *Lakkhu* (6) that there was nothing to prevent this and that if an agent can clearly show, that a gift was made in his favour by a donor who was in a position to excercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. The facts of the Privy Council case reported as *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (7) were similar to those of the present case. There certain transactions entered into by a mother of a Muhammdan lady in favour of her daughter were impugned by her son. Their Lordships refused to presume undue influence on the ground of the mere relationship of daughter to mother and of the daughter managing the affairs of the mother. The circumstances of the case are thus narrated in the judgment of the Privy Council: "Khaja Boo was a very old woman with the natural infirmities incident to her age. She was not of unsound mind or unable to attend to business. She is spoken of as *parda-nashin*, but she had no objection to communicate, when necessary, in matters of business, with men other than members of her own family, and to some extent she did so. She was able to go to Court and give evidence in her litigation against her son and she was able to attend at the Registrar's Office in person to acknowledge her deeds for the purpose of registration.

"On the other hand her daughter, resided with her, presided over her household, and had the general management of her affairs. It is not shown, whether with regard to the specific transactions impugned, the mother consulted anybody.

"As to those transactions themselves, they appear to their Lordships to have been very natural under the circumstances existing at the time. The mother was extremely hostile to her son. She was old, and in case of her death her son would have inherited the greater part of her property. The only apparent way to prevent his doing so, was to divest herself of the property in her lifetime."

On behalf of the plaintiffs reference was made to the following reported cases:—

Wajid Khan v. *Ewaz Ali Khan* (8), *Mahomed Buksh Khan* v. *Hosseini Bibi* (9), *Sital Prasad* v. *Parbhu Lal* (10), *Bai Manigavri* v. *Narondas Calliandas* (11), *Lakshmi Doss* v. *Roop Laul* (12).

In *Mahomed Buksh Khan* v. *Hosseini Bibi* (9) their Lordships lay down the matters which should be enquired into on an issue of undue influence being raised in the case of a gift; the Court should consider whether the gift in question (*a*) is one which a right-minded person might be expected to make, (*b*) is or is not an improvident act on the donor's part, (*c*) is such as to have required advice, if not obtained by the donor, and (*d*) whether the intention to make the gift originated with the donor. Applying these tests to the present case, we have already shown how the *waqf* executed by Habibullah is a transaction which a right minded person in his circumstances might be expected to make and is a provident act on his part. The making of a *waqf* did not require any advice and there is no reason to believe that if Habibullah had any advice

(6) 25 A. 358; A. W. N. (1903) 70.
(7) 33 C. 773; 10 C. W. N 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R 379; 16 M. L. 66; 1 M. L. T. 137; 33 I. A. 86 (P. C.).

(8) 18 C. 545; 18 I. A. 144; 6 Sar P. C. J. 46; Rafique and Jackson's P. C. No. 123; 9 Ind. Dec. (N. S.) 364 (P. C.).
(9) 15 C. 684; 15 I. A. 81; 12 Ind. Jur 291; 5 Sar P. C. J. 175; 7 Ind. Dec. (N. S.) 1040 (P.C.).
(10) 10 A. 535; A. W. N. (1888) 221; 6 Ind. Dec. (N. S.) 360
(11) 15 B 549; 8 Ind. Dec (N. S.) 371.
(12 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4 (F B.).

he would have acted differently. In argument on behalf of the plaintiffs much was made of the fact that the defence did not prove by any specific evidence how Habibullah's intention to make a *waqf* originated. Yaqub has stated on oath that he did not make any such suggestion and there is no evidence to the contrary on the subject. Karim Bakhsh executed a Will on the same date that he executed the *waqf* and it seems likely that the idea of making a *waqf* of his property occurred to Habibullah when he heard of his brother's intention of making a Will.

In *Wajid Khan* v. *Ewaz Ali Khan* (8) the agent was a complete stranger. There was no reason for the widow who endowed property and gave management thereof to her agent to leave the property away from her heirs and the agent substantially benefited by the endowment. The facts of the present case are different.

In *Sital Prasad* v. *Prabhu Lal* (10) the bargain was unconscionable and the provision of section 26 of the Contract Act had operation.

The case in *Bai Manigauri* v. *Narondas Calliandas* (11) was a voluntary settlement to which special provision of English Law applied as explained in *Ashidbai* v. *Abdulla Haji Mahomed* (13). That case did not invoice any question of the undue influence.

The case in *Lakshmi Dass* v. *Rup Laul* (12) which came up before a Full Bench of that Court after difference of opinion among some Judges, was one of a father who obtained an indenture from his son under which certain persons were given large benefits. The facts of that case are not even remotely similar to the facts of the present case.

We hold that the deed of *waqf* is not vitiated by undue influence and is binding on the plaintiffs.

As we have held that the deed of *waqf* was not executed under undue influence the period of limitation to set it aside, under Art. 91 of the Limitation Act, started from the date of its execution and, therefore, the present suit is time-barred. To save the suit from the bar of limitation the case of the plaintiffs was that not only did Habibullah execute the document under undue influence of Yaqub and Ismail but that he remained under that undue influence until the time of his death. There is no affirmative evidence of any kind to prove these allegations. In the course of the judgment we have referred to evidence in proof of the fact that Habibullah knew that he had executed a *waqf* of his property. Without any substratum of evidence, the plaintiffs desire the Court to presume that Habibullah was under the impression that he had executed a *waqf* of some different kind and not the one in suit. "When a suit or an application is, on the face of it barred it is, for the plaintiff or the applicant to satisfy the Court of the circumstances which would prevent the Statute from having its ordinary effect." *Purna Chandra Mandal* v. *Anukul Biswas* (14). No positive evidence of any undue influence was produced on behalf of the plaintiffs.

In the lower Court the validity of the *waqf* under the Muhammadan Law was attacked on the ground that it was a testamentary *waqf* and with reference to this contention the lower Court observed (page 409 of the judgment). "It is not shown that a testamentary *waqf* by a *Hunfi, Sunni* is not valid." The contentions of the plaintiffs' learned Counsel in this Court were different and two-fold:—(1) that the *waqf* was invalid for want of possession by the donor, and (2) that cash cannot be the subject of a *waqf* and so the *waqf* must fail with respect to Rs. 50,000. On an interpretation of the deed it seems to be certain that Habibullah appointed himself *mutwalli* and the possession of the property continued with him as before. Habibullah's declaration in the deed in the pre-amble that he had created a *waqf* and in paragraph 3 that he shall in his lifetime perform every *waqf* duty and not incur such expenses or such private transfers for household purposes in respect of the *waqf* property as might tend to a reduction in the *waqf* property is sufficient to prove a change in the nature of his possession (Ameer Ali, Vol. 1, 4th Edition, pp. 236

(13) 31 B. 271 at p. 281; 8 Bom. L. R. 652.

(14) 2 Ind. Cas. 844; 36 C. 654 at p. 657.

MANPHUL SINGH v. HAMID ALI KHAN.

and 237). There is a conflict of opinion among different High Courts in India whether the *waqf* of cash is valid or not. We prefer to follow the opinion of the Allahabad High Court in *Abu Sayid Khan* v. *Bakar Ali* (15) that such a *waqf* is valid according to the Muhammadan Law because the opinion has found favour with learned Muhammadan Commentators. (Ameer Ali, Vol. 1, 4th Edition p. 246, and Tyabji, 2nd Edition, pp. 574, 578 and 579). In the present case the money has been spent in constructing buildings, so the prohibition against interest enjoined by Muhammadan Law will have operation here. It has been held by a Bench of this Court in *Izzat-un-nissa Begam* v. *Kanis Fatima Begam* (16) in a similar case, that the difficulty was removed by the fact that the Government promissory-note has passed out of the trust and the income from landed property was devoted towards the purposes of the trust.

In the result, we dismiss the appeal, with respect to properties Nos. 6, 7 and 8 of List A attached to the plaint with proportionate costs of both Courts, and decree the appeal and dismiss the rest of the plaintiffs suit with proportionate costs of both the Courts.

K. S. D. *Appeal partly allowed.*

(15) 24 A. 190; A. W. N. (1902) 1.

(16) 36 Ind. Cas. 643; 19 O. C. 69 at p. 74; 3 O. L. J. 677.

ALLAHABAD HIGH COURT.

APPLICATION FOR REVIEW OF ORDER IN FIRST APPEAL FROM ORDER NO. 107 OF 1922.

April 23, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MANPHUL SINGH—APPLICANT

versus

Hakim HAMID ALI KHAN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 19, O. XLVII, r. 1—Appeal dismissed for default—Remedy—Review, whether permissible.

The ordinary remedy provided by law to meet the case of an appellant who has been prevented by some sufficient cause from appearing when his appeal is called upon and whose appeal is dismissed in default, is by way of an application under O. XLI, r. 19 of the Civil Procedure Code, and an appellant who allows this remedy to become barred cannot avail himself of the provisions of r. 1 of O. XLVII of the Civil Procedure Code.

Mr. *Girdharilal Agarwala*, for the Applicant.

JUDGMENT.—This and the connected application before us purport to be applications for review of an Order of this Court dated the 5th of December 1922 whereby two appeals presented by the present applicant were dismissed for default. The ordinary remedy provided by law to meet the case of an appellant who has been prevented by some sufficient cause from appearing when his appeal was called upon, is by way of an application under O. XLI, r. 19, of the Code of Civil Procedure. This remedy the present applicant had allowed to become Statute barred by reason of Art. 168 of the First Schedule to the Indian Limitation Act before the present applications were presented to the Court. He, therefore, seeks to avail himself of the provisions of O. XLVII, r. 1, of the Code of Civil Procedure. We are not prepared to hold that, under the circumstances, these applications can be admitted on the strength of the words "or for any other sufficient reason" appearing in r. 1 of O. XLVII aforesaid. We dismiss both the applications. As they have been heard *ex parte* we make no order as to costs.

Z. K. *Applications dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 81 OF 1923.
May 15, 1923.
Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.
TARA AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 24—Confession under hope of pardon, whether admissible.

During an investigation into certain dacoities the Police came into touch with one *K.* who admitted his participation in the dacoities and intimated to the Police that he was willing to tell them what he knew for consideration. He was told that if he made a true and voluntary statement the question of his pardon would be considered. He then made an elaborate statement which was recorded under section 164 of the Criminal Procedure Code, and which amounted to a confession. He was eventually put upon his trial and was convicted, and his confession was used both as against himself and as against his co-accused;

Held, that the confession having been obtained from *K.* by holding out to him the hope that he would be pardoned if he made a confession was rendered inadmissible in evidence by the provisions of section 24 of the Evidence Act and its use at the trial was, therefore, illegal. [p. 531, col. 1.]

Khetal v. *Emperor*, 73 Ind. Cas. 62; 21 A. L. J. 143; (1923) A. I. R. (A) 352; 45 A. 300, followed.

Criminal appeal from an order of the Sessions Judge, Bulandshahr.

Mr. *G. W. Dillon*, for the Appellants.

Mr. *R. Malcomson* Assistant Government Advocate, for the Crown.

JUDGMENT.

Walsh, J.—This is a very difficult case which has given us a great deal of trouble, and the result of which probably invloves a miscarriage of justice, but, speaking for myself, I have no doubt whatever as to the legal principles applicable to it, and as to the applicability of them to the peculiar circumstances of the various appellants before us. Now, there are three cases, each of them involving a large number of alleged dacoits, who were tried together for participation in three separate dacoities, committed at different times and at different places, but round about the same season and round about the same neighbourhood. Their connection arose more from the alleged co-operation of a large number of accused in each of them, than from any other circumstance showing direct connection between the three dacoities. There were really four in all, and I desire to say at once, because I shall have something to say hereafter by way of criticism, that the Police and the Sessions Judge were alike confronted with a difficult task.

We are dealing to-day with one only of these dacoities, namely, that committed at Sarai Chabila, on the night between the 23rd and 24th of July at the house of one Rate Ram and others in the same compound. The other appeals relate to dacoities committed on the 9th of March of the same year, 1922, and on the 28th of June 1922. The fourth dacoity, which the Judge says was thought by the Investigating Officer to be closely connected with this dacoity by reason of its being carried out by the same participants, occurred on the 20th of July.

We have not heard the other appeals, but we are told by the Assistant Government Advocate that in substance, and in respect of the characteristics which have evoked our criticisms of the judgment in this case, the other two appeals, which are still pending, do not greatly differ from this, and, therefore, although this decision does not govern the others, this case, on the other hand, must be considered to be a type of the others, and the result in the others when we reach them must be governed by the principles which we propose to lay down in this, and the criticisms which we propose to pass upon the procedure unfortunately adopted in this case must be read with reference to the other cases *mutatis mutandis*.

It cannot be denied that the general characteristics in this case, at any rate, and we are told both by the Counsel for the defence and by the Assistant Government Advocate that the same characteristics apply to the other appeals, resemble more a gang case, in which the evidence obtained by the Police, mainly through approvers, of association and active participation in planning and preparation and so forth, are applicable to a class of persons varying in number who have set out to commit a series of joint crimes. The learned Judge himself, as

shown by his judgment, experienced insuperable difficulty in avoiding reference to the other cases from time to time, and he also from time to time utilised to a quite considerable extent material which he had got, either from the Police evidence, or from what seems not at all improbable also Police diaries, tending to throw suspicion and afford clues which were entertained by the Police generally against particular individuals before they got any definite information with regard to the commission of this or other of the dacoities which I have mentioned. Another characteristic is that there is a total absence, very unusual in a case where so many convictions have been secured in the commission of a particular dacoity in a particular village, of any attempt to obtain identification by villagers or the complainants or their households, and none of them have been called to give evidence.

Another exceptional characteristic is that, with the exception of an absconding accused to whom we shall have to refer again, no *loot* has been traced, and as against the 17 appellants who have been convicted there is no evidence of any *loot* found in their possession.

We now come to the peculiar and embarassing features of this case. One of the appellants is a man named Kishen. Somehow, it does not matter how, the Police got his name and came into touch with him. He immediately informed them that he was ready to give information. He admitted (this, of course, is in the nature of a confession which is rendered inadmissible by law and it really ought not to have appeared upon the evidence at all) participation in the dacoities into which the Police were enquiring and he plainly intimated to the Police that he was willing to tell them what he knew for consideration. Eventually, he was put up under section 164, Criminal Procedure Code. He made an elaborate statement under that section amounting to a confession. He was put upon his trial and has been convicted and that confession has been used by the learned Judge not merely under section 30 of the Evidence Act against all the appellants as the confession of a co-accused, but it has, and this is the real difficulty in the case, formed the foundation and main structure of the whole of the learned Judge's reasoning in the judgment. No criticism could be passed upon the learned Judge for his method of dealing with the rest of the evidence, if this confession had been admissible. He has sought, and found to his own satisfaction, adequate corroboration of the confession in the case of each person whom he has convicted upon it, but the serious question is whether it was admissible at all. Both of us are satisfied beyond question that it was not only inadmissible, but that the learned Judge has really made a serious mistake in not realising from the first how clearly on his own statement it was rendered inadmissible. The Assistant Government Advocate did not attempt to combat the view which we take upon the assumption that the learned Judge meant what he said. What the learned Judge has said is this:—First, Kishen was clearly asking for a pardon. He refused to give any information to the Police until some *quid pro quo* could be, as he hoped, obtained. Secondly, he communicated his frame of mind to Ram Sarup, the Investigating Officer. Thirdly, on the morning of the 6th of August Ram Sarup took Kishen to the Collector's bungalow for the express purpose of negotiating for a pardon. It is not suggested that Kishen took part in the negotiation. Of course, he did not. But it would be equally absurd to suppose that he was not well aware of the object of the visit to the Collector's bungalow. There was a hitch in the negotiation. Ram Sarup and Kishen were sent back to the Sub-Divisional Officer with a note and some of Kishen's statement was recorded that day. The rest of it was completed the next morning. It would not be a violent presumption to conclude that, having regard to all that had passed before, Kishen, when he returned to the Sub-Divisional Officer from the visit to the Collector's bungalow in the custody of the Investigating Officer, entertained, and had been encouraged to entertain, reasonable hope that if he told the truth, or what appeared to be a truthful story, he would get a pardon in the end. The learned Judge uses this language:—"The meaning of this exchange

of notes between the Collector and the Sub-Divisional Magistrate has been explained. The Collector apparently was at first of the opinion that Kishen should be given a pardon which was clearly what Kishen was working for. Indeed, it would appear that Kishen specifically bargained for a pardon as the price of his statement. The Sub-Divisional Magistrate objected that it would be premature to make a firm offer of the pardon at that stage, and the Collector eventually agreed and it was explained to Kishen that he would have to take his chance, and he then made his statement." So stated, the position is as clear as daylight. If a man prepares the ground by expressing his own position, and invites the other party to treat with him, and the other party goes so far as to consider whether he is willing to pay the price, and, eventually, without refusing to do so, postpones the decision until further examination of the article to be sold, there must remain in the mind of the proposing vendor a reasonable hope that, when the purchaser sees the article he is thinking of buying, he will pay the price. I have used this commercial language because, throughout, the matter was discussed by the Executive Authorities, and has been considered by the Judge in the light of negotiations for a bargain. How the learned Judge could possibly come to the conclusion that the making of the confession by Kishen under section 164, Criminal Procedure Code, was not caused by the inducement that, if it was satisfactory, a pardon would probably be granted to him, I cannot for myself conceive, but, in my opinion, he has plainly found that it was so induced, and where he has failed is in not realizing that section 24 makes a confession so induced irrelevant in a criminal proceeding. Mr. Malcomson, on behalf of the Crown, preferred to take his stand upon a denial that the learned Judge meant what we think he said in his judgment, and we, therefore, allowed him to obtain, and tender copies of the correspondence referred to by the Judge. Any doubt lurking in the mind of any body up to this point is entirely removed by a persual of this remarkable correspondence. The Sub-Divisional Officer and the District Magistrate exchanged notes with the greatest candour, as indeed they might, in considering whether or not a pardon should be offered, but they went much further than that. They discussed the terms of the offer, or bargain, which was to be made with the accused. The District Magistrate signed the note on the 6th of August and wrote to the Sub-Divisional Magistrate as follows :—" He may, however, be told that if he makes a voluntary confession, which is considered to be full and true, his prayer for being made an approver will receive due consideration." How in the world any officer of experience, or any ane with any legal training at all, or acquaintance with this section, could doubt that this was an inducement to the man to make a statement, we are at a loss to understand. The very document in which the Magistrate uses that language contains a statement that the confession must be voluntary and without any inducement. The Sub-Divisional Officer in his note expressed his opinion that there was very little value in such a confession. Whether there is or whether there is not, any intrinsic value in the statement, the law makes it irrelevant, and the learned Judge ought to have refused to bring it on the record, and to have ruled it as irrelevant under section 24 of the Evidence Act. The result is, that it has to be struck out of this case, as well as of the other cases in which appeals are pending, and in which it has been used. We are bound to say that it really is a lamentable result of the expenditure of time and money on this case, and that the error into which both the Judge and the District Magistrate have fallen is an elementary one. Judges from time to time have exhausted themselves in endeavouring to explain the working of this section, and, for my own part, I refer to and repeat what I said in the recent case of *Khetal* v. *Emperor* (1), with which my learned brother entirely agrees. It really ought to be unnecessary for Judges constantly to be referring to the working of this section. It looks as though we were endeavouring to lay down some new prin-

(1) 73 Ind. Cas. 62; 21 A. L. J. 143; (1923) A. I. R. (A.) 352; 45 A. 300.

ciple, when really all we do is to repeat the law as it should be known by those who have to administer it.

This, however, does not dispose of all the difficulties in this case. The learned Judge in a most painstaking judgment has reviewed all the evidence, but when Kishen's confession is struck out, the balance against the remaining appellants consists of the sworn testimony and identification made by the approver Ghafur, and as against certain appellants, the evidence of one *Musammat* Ganga Dei. As a question of principle is involved in their evidence, it is necessary to consider whether as a class those mentioned by Ganga Dei ought to be convicted unless her evidence is corroborated by satisfactory independent testimony. Somehow or other the Police got hold of this woman, and it was a creditable piece of detective work, but her husband was a notorious dacoit who was absconding. According to her, he left his house on the night of the dacoity with several of the appellants, and next day returned with the *loot*. In any case, it is certain that her husband is a fugitive from justice. According to her testimony he is implicated in this dacoity, and, probably, in the others too, and he left in his house, and probably in her custody, silver ornaments and other jewellery, the proceeds of this dacoity. She may or may not have motives of either spite or fear against specific individuals whom she has named. She may or may not have been either persuaded or frightened by the Police, but taking her position broadly, she was placed in considerable difficulty. She had every motive for assisting the Police, every motive for naming any one whom the Police wished her to name. The Police were in a position to put pressure upon her by the very fact of her possession of the property, and to use persuasion with her by the very fact that her husband was absconding. In the case of a low class woman in this country who has very little independence, education or public spirit to influence her, it is obvious that such a person may become an easy victim to an astute Police investigator, and all I can say is that if I had a jury trying this case, I should unhesitatingly have told them that they should not convict a single individual on the testimony of the woman alone. It is made no better when there is added to it the testimony of the approver who is one of the most despicable specimens of humanity one can imagine, a man steeped in crime, living at war with society, ready to commit any violence to enable him to carry out his thefts, and ready to sell his comrades if only he can get freedom for himself, and, for my own part, I am not prepared to accept the evidence of a worthless creature of this kind, as corroborating an almost equally worthless and particularly helpless wife of an absconding dacoit. The difficulty in this case is that, having acted as the Judge has done very largely on the confession of Kishen, one does not know whether he would have been prepared to act on the residuum which I have just mentioned after Kishen was withdrawn, and really the logical thing to do would be to send the case back, but we are agreed that in substance nothing is to be gained by that, and we, therefore, deal with the case by final orders. In the case of four of the appellants (leaving out Kishen for the moment) we find that the evidence of Ghafur is satisfactorily corroborated by the learned Judge's view of the evidence. These four are Kallan, Nasib Khan, Aslub and Zabar Khan. In the case of these four we dismiss their appeals, and confirm their convictions and sentences. In the case of the remainder, namely, Tara, Dalip, Azan, Kanhaiya, Bucha, Khacheru, Budhan, Khiali, Chiranji Bihu or Baba, Kallan, son of Ghasita, and Diwan, we are driven by force of law to allow their appeals and to direct that they be released subject to any other punishment standing against them unperformed.

This leaves only the case of Kishen. His appeal is also dismissed and we confirm his conviction and sentence. As I have already said, his confession was irrelevant, but my brother pointed out during the agrument and Mr. Malcomson has also argued, that in substance he confessed again before the trial. When he was examined under section 364, before the Committing Magistrate, his previous statement under section 164 was put to him. It ought not to have been if they

knew as much about it as we do now. But he then stated that he had no hope of a pardon. He had discovered that his previous hopes were doomed to disappointment, and he said that that statement was true. Whether it was or whether it was not, and the probability is that it was not, it is ample on which to convict him, and I am prepared to agree that that amounts to a fresh confession in the Magistrate's Court, which was duly proved against him at the trial, and that his conviction on that ground must stand. It may be said, if so, why is it not a confession made before the trial so as to be proved at the trial affecting the other persons who were being tried jointly with him. I think that, technically, it could be used under section 30 even against his co-accused. But, however satisfactory it may be as a piece of damning testimony against himself, I am not prepared to regard it as of any real value, standing alone, or even in association with the evidence of Ghafur and Ganga Dei, against the other accused. Therefore, on that ground, in my opinion, it is still to be disregarded except as sufficient to convict Kishen. Our order, therefore, is that the appeals of the above five are dismissed and of the others are allowed and their convictions are set aside.

Kanhaiya Lal, J.—I agree with the order proposed.

Z. K. *Appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 354 OF 1923.
January 16, 1923.
Present:—Mr. Dalal, A. J. C.
JAGESHAR—ACCUSED—APPELLANT
versus
EMPEROR—COMPLAINANT.

Penal Code (Act XLV of 1860), ss. 80, 304, 304A, 325—Death of child caused by accidental blow—Offence.

Accused was beating a person with his fists when the latter's wife with a baby on her shoulder interfered. Accused hit at the woman but the blow accidentally struck the baby and two days later, it died from the effects of the blow;

Held, (1) that, although the child was hit by accident the accused's act was not covered by the exception contained in section 80 of the Penal Code, inasmuch as he was not at the time, doing a lawful act in a lawful manner by lawful means; [p. 533, col. 1.]

(2) that the accused's act being in its nature criminal was not covered by the provisions of section 304A of the Penal Code; [p. 534, col. 1.]

(3) that when wanting to hit the woman the accused did not intend or knew himself to be likely to cause death and that he could not, therefore, be convicted under section 304 of the Penal Code; [p. 533, col. 2.]

(4) that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grevious hurt. [p. 534, col. 1.]

Empress v. *Sahai Rae*, 3 C. 623; 2 C. L. R. 304; 1 Ind. Dec. (N. S.) 980, relied on.

The Government Pleader, for the Crown.

JUDGMENT.—Jageshar Ahir, about 40 years of age, has appealed from his conviction under section 304, Indian Penal Code. The learned Sessions Judge has stated the facts of the case with great fairness and I accept his finding thereon. The appellant was beating one Sheopal Ahir with his fists when Sheopal's wife with a two months' baby on her shoulder interfered. The learned Judge has noted that she is a solid powerful looking woman. Apparently the appellant hit at the woman and the blow struck the child on the head; the baby died two days later from the effects of the blow. It is clear, that the child was hit by accident but the appellant's act is not covered by the exception of section 80 because at the time he was not doing a lawful act in a lawful manner by lawful means.

The next question is, whether he is guilty of culpable homicide under section 301, Indian Penal Code. Was he doing any thing at the time intending or knowing to be likely to cause the death of another person when he caused the death of the child whose death he neither intended nor knew himself to be likely to cause. It was not suggested by the prosecution in the Trial Court that while wanting to hit the woman with his fist the appellant intended or knew to be likely to cause the death of the woman. The appellant could be convicted under section 304, Indian Penal Code, only if his

BISHEN SINGH v. EMPEROR.

act fell within the description given in section 301, Indian Penal Code. The appellant's act was in its nature criminal, so provisions of section 304A, Indian Penal Code, will not apply. I think, it will be proper to record a conviction under section 325, Indian Penal Code. There is a similar case reported as *Empress* v. *Sahai Rae* (1). An accused struck a woman carrying an infant in her arms violently on head and shoulder. One of the blows fell on the child's head, causing death. It was held that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt. It is likely that the woman abused the appellant before he struck at her and it is not suggested that any severe blow fell on her. Having regard to all these circumstances, I alter the conviction to one under section 325, Indian Penal Code, and reduce the sentence to one of six months' rigorous imprisonment. The fine ordered by the lower Court and the direction as to its payment, if recovered, are maintained.

Z. K. *Sentence reduced.*

(1) 3 C. 623; 2 C. L. R. 304; 1 Ind. Dec. (N. S.) 980.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 73 OF 1923.

February 23, 1923.

Present:—Mr. Justice Moti Sagar.

BISHEN SINGH—CONVICT—PETITIONER

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 447—Criminal trespass—Ingredients of offence—Property not in the possession of complainant.

In order to establish an offence under section 447 of the Penal Code, it must be shown that the trespass was committed on property which belonged to the complainant, and that the intention of the accused was to commit an offence, or to intimidate, insult or annoy any person.

Chandi Pershad v. *Evans*, 22 C. 123; 11 Ind. Dec. (N. S.) 83, followed.

Petition, under section 439 of the Criminal Procedure Code for revision of an order of the Additional District Magistrate, Lyallpur, dated the 28th November 1922, affirming that of the Magistrate, Second Class, Toba Tek Singh, District Lyallpur, dated the 14th of October 1912.

Lala *Ram Chand Manchanda*, for the Petitioner.

Mr. *Sagar Chand*, for the Complainant.

JUDGMENT.—The facts are fully stated in the judgment of the learned District Magistrate and need not be recapitulated. One Boga trespassed into the fields of the accused. The accused remonstrated upon which Boga ran into an adjoining field belonging to one Sadr Din. The accused went in pursuit, overtook him there and gave him a slight beating. The accused was thereupon challaned by the Police under section 447 of the Indian Penal Code and on conviction sentenced to pay a fine of Rs. 100. On appeal his conviction and the sentence was maintained by the learned Additional District Magistrate. The accused has now come up in revision to this Court.

After hearing Counsel I am clearly of opinion that no case under section 447, Indian Penal Code, has been established against the petitioner. In the first place, the field into which the petitoner is alleged to have trespassed did not belong to the complainant Boga, and was not in his possession and it is very doubtful if section 447 could be held applicable to such a case. In the second place, there is no evidence of any intent to commit an offence or to intimidate, insult, or annoy, any person which it is necessary to prove before a conviction under this section could be sustained. In my opinion, the case reported as *Chandi Pershad* v. *Evans* (1) was fully applicable and, following the rule laid down in that case, I hold that no case under section 447, Indian Penal Code, has been made out and that the petitioner is entitled to an acquittal. I accept the revision and setting

(1) 22 C. 123; 11 Ind. Dec. (N. S.) 83.

aside the order of the Court below direct that the fine if paid should be refunded.

W. C. A. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 42 OF 1293.
May 22, 1923.
Present:—Mr. Dalal, J. C.
RAGHUDATT—ACCUSED—APPLICANT
versus
EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Evidence of vague character, order, whether can be based on—Prosecution evidence, value of.

An order requiring security for good behaviour cannot be based on the vague evidence of a large number of persons to the effect that the accused is a thief and a dacoit and that the neighbourhood is of that opinion. There is no rule of law or of good sense that every person who appears as a witness on behalf of the prosecution must be believed.

Application against an order of the Sessions Judge, Gonda, dated the 16th January 1923, upholding an order of the District Magistrate, Gonda, dated the 22nd November 1922.

Messrs. *J. P. C. Bhattacharji* and *Hayat Ullah*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The order binding over the applicant, Raghu Datt, cannot be sustained. He has done himself considerable harm by producing evidence for the defence. The minds of the three learned Judges who went through the proceedings in the lower Courts, have all been deflected on account of this mass of evidence from the true purpose of a Court of examining the evidence for the prosecution. There is neither any rule of law nor of good sense that any man who appeared on behalf of the prosecution must be believed. There are 33 witnesses for the prosecution in this case, but the number is the only fact in favour of the prosecution. The statement of every witness is of a pattern that the appellant is a thief and a dacoit and that the neighbourhood is of that opinion. It is not even said which neighbourhood. During the last few years the applicant has not always lived at his house in Lila Bamhni. For the most part he has lived in the town of Gonda and from October 1918 to March 1919 he lived in Rampur, which is not even situated within the jurisdiction of Gonda Police station.

Coming to particulars: Two witnesses Abdul Ghafur, Sub-Inspector of Gonda since 18th April 1921, and Sardar Lachman Singh, a retired Sub-Inspector, deposes to the applicant being suspected of complicity in certain cases of theft. The Sub-Inspector of Gonda deposed that he was suspected of committing three thefts in Forbesganj, a quarter of Gonda, on 30th September 1921 and at the house of Piare Lal in November 1921. Possibly, the house of Piare Lal is also situated in Gonda. This suspicion appears to have originated from the time of the theft in the house of Sardar Lachman Singh. Some years ago, when the Sardar was in charge of the Gonda Police Station he happened to prosecute the applicant who was bound over to be of good behaviour. No date of that order can be discovered on the record. When Lachman Singh started this story and the Sub-Inspector discovered that the applicant was once bound over, it was easy enough for the Sub-Inspector to attribute all subsequent thefts to this applicant. Two witnesses (P. W. No. 15) and (P. W. No. 24) have told an absurd story of the applicant's complicity in a dacoity 10 days prior to the 7th of April 1922. The record shows that the applicant has been in the lock up since 24th February. Such is the random way in which these prosecution witnesses have talked. There is one witness (P. W No. 23) who asserted in examination-in-chief that while he was attending a village dinner the applicant and his friends bolted and concealed themselves on hearing of the arrival of a Police constable. In cross-examination this assertion dwindled down to a statement that the witness had heard of such a thing having occurred. Obviously, these witnesses attached no value to words. In India, it is most dangerous to accept

vague statements of hearsay information. Often what a man hears he believes that he saw it himself. The prosecution evidence is entirely valueless on account of its vagueness. I have examined above the statement of the few witnesses who entered into particulars. As to the rest there was the same parrot cry of the applicant being a thief and the neighbourhood believing in such a rumour. The only variation is in the English record where the neighbourhood in some cases turns into a country side. None of these witnesses has stated who the applicant's associates are, what are his means of subsistence, whether increase of thefts syncronised with his appearance in any particular locality. When the prosecution evidence is so futile and deliberately false, when it enters into particulars, it is not necessary to examine the evidence produced on behalf of the defence. I have only one observation to make as regards the first Court's criticism of the defence evidence. The learned Deputy Magistrate's ridicule of a witness of the name of Barkat Ullah, presumably respectable as he is invested by Government with the title of Khan Bahadur, is not to be approved. The learned Deputy Magistrate observes: "The defence witnesses have been forced to come to Court.' What else did the learned Deputy Magistrate expect? When a respectable man, entering the witness-box to depose in favour of a man run in for being a bad character, is exposed to animadversions by the Court, how will a smaller man have the pluck to give evidence for the defence under such circumstances?

I discharge the order made by the Deputy Magistrate and direct that Raghu Datt be released at once.

Z. K. *Order accordingly.*

PATNA HIGH COURT.

CRIMINAL APPEAL NO. 9 OF 1923.

February 8, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

CHETA MAHTO—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190, 476—Presentation of forged document for registration—Order by District Registrar for prosecution—District Registrar also District Magistrate—Order, whether legal.

An application for the compulsory registration of a sale-deed was rejected, whereupon the applicant appealed to the District Registrar, who dismissed the appeal, but a few days later directed the prosecution of the applicant for an offence under section 471, Penal Code, and referred the case under the provisions of section 476, Criminal Procedure Code, to the District Magistrate. After the usual enquiry the accused was committed to the Court of Session and eventually convicted. On appeal it was objected that the District Registrar not being a Civil, Criminal or Revenue Court within the meaning of section 476 had no jurisdiction to proceed under that section:

***Held*, that as the District Registrar was also the District Magistrate, it was competent for him to take cognizance under section 190, clause (1), sub-section (c), of the Criminal Procedure Code and to transfer the case to a Subordinate Magistrate in order that a commitment enquiry might be held. [p. 538, col. 1.]**

Criminal appeal from a decision of the Sessions Judge, Saran, dated the 18th December 1922.

Mr. *Bankim Chandra De*, for the Appellant.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—The appellant, Cheta Mahto, has been sentenced to rigorous imprisonment for four years and a fine of Rs. 250 for having, on the 12th August 1920, dishonestly used as genuine a forged document, by presenting it for registration before the Sub-Registrar of Chapra, knowing the same to be a forged document. The document purports to be a sale-deed executed on the 1st June 1920, by Elahi Baksh and his brother Hayati Mian in favour of the appellant, Cheta, in respect of two areas of 17 *kattas* and 18 *katas* constituting, respectively, the occupancy holding of Elahi and Hayati. The con-

sideration money was stated to be Rs. 50 and it was also recited in the deed that about Rs. 20 being due to the landlord Jotik Lal Sahu, for arrears of rent, and about Rs. 19 being due to a creditor named Pranpat Singh a sum of Rs. 40 on account of these two debts was left in the hands of the vendee and that the vendor was receiving the balance of Rs. 10 in cash.

The previous history of the case is this. In 1912 Jotik Lal Sahu, the landlord, obtained a decree in the Small Cause Court at Chapra for a sum of Rs. 92 against Elahi and in execution attached Elahi's bullocks. Elahi and his brother Hayati thereupon induced the landlord to remit the principal and to take only the costs of the suit which amounted to Rs. 13, but he took the precaution of getting Elahi and Hayati to sign their names and give their thumb impressions on a blank paper bearing a non-judicial stamp of 8 annas. The motive ascribed to the landlord for taking this precaution was that he was afraid that Elahi or his brother would apply for the restoration of the suit and it is suggested that this blank paper was, as the learned Judge put it, a sort of Damocles' sword held over the head of judgment-debtor. The stamp-paper appears from the endorsement on the back to have been purchased by Elahi on the 21st January 1913, and full satisfaction was entered in respect of the Small Cause Court decree on the 22nd January 1913.

On the 10th February 1917, the landlord gave Elahi settlement of a plot measuring 18 *kattas*, of which the landlord was in *khas* possession. The *patta* was duly registered; and the case for the prosecution is that, since that date, Elahi has been in continuous possession. It is alleged that, shortly afterwards, Liladhar, the *Gomastha* of the landlord, who had been an unsuccessful applicant for the lease of the land, began to press Elahi for *salami* and upon Elahi refusing to give him anything he lodged a criminal case against Elahi alleging that Elahi had wrongfully trespassed upon the land and cut away a tree. That case was dismissed and a sum of Rs. 20 was awarded to Elahi as compensation on the 10th November 1917. Liladhar, however, was not discouraged and in the following year, when the Revisional Survey operations commenced in Khalispore, he claimed possession of the 18 *kattas* plot, but he was again unsuccessful. It is stated that before the Settlement Officer the accused, Cheta Mahto, also filed objections to the entry in the Record of Rights and claimed to be in possession of the land; but what the nature of his claim was and upon what title he based his claim is not disclosed. We merely learn from the evidence of Elahi and Hayati that objections were made by Liladhar and Cheta and were dismissed.

Nothing further happened till the year 1920. The case for the prosecution is that, on or about the 1st June of that year, Liladhar and Cheta conspired together to manufacture a document of title in respect of the 18 *kattas* and, in order to do so, they induced Jotik, the landlord, to hand over the blank paper which Elahi and Hayati had given him seven years earlier. It is alleged that upon this paper a deed of sale was inscribed reciting that the 18 *kattas* settled with Elahi on the 10th February 1917, and another plot of 17 *kattas* held by Hayati, under the same landlord, had been transferred to the accused Cheta for a sum of Rs. 50. It is alleged that, armed with this sale-deed, Liladhar, Cheta and thirteen others trespassed upon Elahi's land and attempted to build a road across. There was consequently a riot in the course of which Elahi was severely wounded and on the 30th October 1920 the Deputy Magistrate of Chapra sentenced all the accused before him to various terms of imprisonment and fine. In appeal the Additional Sessions Judge of Chapra, by a judgment, dated the 8th February 1921, acquitted fourteen of the appellants but maintained the convictions of Cheta, Liladhar, Babu Ram and Deonandan. The result of these criminal proceedings was that Cheta was directed to serve a sentence of six months' rigorous imprisonment and Liladhar a sentence of nine months' rigorous imprisonment.

During the trial of this criminal case Cheta and his co-accused appear to have been foolish enough to file the above-mentioned sale-deed of the 1st June 1920. The Deputy Magistrate, Babu Dhirakshan Singh, declined to give any weight

to the document and disbelieved the defence that Cheta was in possession; but Cheta was still persistent and on the 12th August 1920, he made an application for the compulsory registration of the document before the Special Sub-Registrar. Upon issue of notice Elahi and Hayati appeared and denied execution and the Sub-Registrar, after a protracted inquiry, passed an order on the 5th April 1921 refusing to register the document.

An appeal was made to the District Registrar under the provisions of the Indian Registration Act, but that appeal was dismissed on the 28th July 1921 and on the 2nd August 1921 the District Registrar directed the prosecution of Cheta for an offence under section 471, Penal Code, and referred the case under the provisions of section 476, Criminal Procedure Code, to the District Magistrate of Chapra.

After the usual inquiry the accused was committed to the Court of the Sessions Judge, who, agreeing with both Assessors, has found the accused guilty of the offence charged.

Now, a preliminary point is taken that the Magistrate who made the commitment inquiry, had no jurisdiction to take cognizance inasmuch as the District Registrar not being a Civil, Criminal or Revenue Court within the meaning of section 476, had no jurisdiction to proceed under that section. This contention may be accepted but the District Registrar was also the District Magistrate and it is not denied that the District Magistrate was competent to take cognizance under section 190, clause (1), sub-section (c), of the Criminal Procedure Code and to transfer the case to a Subordinate Magistrate in order that a commitment inquiry might be held. That officer has committed that case to the Sessions Court in accordance with law and, in my opinion, the commitment is valid. There was, therefore, no defect in the jurisdiction of the Sessions Judge to try the accused.

Then coming to the merits: the first question is, whether the document of the 1st June 1920 is in fact a forgery. On this point we have the evidence of Elahi and Hayati, which was the only direct evidence it was possible for the prosecution to adduce. It appears that in 1921, that is to say, after his conviction in the riot case, a civil suit was instituted by Cheta Singh against Elahi and Hayati, for a declaration of title to the lands covered by the *kabala*, and for recovery of possession. On the 25th April 1922, the Munsif dismissed that suit on the ground that the sale-deed had not been produced and that the contract upon which the title was founded had not been proved. In the present case the onus lay still more heavily upon the accused to give substantive evidence of the contract but he has called neither the writer nor any of the witnesses to the deed; and the examplanation that his legal advisers in the Sessions Court did not think it advisable to let in the Crown's right of reply is not by any means adequate. The accused could not have been ignorant of the necessity of calling this evidence if indeed the document was genuine, for his person and liberty were in jeopardy, and I agree with the Sessions Judge that the accused knew that the document was a forgery and that its execution could not be proved. Therefore, having considered the evidence of Elahi and Hayati very carefully I do not think there can be any doubt that it is substantially true. They are corroborated by three other witnesses, Sakhi Chand, Chirkut and Jinnat Ali whom they took to Chapra to negotiate with Jotik Lal in the matter of the satisfaction of the Small Cause Court decree. It seems strange, at first, that Hayati should also have been taken, for he had apparently no interest in the satisfaction of the decree; but the explanation seems to be that the landlord who knew Hayati to be a very astute person, was afraid that he would induce Elahi to repudiate the compromise and to apply for a re-hearing of the Small Cause Court suit and that for that reason he insisted on Hayati's signature on the paper. These three witnesses mentioned above all state that negotiations took place in the Court compound at Chapra and I see no reason why they should be disbelieved. Two are Hindus and one is a Muhammadan and it does not appear that they have any enmity either against the accused or against Jotik. The taking

of a blank paper from Elahi and Hayati is, in my opinion, proved.

The next question is, how did it get into the custody of the accused Cheta? Now, the evidence on this point is that the landlord has been siding first with Liladhar and then with both Cheta and Liladhar for the purpose of ousting Elahi. There is clear evidence that during the trial of the riot case he was paying the fees of the defence. It was, therefore, possible for Cheta to get the document from the landlord.

Why, having given the settlement in 1913, the landlord should attempt to eject Elahi shortly afterwards has not been disclosed. Lildhar is his *Gomastha* and Cheta is the cousin of Liladhar and it may be that they will be more useful tenants than Elahi. The evidence shows that at the time of the first criminal case in 1917, Cheta was siding with Elahi and that he did not begin to claim the disputed land till about the time of the Revisional Survey. It was suggested in Elahi's cross-examination that Elahi and Hayati did in fact execute the sale-deed in favour of Cheta in 1920 in order that he might fight Liladhar and the landlord but that there was a collateral undertaking on Cheta's part to return the holding to Elahi on re-payment of the consideration money. It was also suggested that after getting this document, Cheta turned round, went over to Liladhar's side and joined Liladhar in the forcible dispossession which gave rise to the riot case. Upon the evidence I do not think these suggestions have any foundation. If Elahi and Hayati had in fact transferred their lands it is impossible to believe that they would have resisted the possession of Cheta with such tenacity throughout. Moreover, if his object was to protect Elahi, I see no reason why Cheta should have taken a transfer of Hayati's land also. The case put forward by the prosecution accounts far more satisfactorily for the inclusion of Hayati's name in the document and I am satisfied that the document was not executed by Elahi and Hayati on the 1st June as now alleged by the accused. The document was certainly a forgery and the accused must have known it to be so. His object being to deprive Elahi of his land, his user was clearly dishonest. There can be no question that presentation before the Special Sub-Registrar was sufficient evidence of user. The accused has, therefore, been rightly convicted by the Sessions Judge.

The only question that now remains is that of sentence; but we do not think we can allow any remission. The accused's conduct has been thoroughly heartless and unprincipled. He was first of all upon Elahi's side and was assisting him to resist the landlord and Liladhar he then betrayed Elahi and joined the landlord and Liladhar and not content with this he made an attempt to take forcible possession and engaged in a riot in which Elahi was seriously injured; he then brought a civil suit in which he attempted to enforce his thoroughly false and malicious claim; fortunately, he overreached himself in filing his appeal to the District Registrar. The appellant is a dangerous type of litigant and it is necessary, therefore, that an offence involving the use of a forged document by him should not be lightly viewed. The sentence of four years' rigorous imprisonment and the fine of Rs. 250 are maintained.

Bucknill, J.—I agree.

Conviction and sentence confirmed.

K. S. D. & W. C. A.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 5 OF 1923.

March 9, 1923.

Present:—Mr. Kanhaiya Lal, J. C., and Mr. Dalal, A. J. C.

EMPEROR—COMPLAINANT

versus

RAMESHWAR TEWARI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 122—Sureties living at distance from person bound over, whether can be accepted.

Section 122 of the Code of Criminal Procedure gives a discretion to a Magistrate to refuse or accept the sureties according as he considers them unfit or otherwise for the purpose for which the

security is required. The elements necessary for determining the fitness of the sureties have not been laid down, but in each case the Magistrate must consider whether the surety is in a position to exercise considerable control and supervision over the accused. The mere solvency of a surety may not invariably be sufficient to ensure the good conduct of the accused any more than the mere fact of his residing at a distant place may be a sufficient ground for rejecting him as such, because there might be circumstances suggesting that, in spite of the solvency of the surety or his residence at a distant place, the exercise of due supervision and control over the conduct and movements of the accused may not or may yet be practically possible. The object of requiring security is not to obtain money for the Crown by the forfeiture of recognisances but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is, therefore, reasonable to expect and require that the sureties to be tendered, should not be sureties from such a distance as to make it unlikely that they would exercise any control over the man for whom they are willing to stand surety. If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the suspervision and control needed to keep him in good behaviour there can be no inherent objection to their being accepted as sufficient. [p. 541, col. 2; p. 542, col. 1.]

Queen-Empress v. *Rahim Bakhsh*, 20 A. 206; A. W. N. (1898) 21; 9 Ind. Dec. (N. S.) 494, *In re Jesa Bhatha*, 55 Ind. Cas. 857; 22 Bom. L. R. 190; 21 Cr. L. J. 377; 44 B. 385 and *King-Emperor* v. *Mangal*, 6 O. C. 199, relied on.

Reference made by the Sessions Judge, Gonda, under section 438, Criminal Procedure Code.

ORDER.

Dalal, A. J. C.—(*February* 23, 1923).—The applicant Rameshwar Tewari was ordered under section 118 of the Code of Criminal Procedure by a First Class Magistrate of Gonda to give security to be of good behaviour for a period o one year. He was directed to furnish two reliable sureties of Rs. 200 each and to execute a personal bond for a like sum. When the names of the sureties were submitted to the Magistrate in December 1922 he re used to accept them on the ground that they resided at a distance of 18 miles from the place where the accused lived and could not be expected to excercise full supervision over the bad character. On an application being made to the learned Sessions Judge of Gonda for revision of this order rejecting the sureties he referred the matter to this Court with a recommendation that the Magistrate's order may be set aside and the sureties accepted. He relies on a ruling of the Allahbad High Court reported in *Hasin-ud-din* v. *Emperor* (1).

The rulings of the Allahabad High Court in this matter are contradictory and so are some of the reported cases of the Calcutta High Court. In the case of *Queen-Empress* v. *Rahim Bakhsh* (2) the learned Chief Justice held in a case similar to the present that the Magistrate had come to a proper conclusion. It was observed: "The Magistrate considered that sureties at Roorkee would probably have but little influence over a gentleman like Rahim Bakhsh residing at Saharanpur. In my opinion the Magistrate came to a proper conclusion. The object of requiring security to be of behaviour is, not to obtain money for the Crown by the forfeiture of recognizances, but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It eems to me to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom thay were willing to stand surety." The principle of this case was followed by another Judge of that Court in 1902 in *Emperor* v. *Nabbu Khan* (3). Subsequently, in cases not reported in the Indian Law Reports Series, individual Judges have given a contrary opinion, though possibly those cases may be distinguished from that of 20 Allahabad. In *Hasin-ud-din* v. *Emperor* (1) the sureties were rejected because they did not live within a radius of five miles of the place where the accused person lived; and the learned Judge considered this reason for rejection of the sureties to be bad. In 1918 in the case of *Gobardhan* v. *Emperor* (4) sureties were rejected because they belonged to a different Police Circle and

(1) 17 Ind. Cas. 575; 10 A. L. J. 354; 13 Cr. L. J. 831.
(2) 20 A. 206; A. W. N. (1898) 21; 9 Ind. Dec. (N. S.) 494.
(3) 24 A. 471; A. W. N. (1902) 122.
(4) 44 Ind. Cas. 969; 16 A. L. J. 263; 19 Cr. L. J. 441.

this reason was considered to be insufficient for their rejection. In neither of these latter cases any reference was made to the case reported in 20 Allahabad. In Calcutta the opinion of the learned Chief Justice of Allahabad was definitely dissented from in 1908 *Adam Sheikh* v. *Emperor* (5) and quoted with approval in 1909 [*Sa igram Singh* v. *Emperor* (6).] In this Court there is a ruling of 1903, where, however, a point for consideration was the nature of the surety required under sections 112 and 118. In the course of his judgment Mr. Justice Chamier gave it as his opinion that a surety should not be rejected as unfit merely because he resides in a different Tahsil. The question is not examined from a point of view of distance between the residence of the surety and the accused person and the improbability of a surety residing at a great distance being able to exercise any supervision over the behaviour of the particular accused person.

I am of opinion that this matter should be reconsidered by a Bench of two Judges and, therefore, I certify this to be a fit case to be heard by a Bench under section 8 of the Oudh Courts Act (XIV of 1891).

An early date shall be fixed as the accused person is undergoing regorous imprisonment in jail.

Mr. *M. H. Kidwai*, for the Accused.
The Government Pleader, for the Crown.

JUDGMENT.—The accused Rameshwar Tewari has been bound over to be of good behaviour under section 118 of the Code of Criminal Procedure for a period of one year. He was directed to furnish two reliable sureties of Rs. 200 each and to execute a personal bond for a similar sum. The accused is a resident of Lawa Birpur, *Tahsil* Tarabganj, District Gonda. He offered two sureties, Ram Sudh and Bhai Lal, of whom the former resided in the village Kinki, *Tahsil* and District Gonda, and the latter lived in the village Barwa, *Tahsil* and District Gonda. The village Kinki adjoins Barwa. The learned Magistrate refused to accept them as sufficient on the ground that the sureties resided at a distance of 18 miles from the place where the accused lived and could not be expected to exercise full supervision over his conduct and movements. On revision the learned Sessions Judge was of opinion that the ground assigned by the Magistrate for rejecting the sureties was insufficient, and he referred this matter to this Court with a recommendation that the order of the Magistrate may be set aside and the sureties accepted. He relied in support of his reference on the decision in *Hasin-ud-din* v. *Emperor* (1). In that case one of the sureties, who had been rejected, had offered to keep the person who was to be bound over for good behaviour in his village, and the other surety lived 10 miles away from the village, where it was proposed the said person was to reside. The order of the Magistrate demanding the security, had directed that both the sureties should live within a radius of 5 miles without specifying the center, from which the radius of 5 miles was to be drawn, and it was held that there was no sufficient ground for rejecting the sureties because they did not live within 5 miles of each other or of the abode of the accused. In the present case the sureties are said to live at a distance of about 18 miles from the village in which the accused ordinarily resides. One of the sureties is a nephew of the accused and the other surety is a caste-fellow. In the security-bond filed by them in the Court below they did not undertake to keep the accused under their supervision and control where they resided, but it is now stated by the learned Counsel for the accused that the accused would be kept by the sureties under their control and supervision in the village Kinki for the period for which the security has been offered.

Section 122 of the Code of Criminal Procedure gives a discretion to a Magistrate to refuse or accept the sureties according as he considers them unfit or otherwise for the purpose for which the security is required. The elements necessary for determining the fitness have not been laid down but it is obvious that in each case the Mag strare has to consider whe-

(5) 35 C. 400; 7 Cr. L. J. 439.
(6) 2 Ind. Cas. 592; 36 C. 562; 9 C. L. J. 296; 13 C. W. N. 555; 10 Cr. L. J. 89.

ther the surety is in a position to exercise considerable control and supervision over the accused. The mere solvency of a surety may not invariably be sufficient to ensure the good conduct of the accused any more than the mere fact of his residing at a distant place may be a sufficient ground for rejecting him as such, because there might be circumstances suggesting that, in spite of the solvency of the surety or his residence at a distant place, the exercise of due supervision and control over the conduct and movements of the accused may not or may yet be practically possible. The object of requiring security, as pointed out in *Queen Empress* v. *Rahim Bakhsh* (2), is not to obtain money for the Crown by the forfeiture of recognizances but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is, therefore, reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as to make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour, there can be no inherent objection to their being accepted as sufficient. *In re Jesa Bhatha* (7) certain sureties were accepted, because they had offered to take the accused persons as their tenants in order that they may have a good opportunity of preventing them from getting into mischief, and the mere fact that they resided at a distance of 6 miles from the place of residence of the accused was not held to be a sufficient ground for rejecting them.

A similar rule was laid down in *King-Emperor* v. *Mangal* (8). There the order of the Magistrate directed that the sureties shall be persons residing within two miles from the place where the person required to give security lived, and it was held by this Court that that order was not justified and that the right course for the Magistrate was to have considered the question of the fitness of the sureties at the time the security was offered. It was there pointed out that when drawing up an order for security, a Magistrate should remember that the object is to obtain security for good behaviour not to punish the person concerned with imprisonment, and that sureties residing at a certain distance from the residence or abode of the accused may also be acceptable in cases where, for example, they consent to be sureties upon the person concerned undertaking to live in their village. If that undertaking is here given, and the sureties concerned are otherwise suitable, the Magistrate might reconsider his order and determine whether the accused should not be released on their security. With this direction, the record will be returned.

Z. K. *Record returned.*

(7) 55 Ind. Cas. 857; 22 Bom. L. R. 190; 21 Cr. L. J. 377; 44 B. 385.
(8) 6 O. C. 199.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 69 OF 1923.
March 9, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

KRISHNA CHANDRA BHOWMIK —ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 481—Penal Code (Act XLV of 1860), s. 228—Contempt of Court—Statement of accused, failure to record—Illegality—"If any" in s. 481, meaning of.

No person can be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him is specifically stated and an opportunity is given him of answering it. [p. 543, col. 1.]

In re Edward Hutchinson Pollard, (1868) 2 P. C. 106; 5 Moo. P. C. (N. S.) 111; 16 E. R. 457, *Chan Hang Kiu* v. *Supreme Court of Hong Kong,* 4 Ind Cas. 539; 13 C. W. N. 685; 6 M. L. T. 9; 19 M. L. J. 324; 11 Cr. L. J. 277 (P. C.), followed.

All that the expression "statement (if any) of the offenders" in section 481 of the Criminal Procedure Code indicates is, that the Court can not compel the accused to make a statement; but it does not mean that the Court should not give him an opportunity of making the statement. [p. 543, col. 1.]

A conviction under section 228 of the Penal Code without giving the accused person an opportunity of making a statement as required by section 481 of the Criminal Procedure Code, is illegal. [p. 543, col. 1.]

SANT RAM *v.* EMPEROR.

Criminal revision against the order of the Sessions Judge, Pabna, dated the 15th December, 1922, affirming that of the Sub-Divisional Magistrate, Pabna, dated the 11th November, 1922.

JUDGMENT.—The petitioner in this case is a *Muktear* practising in the Criminal and Revenue Courts in Pabna. He has been convicted of contempt of Court by the Sub-Divisional Magistrate of Pabna and under section 228, Indian Penal Code, sentenced to pay a fine of 50 rupees. This conviction was upheld on appeal by the Sessions Judge of Pabna.

This Rule was granted on the ground that the order passed by the Magistrate was illegal and without jurisdiction inasmuch as the petitioner was not called on to make a statement and no statement was, as a matter of fact, recorded as required by section 481, Criminal Procedure Code. In dealing with this point the learned Sessions Judge remarked in his judgment that:—"The fundamental principle of criminal jurisprudence that a man must be heard before he is condemned has no application in such cases where special procedure has been provided by express law." With this expression of law we are in entire disagreement. The point has been considered by the Judicial Committee of the Privy Council in the case of *In re Edward Hutchinson Pollard* (1). Their Lordships stated that in their judgment no person can be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering. This case was decided in 1868, and the same principle was affirmed by their Lordships of the Judical Committee in a more recent case of *Chan Hang Kiu* v. *Supreme Court of Hong Kong* (2). We are unable to accept the contention of the learned Vakil who shows cause against the Rule that the words "if any" in section 481, Criminal Procedure Code, show that in the special procedure provided by this section an exception to this general rule is provided. All that the expression "if any" indicates is that the Court cannot compel the accused to make a statement, but it cannot mean that he should not give him an opportunity to make a statement. We hold that this defect in the procedure was fatal to the conviction, and we must, therefore, set it aside.

Before leaving this case, we think, we should express our opinion that we are in agreement with the learned Sessions Judge that the conduct of the petitioner was unjustified and reprehensible. We think it sufficient, having regard to the facts of the case to confine ourselves to this expression of opinion and it is not necessary to direct any further proceedings to be taken against him in the matter. We make this Rule absolute and set aside the conviction and sentence passed on the petitioner and direct that the fine, if paid, be refunded.

Z. K. *Rule made absolute.*

(1) (1868) 2 P. C. 106; 5 Moo. P.C. (N. S.) 111; 16 E. R. 457.

(2) 4 Ind. Cas. 539; 13 C. W. N. 685; 6 M. L. T. 9; 19 M. L. J. 324; 11 Cr. L. J. 277 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 62 OF 1923.

March 28, 1923.

Present:—Mr. Dalal, A. J. C.

SANT RAM—PRISONER—APPELLANT

versus

EMPEROR—COMPLAINANT.

Approver—Complicity not proved—Statement, whether admissible.

The statement of an alleged approver who is not proved to have participated in the offence is not admissible against the accused.

Appeal against an order of the Additional Sessions Judge, Lucknow, dated the 23rd January 1923.

The Government Pleader, for the Crown.

JUDGMENT.—The learned Sessions Judge in disagreement with the Assessors has convicted the appellant, Sant Ram Brahman, of an offence under section 396, Indian Penal Code. The evidence on which the conviction is based consists of (1) the statement of the approver, Ram Autar and (2) the recovery of stolen property (a *dhussa* and a *kurta*) from the appellant's possession during the morning following the night of the occurrence. The learned Judge has omitted to discuss in his judgment on what ground he held Ram Autar to be an accomplice. The learned Government Pleader here referred only to Ram Autars' confession in support of

his complicity. That is not enough. Unless the man adheres to it in the Sessions Court he himself could not have been convicted on that statement. If such a statement is accepted as that of an approver without any test as to his complicity in the crime it would be easy enough for the Police to put forward any bad character to narrate a picturesque and a detailed story of a dacoity of which most of the details are known to the Police from the complainants. Ram Autar has not been proved to have participated in the dacoity so his statement does not amount to evidence against the appellant. The peculiarity of this case is that the learned Judge has refrained from saying anywhere definitely in his judgment that he trusted the statement of Ram Autar. There may be occasions where a learned Judge of the Trial Court is so impressed by the statement of a person put forward as an approver that an Appellate Court would accept the Judge's assurance without any other evidence that the person was really an approver. The present is not such an occasion, where the learned Judge has not even considered the matter.

I agree with the learned Judge that the evidence of the recovery of stolen property is reliable. Lalta Bakhsh Singh is an independent witness and he arrested the appellant almost before the Police enquiry started. The appellant did not claim the stolen property to be his and I see no reason to distrust the testimony of the complainant's brother, Mohan Lal that *dhussa* and *kurta* were stolen during the dacoity. There are, however, circumstances in the case which would prevent a Court from presuming that the appellant took part in the dacoity though the stolen property was found in his possession a few hours after the occurrence. A lot of other property obviously stolen was found in the appellant's possession in a bundle which contained the complainant's *dhussa* and *kurta*. This fact gives rise to two possibilities: there were several dacoities and possibly the appellant did not take part in the one under inquiry, or the appellant was utilized only to carry stolen property and not to help in the dacoity. The appellant's denial of possession proves his guilty knowledge and it may safely be presumed that the knowledge was of the property having been taken during the dacoity.

In the result I alter the sentence to one under section 412, Indian Penal Code, and reduce the sentence to rigorous imprisonment for five years.

Z. K. *Sentence altered.*

OUDH JUDICIAL COMMISSIONR'S COURT.

MISCELLANEOUS APPLICATION NO. 125 OF 1923.

April 17, 1923.

Present:—Mr. Dalal, A. J. C.

DALSHER—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Magistrate having tried other persons on same charge, whether ground for transfer.

The fact that a Magistrate trying an accused person has already tried other persons on the same charge, is not a sufficient ground for directing the transfer of the case to some other Magistrate.

Application for transfer of a criminal case from the Court of the Magistrate, First Class, Partabgarh.

Mr. *Moti Lal Saksena*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—I see no reason to order the transfer of the hearing of the charge against the applicant Dalsher, from the Court of the Sub-Divisional Officer of Patti. The only reason assigned for a transfer is that this Magistrate has already tried certain other persons charged with the same offence. If the principle of such a reason be accepted considerable inconvenience will be caused by every absconding accused person out of a large number, turning up from time to time and claiming that he should be tried by some Magistrate who had not heard the charges against persons previously convicted. It has often happened that I myself have dismissed appeals of certain persons and subsequently granted an appeal of another convicted of the same offence. I am sure that the Sub-Divisional Officer of Patti will consider the case against Dalsher on its own merits without giving thought to the previous trial held by him. I dismiss this application.

Z. K. *Application dismissed.*

ABDUL AZIZ v. LAKHMI CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1205 OF 1920.

May 25, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

ABDUL AZIZ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAKHMI CHANDRA MAJUMDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of respondent—Case remanded in ignorance—Procedure.

A suit was decreed by the Trial Court but was dismissed on appeal by the District Judge. During the pendency of a second appeal preferred by the plaintiff, one of the defendants-respondents died and no application was made to bring his legal representatives on the record. The High Court heard the appeal in ignorance of this fact and, accepting the appeal, remanded the case to the District Judge for re-decision. When the latter proceeded to decide the case he was informed that one of the defendants had died. He, consequently, declined to hear the appeal and decided that the decree passed by him on the previous occasion stood in its entirety:

Held, (1) that the fact of the death of one of the respondents had not destroyed the jurisdiction of the High Court; [p 546, col. 1.]

(2) that the District Judge should not have regarded the order of the High Court as if it were null and void and should have reported the matter to that Court for proper action under the circumstances; [p. 546, col. 1.]

(3) that the order of the District Judge must be set aside and the case must be re-called to the High Court and placed before the Bench which disposed of it on the previous occasion for orders. [p. 546, col. 1.]

Appeal against the decision of the District Judge, Noakhali, dated the 14th August 1918.

Babu *Gobinda Chandra Dey Roy*, for the Appellants.

Babus *Abinash Chandra Ghose* (for Babu *Girija Prasanna Roy Chowdhury*), *Panchanan Ghose* and *Sures Chandra Talukdar*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for cancellation of a sale held under the Putni Regulation. The suit was decreed in the Court of first instance. Upon appeal by the two *zemindars*, that judgment was reversed and the suit was dismissed. The plaintiffs thereupon appealed to this Court. They joined as respondents three sets of persons, *viz.*, (*i*) the auction-purchaser; (*ii*) the two *zemindars*, and (*iii*) the persons alleged to be joint tenants in the *putni*. During the pendency of the appeal in this Court, Sarat Chandra Ghose, the executor to the estate of Saraswati Debi, one of the *zemindar* respondents, died on the 10th June 1916. The plaintiffs, it is now asserted, were not aware of this circumstance and the auction-purchaser as also the other *zemindar* respondent were equally ignorant of the event. The result was that on the 31st January 1917 when the appeal was taken up for final disposal in this Court, the hearing proceeded on the assumption that all the parties were properly represented on the record. The appeal was heard, the decree of the lower Appellate Court was set aside and the case was remanded for reconsideration. When the case went before the District Judge, he was informed on the 20th December 1917 that one of the *zemindar* defendants had died during the pendency of the appeal in the High Court and that the representative-in-interest of that *zemindar* was not bound by the order or remand made by the High Court. The position consequently was that the District Judge was called upon to hear an appeal which had been preferred by the two *zemindars* defendants, one of whom was bound by the order of remand while the other was dead and not affected by that order. The District Judge held, in these circumstances, that the appeal could not be re-heard by him. The view he adopted was that the decree of the lower Appellate Court as made by his predecessor had been vacated by the High Court with regard to one of the *zemindar* defendants, but not with regard to the other. He, consequently, declined to hear the appeal and added that the decree made by the lower Appellate Court on the previous occasion stood restored in its entirety. This view, it has been urged, is supported by the decision of this Court in the case of *Kali Dayal* v. *Nagendra Nath* (1).

On the present appeal the plaintiffs have contended that if, in the opinion of the District Judge, the order of the High

(1) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44.

SHYAM LAL v. RADHE SHYAM.

Court, made in ignorance of the real facts, could not be carried out, the proper course for him to follow was to intimate the true position to this Court so as to unable this Court to determine what action should be taken in the matter. On the other hand, the *zemindar* repsponent who was a party to the appeal on the previous occasion and is bound by the order made therein, has contended that the order of the High Court must be deemed to have been made without jurisdiction and that the District Judge was competent to treat it as a nullity. We are of opinion that this view cannot possibly be supported.

The fact of the death of one of the respondents to the appeal did not destroy the jurisdiction of the Court. If this Court had been apprised of the true state of facts, no doubt, the Court would have made an order of a different description. That very circumstance shows that the jurisdiction of this Court was not ousted by reason of the death of one of the respondents. We are of opinion that the District Judge should not have regarded the order of this Court as if it were null or void, but should have reported the matter to this Court for such action as might be deemed necessary in the events which had happened.

The result is that this appeal is allowed and the decree of the District Judge set aside. The case is remanded and re-called to the file of this Court so that it may be placed before Richardson, J., who is the only member, now in this Court of the Division Bench which decided the appeal on the previous occasion. It is not proper for us to consider what order should be ultimately passed in this matter. The effect of our order is to place the parties in the position which they would have occupied if the District Judge on discovery of true facts had sent back the case to this Court. There will be no order for costs.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 42 OF 1923.

March 27, 1923.

Present :—Mr. Kanhaya Lal, J. C.

SHYAM LAL—OBJECTOR—APPLICANT

versus

RADHE SHYAM—DECREE-HOLDER—AND ANOTHER—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Objection to attachment on ground of alleged sale—Sale found to be not genuine—Objection disallowed—Revision, whether competent.

Certain house property having been attached in execution of a decree, an objection was filed that the property had been purchased by the objector long before the passing of the decree in execution of which it was attached. The Court having found that the *bona fides* of the alleged sale were doubtful and that the judgment-debtor was still in possession disallowed the objection. The objector put in an application for revision of the order :

Held, that there was no reason for interferring in revision with the order. [p. 547, col. 2.]

Application for revision of the order of the Munsif, Bilgram, dated 10th February 1923.

FACTS appear from the following order of the Munsif Bilgram:—

"Radhe Shyam (opposite party No. 1) obtained a simple money decree against Lalu (opposite party No. 2) on 7th November 1921. The decree was passed in District Farrukhabad. On 21st December 1921 the decree-holder moved the Farrukhabad Court to have the decree transferred for execution to this Court. On 22nd December 1921 the order of transfer was made in his favour. On 8th April 1922 he moved this Court to have his decree executed. The application for execution sought the attachment of two houses belonging to the judgment-debtor at Sandi. The attachment of these houses was made on 24/29th April 1922. On 11th May 1922 Shyam Lal objected to the attachment on the ground that the attached houses had been sold off to him on 23rd August 1921, *i.e.*, before the passing of the decree. The decree-holder contests the objection. He says that if there is any deed in existence it is fictitious and fraudulent and void in view of the pro-

Chattopadhya v. *Umatara Deby* (1) and *Rajani Kant Nag* v. *Jageshwar Singh* (2). The decree under appeal in each of these cases has decided the question, not of the amount of cesses annually payable but of the liability of the defendant to pay cess when the plaintiff has not published the notices contemplated by the Bengal Cess Act. We are consequently of opinion, that the preliminary objection must prevail in each case and that the appeals should be dismissed, with costs where the respondent has entered appearance.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 49 OF 1921.
February 6, 1923.

Present:—Mr. Dalal, A. J. C., and Mr Simpson, A. J. C.

FATEH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGANNATH BAKHSH SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXIII, r. 1—Dismissal of suit for declaration—Permission given suo motu to file fresh suit—Subsequent suit for possession, whether maintainable—Res judicata—Relief, how determined—Change of events after institution of suit, effect of.

In dismissing a suit for a declaration that a certain deed of gift was void, the Court went on to remark *suo motu* that plaintiffs were given liberty to file a fresh suit for possession. Such a suit was subsequently filed wherein the plaintiffs set up a custom contrary to the general law of reversion:

Held, that the remark of the Court did not amount to an order under O. XXIII, r. 1, of the Civil Procedure Code, and did not confer any right on the plaintiffs which they did not otherwise possess, or prevent the application of section 11, Explanation 4, to the question of custom which the plaintiff attempted to raise in the present suit. [p. 552, cols. 1 & 2.]

The general rule is that relief will be granted according to the state of things at the date of institution. The Court is not precluded from granting the plaintiff a declaration because that relief has ceased to be appropriate owing to events occurring after institution. [p. 551, col. 1.]

Ram Adhar v. *Ram Shankar*, 26 A. 215; A. W. N. (1903) 236, followed.

Appeal from the decree of the Subordinate Judge Bahraich, dated 14th July 1921.

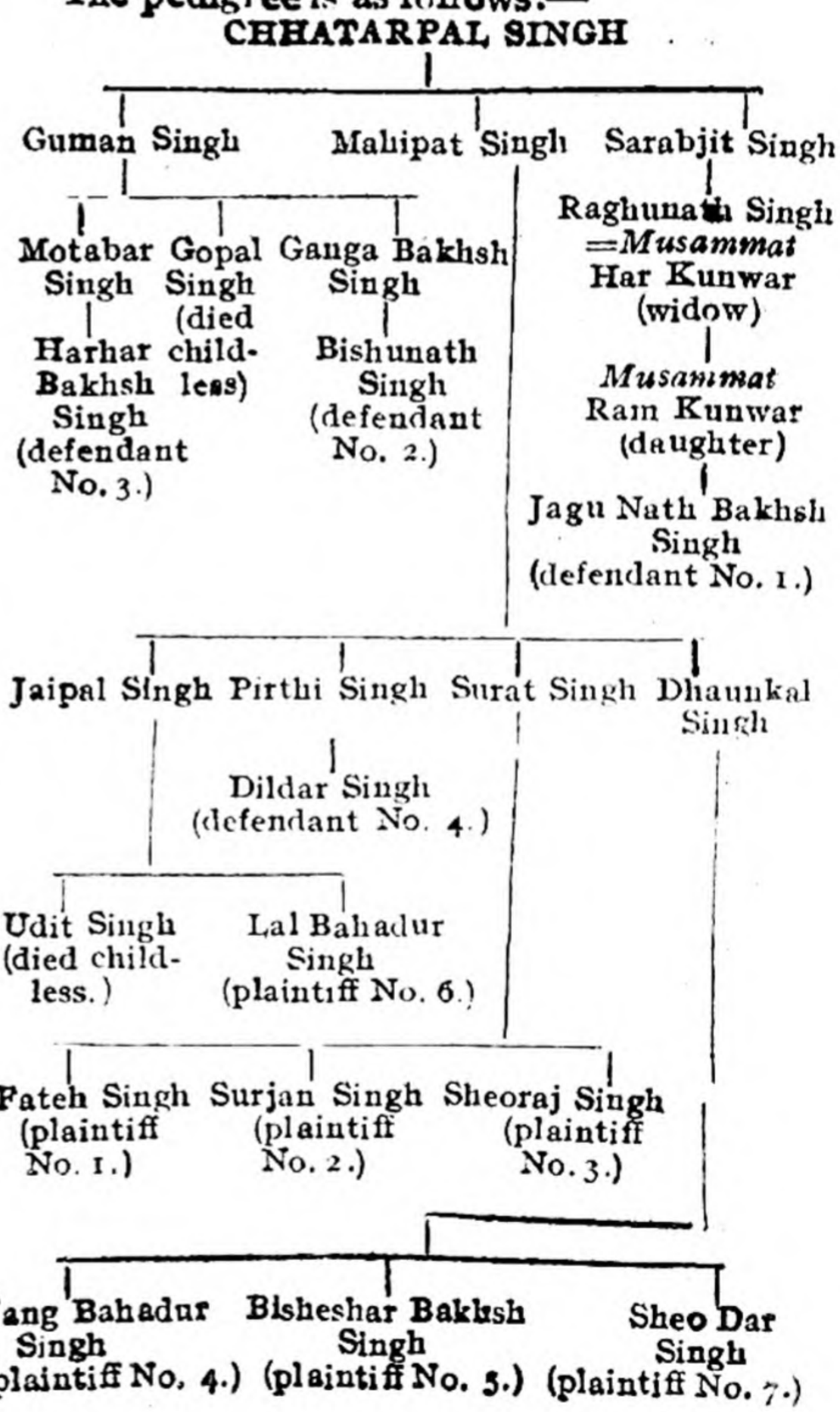
Mr. *Aditya Prasad*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for Respondent No. 1.

Messrs. *A. P. Sen* and *Basdeo Lal*, for Respondent No. 2.

JUDGMENT.—This is a fresh appeal by the plaintiffs. Their suit was dismissed on a finding of *res judicata*. The only question for decision in this appeal is, whether the *res judicata* exists or not.

The pedigree is as follows:—



The last male owner was Raghunath Singh. He died in January 1892 and his widow, *Musammat* Har Kunwar, got possession on 2nd June 1908. She executed

BIRENDRA KISHORE v. TRAILAKHYA NATH ROY.

A suit for the recovery of cess was dismissed by a Subordinate Judge on the ground that the plaintiff was not entitled to recover cess from the tenant defendants as he had not served the notices contemplated by section 54 of the Bengal Cess Act. The amount claimed did not exceed Rs. 100:

Held, that sections 3 (5) and 153 of the Bengal Tenancy Act, read with section 47 of the Bengal Cess Act, rendered an appeal incompetent in the case.

Watson & Co. v. *Sreekristo Bhumick*, 21 C. 132; 10 Ind. Dec. (N. S.) 720, *Debendra Prasad Ghose* v. *Paresh Nath Mitter*, 4 C. L. J. 119, distinguished.

Mohesh Chunder Chuttopadhya v. *Umatara Deby*, 16 C. 638; 8 Ind. Dec. (N. S.) 421, *Rajani Kant Nag* v. *Jageshwar Singh*, 20 C. 254; 10 Ind. Dec. (N. S.) 172, followed.

Babus *Mohendra Nath Ray, Gobinda Chandra Dey Roy, Romes Chandra Sen* and *Birendra Chandra Das*, for the Appellant.

Babu *Sasadhar Roy (Sr.)*, for the Respondents in Appeals Nos. 1084, 1085 and 1090.

Babu *Upendra Kumar Roy*, for the Respondents in Appeals Nos. 1085, 1088 and 1103.

Babu *Biraj Mohan Majumdar*, for the Respondents in Appeals Nos. 1093 and 1115.

Babu *Jotir Mohan Bhattacharjee*, for the Respondents in Appeals Nos. 1110 and 1115.

JUDGMENT.—These forty appeals arise out of as many suits for recovery of cesses due to the plaintiff on account of rent-free lands within his estate. The Subordinate Judge has dismissed the suits on the ground that the plaintiff was not entitled to realise cesses from the tenant defendants, as he had not served the notices contemplated by section 54 of the Bengal Cess Act. The contention of the appellant is that this view is erroneous in law.

A preliminary objection has been taken on behalf of the respondents on the ground that the appeals are incompetent under section 153, Bengal Tenancy Act. That section bars a second appeal in suits for rent where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, unless a question of a special character has been decided by the decree under appeal. The contention of the respondents is that this provision, read with section 47 of the Cess Act, renders all the appeals incompetent. In support of this position they have placed reliance upon the decisions in *Mohesh Chunder Chuttopadhya* v. *Umatara Dely* (1), and *Rajani Kant Nag* v. *Jageshwar Singh* (2). On behalf of the appellant; reliance has been placed, on the other hand, upon the decision in *Watson & Co.* v. *Sreekristo Bhumick* (3) and *Debendra Prosad Ghose* v. *Paresh Nath Mitter* (4). In our opinion the cases mentioned on behalf of the appellants are distinguishable. The appeals in *Mohesh Chunder Chuttopadhya* v. *Umatara Deby* (1) and *Rajani Kant Nag* v. *Jageshwar Singh* (2) arose out of suits instituted for recovery of cess only. There was no question in either case as to the amount of cess annually payable, but there was a question as to the liability to pay cess, and it was ruled that the appeal weas barred under section 153 inasmuch as the decree which was assailed had not decided a question relating to the amount of cess annually payable by the tenant. On the other hand, the decisions in *Watson & Co.* v. *Sreekristo Bhumick* (3) and *Debendra Prosad Ghose* v. *Paresh Nath Mitter* (4) were pronounced in suits instituted for the recovery of rent and cess. There was no question as to the amount of cess annually payable, but there was a question as to the liability to pay cesses. It is plain that the effect of the decision of the question of liability to pay cess would be to affect the amount of "rent" annually payable by the tenant, if the word 'rent is interpreted to mean not only rent properly so called but also cesses recoverable as rent; see section 3 (5) of the Bengal Tenancy Act, and section 47 of the Cess Act. The appeals now before us arise out of suits instituted for the recovery of cesses only. Consequently the present appeals are governed, not by the decisions in *Debendra Prosad Ghose* v. *Paresh Nath Mitter* (4) and *Watson & Co.* v. *Sreekristo Bhumick* (3) but by the decision in *Mohesh Chunder*

(1) 16 C. 638; 8 Ind. Dec. (N. S.) 421.
(2) 20 C. 254; 10 Ind. Dec. (N. S.) 172.
(3) 21 C. 132; 10 Ind. Dec. (N. S.) 720.
(4) 4 C. L. J. 119.

Chattopadhya v. *Umatara Deby* (1) and *Rajani Kant Nag* v. *Jageshwar Singh* (2). The decree under appeal in each of these cases has decided the question, not of the amount of cesses annually payable but of the liability of the defendant to pay cess when the plaintiff has not published the notices contemplated by the Bengal Cess Act. We are consequently of opinion, that the preliminary objection must prevail in each case and that the appeals should be dismissed, with costs where the respondent has entered appearance.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 49 OF 1921.
February 6, 1922.

Present:—Mr. Dalal, A. J. C., and Mr Simpson, A. J. C.

FATEH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGANNATH BAKHSH SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXIII, r. 1—Dismissal of suit for declaration—Permission given suo motu to file fresh suit—Subsequent suit for possession, whether maintainable—Res judicata—Relief, how determined—Change of events after institution of suit, effect of.

In dismissing a suit for a declaration that a certain deed of gift was void, the Court went on to remark *suo motu* that plaintiffs were given liberty to file a fresh suit for possession. Such a suit was subsequently filed wherein the plaintiffs set up a custom contrary to the general law of reversion:

Held, that the remark of the Court did not amount to an order under O. XXIII, r. 1, of the Civil Procedure Code, and did not confer any right on the plaintiffs which they did not otherwise possess, or prevent the application of section 11, Explanation 4, to the question of custom which the plaintiff attempted to raise in the present suit. [p. 552, cols. 1 & 2.]

The general rule is that relief will be granted according to the state of things at the date of institution. The Court is not precluded from granting the plaintiff a declaration because that relief has ceased to be appropriate owing to events occurring after institution. [p. 551, col. 1.]

Ram Adhar v. *Ram Shankar*, 26 A. 215; A. W. N. (1903) 236, followed.

Appeal from the decree of the Subordinate Judge Bahraich, dated 14th July 1921.

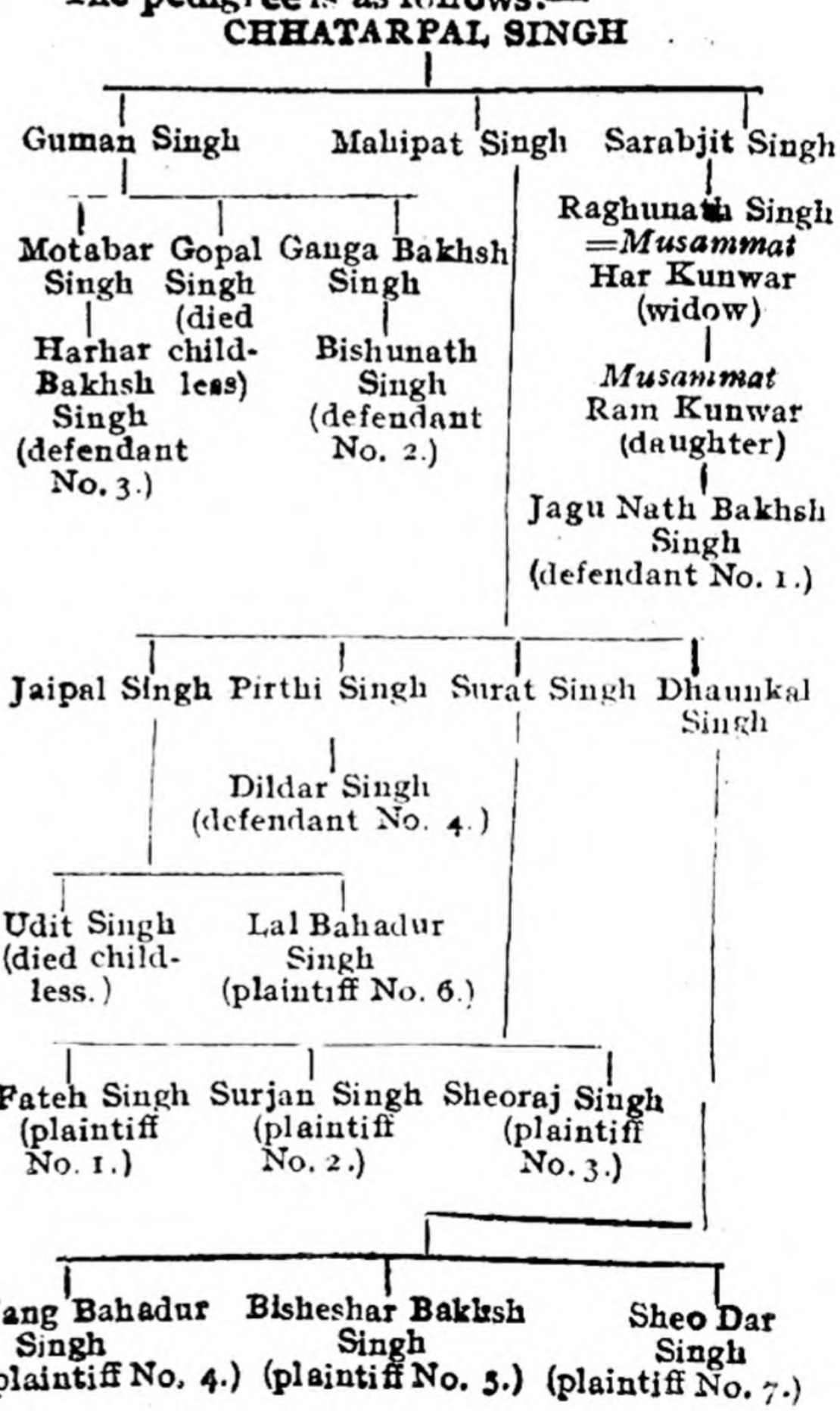
Mr. *Aditya Prasad*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for Respondent No. 1.

Messrs. *A. P. Sen* and *Basdeo Lal*, for Respondent No. 2.

JUDGMENT.—This is a fresh appeal by the plaintiffs. Their suit was dismissed on a finding of *res judicata*. The only question for decision in this appeal is, whether the *res judicata* exists or not.

The pedigree is as follows:—



The last male owner was Raghunath Singh. He died in January 1892 and his widow, *Musammat* Har Kunwar, got possession on 2nd June 1908. She executed

a deed of gift of the entire property in favour of her daughter's son, Jagu Nath Bakhsh Singh, defendant No. 1. The former suit which is claimed to be *res judicata* was brought by all the present plaintiffs and with them were Harbar Baksh Singh who is now arrayed as defendant No. 3 and Udit Singh, who has since died childless. The defendants were *Musammat* Ram Kunwar, who died during the pendency of the suit, Jagu Nath Bakhsh Singh, who is now arrayed as defendant No. 1, Ganga Bakhsh Singh, now deceased, whose son Bishunnath Singh defendant No. 2, and Dildar Singh, who is now defendant No. 4. In both the suits Dildar Singh is a *pro forma* defendant, arrayed as such because he refused to join the plaintiffs. The array of parties, therefore, is identical in the two suits. This fact is admitted.

The pedigree itself shows that the nearest reversioner by Hindu Law was Ganga Baksh Singh. The plaintiffs, however, set up a custom under which all branches of the family inherit *per stirpes*, so that plaintiffs, along with defendant No. 4, would be entitled to half of the property of Raghunath Singh while Harbar Bakhsh Singh and Bishunath Singh would get the other half. That is, the present suit is based on inheritance as reversioners, the reversion having opened on the death of *Musammat* Har Kunwar which took place on 10th February 1909. This suit was filed on 8th March 1921 just within limitation.

The former suit was for declaration that the deed of gift by the widow in favour of daughter's son was void. The custom ought to have been pleaded in that suit, because, if there was no custom the plaintiffs were only remote reversioners and a remote reversioner cannot sue in the presence of the next reversioner. The remarks in Mayne's Hindu Law, 8th Edition, on page 904, with the case cited therein, are sufficient authority for this proposition. I do not know why the plaintiffs did not allege the custom in their plaint. They gave the pedigree correctly with the result that the plaint as originally filed did not give any right to sue on the part of the plaintiffs. A written statement was filed on behalf of the widow and her daughter's son. It is not in the printed book but the plaintiffs' replication is printed, from which it appears that the point was taken by defendant No. 1 and defendant No. 2. Ganga Bakhsh Singh himself filed a written statement in which he distinctly raised the point. In the replication the plaintiffs still refrained from setting up the custom although they admitted that Ganga Bakhsh Singh was nearer. What they said was in paragraph 158, replication, page 11, part III:—

"As stated by defendants Nos. 1 and 2 Ganga Baksh Singh is a nearer heir than the plaintiffs: even then the plaintiffs are entitled to maintain this suit on account of Ganga Bakhsh Singh's denial and his not joining the suit, owing to his indifference towards the preservation of his rights, having regard to his views in the written statement, and on account of his colluding with the defendants Nos. 1 and 2 and the defendants Nos. 1 and 2 cannot derive any benefit by setting up a *jus tertii* (*sic*)." That is to say, they preferred to rest their case not upon custom but upon Hindu Law combined with collusion on the part of defendant No. 2.

It has been argued that they were entitled to do this; that the litigation was not one in which it was necessary to introduce the custom, because the deed of gift could be set aside, custom or no custom. We cannot accede to this proposition. If the custom existed, the plaintiffs had a right to sue independently of what Ganga Bakhsh's conduct might have been. Certainly, they were entitled to base their suit upon collusion, but with the result that they would be precluded from subsequently alleging the custom against the same parties. It would be plainly intolerable that as soon as they had failed on a basis of collusion they should be allowed to bring a fresh suit setting up a custom.

If the matter had stood there the case would have presented no difficulty. But during the pendency of the suit and before any evidence had been taken the widow died. Thereupon the plaintiffs made an application to be allowed to amend their plaint. They said that owing to her death they had become entitled to institute a suit for possession and that in order to show that right it was now necessary for them to plead the custom. They also asked to

FATEH SINGH v. JAGANNANH BAKHSH SINGH.

be allowed to sue for possession. The learned Subordinate Judge refused to allow the amendment of the plaint. The order refusing the amendment is of itself the judgment in the suit. He said that the plaintiffs ought to have pleaded the custom from the first, and here we agree with him. He refused to allow the amendment of the plaint. He then said: "There remains the question as to whether plaintiffs be permitted to add the prayer for possession. It is admitted by the plaintiffs' Pleader that when the plea of custom has not been permitted to be embodied in the plaint their suit must fail. It is, therefore, unnecessary to grant this prayer. The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession.

"It is admitted after disposal of this application disallowing the amendment, that the suit cannot proceed. I, therefore, order that the plaintiffs being one degree remoter to the last male owner than the defendant No. 3, they have no cause of action. The suit must, therefore, be dismissed."

It is this part of his judgment which creates the difficulty. It is necessary to construe it with some care. The words "Their suit must fail" refer to the suit for possession. If there was no custom the plaintiffs would not be entitled to possession, the reversion having opened during the lifetime of Ganga Bakhsh Singh the nearer reversioner. For this reason the plaintiffs were not allowed to convert their suit into one for possession.

I omit for the present the next two sentences which are the crux of the case.

Then comes the sentence "It is admitted after the disposal of this application disallowing the amendment, that the suit cannot proceed." It is not certain why the suit could not proceed, or what it is that the plaintiffs were admitting. The appellants' Pleader says that they were merely admitting that the Court could not be expected, in its discretion, to grant a declaration to a party who could sue for possession. This is very doubtful law. The general rule is that relief will be granted according to the state of things at the date of institution. We do not think that the Court is precluded from granting the plaintiffs a declaration because that relief has ceased to be appropriate owing to events occurring after institution *Ram Adhar* v. *Ram Shankar* (1) The admission would, therefore, appear to be "If we are precluded from proving the custom we must fail because we cannot prove collusion." The concluding order agrees with this. It proceeds on the ground that the plaintiffs have no cause of action because they are one degree remoter than the defendant No. 3.

It remains to consider the effect of the two sentences: "The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession." We agree with the Court of trial that these words have no legal force. It was argeed for the appellants that they amounted to an order under O. XXIII, r. 1. This is not correct. The procedure under that Order is that the plaintiff withdraws his suit. The suit is not dismissed at all and the act is the act of the plaintiff, not of the Court. In this case there was no application and no withdrawal. The suit was dismissed. But there remains the question whether plaintiffs were entitled to construe these words to mean that, although they had not been allowed to add a prayer for possession to their plaint or to plead the custom in that suit, it was nevertheless the Judge's meaning that they were free to bring a second suit for possession and in that second suit to set up their custom. It is certainly difficult to put any other construction on the words. The Court did not only say "I leave them to the liberty of filing a fresh suit for possession" but also said "The death of the lady has given the plaintiffs a cause of action for possession." Now it had done no such thing unless the custom existed. The learned Judge had himself pointed out that the suit for declaration and the suit for possession were on the same footing on this point. He said that the custom ought to have been set forth in the plaintiffs' replication. "It was as essential to the dismissal of the cause of action in a declaratory suit as it would be in a suit for possession." It is probable to construe

(1) 26 A. 215; A. W. N. (1903) 236.

as meaning: "The death of the lady has given the plaintiffs a fresh cause of action for possession (provided they succeed in proving their custom but they will be precluded by the principle of *res judicata* from doing this). I leave them to the liberty of filing a fresh suit for possession (which must necessarily fail)."

Having ascertained the meaning of these remarks it remains to be decided whether they conferred a right on the plaintiffs which they did not otherwise possess: Our decision is that, in the circumstances of the present case, they did not. They were not a decision between parties at all. The first question before the learned Subordinate Judge was whether he was or was not to grant a declaration to the plaintiffs in that suit. Then came the second question whether he ought to allow the plaintiffs to add another relief of possession. He decided that they could not be allowed to amend their plaint so as to ask for this relief. He had no power to decide whether they could or could not bring a fresh suit.

We do not believe any injustice is being done to the plaintiffs. The former suit was decided on 15th March 1909. Ganga Bakhsh Singh promptly brought an action against Jagu Nath Bakhsh Singh for the whole of the property. The parties compromised. Ganga Bakhsh Singh took half and Jagu Nath Bakhsh Singh took the other half. That compromise is dated 15th April 1910 and the decree in terms of the compromise was passed on 19th April 1910. The plaintiffs allowed this state of things to continue until almost the last day of limitation when they brought the present suit. This raises a doubt whether they were actually misled by these remarks in the judgment.

There seems to be no reason to disturb the decree under appeal. We agree with the Court of Trial that the case would have presented no difficulty were it not for these two sentences in the judgment. We agree that these two sentences did not amount to an order under O. XXIII, r. 1, and we agree that, in the circumstances, they did not confer any right on the plaintiffs which they did not otherwise possess, or prevent the application of section 11, Explanation 4, to the question of custom which the plaintiffs attempted to raise in the present suit. The appeal is dismissed with costs.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 563 OF 1920.

April 25, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

GIRIS CHANDRA BHATTACHARYYA AND ANOTHER—PLAINTIFFS-APPELLANTS

versus

BHABATARAN SHAKARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 182—Landlord and tenant—Part of homestead used for keeping cattle, nature of—Termination of tenancy—Notice to quit.

Where a settled *raiyat* uses a piece of land adjacent to his homestead for keeping cattle used for the purposes of agriculture, the land so used is either governed by section 182 of the Bengal Tenancy Act, or is used for purposes of agriculture. In either case the tenancy is not governed by the provisions of the Transfer of Property Act and cannot be validly terminated by a notice to quit.

Dina Nath Nag v. *Sashi Mohan Dey Tarafdar*, 31 Ind. Cas. 16; 22 C. L. J. 219; 20 C. W. N. 550, followed.

Appeal against a decree of the District Judge, Murshidabad, dated the 3rd December 1919, reversing that of the Munsif, Kandi, dated the 22nd July 1918.

Babus *Surendra Chandra Sen* and *Hemendra Chandra Sen*, for the Appellants.

Babus *Tarak Chunder Chuckerbutty* and *Prafulla Chunder Chukerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for ejectment. The plaintiffs served a notice upon the defendant to quit at the end of the then current Bengali year. Notwithstanding this, the defendant remained in occupation. The case for the defend-

ant is that the incidents of the disputed land are governed by the provisions of the Bengal Tenancy Act, and that consequently he is not liable to be ejected. The primary Court held that the land was not agricultural in character and was governed by the provisions of the Transfer of Property Act. In this view the Court of first instance decreed the suit, as the tenancy was capable of termination and had been terminated by a legal notice to quit. On appeal the District Judge has dismissed the suit as, in his opinion, the tenancy was governed by the Bengal Tenancy Act and could not be terminated. We are of opinion that the view taken by the District Judge is manifestly right.

The plaintiffs are on the horns of a dilemma. The defendant has been found to be a settled *raiyat* of the village where the disputed land is situated. He has also been found to have lands under cultivation; he gets these lands cultivated by hired labourers, whom he supplies with his own cattle and ploughs. He has also his granary and *khamar* within his own homestead. In these circumstances, it is plain that as the defendant is a *raiyat*, the disputed land is governed either by section 182 or by the other provisions of the Bengal Tenancy Act. Whichever view is adopted, the plaintiffs are out of Court.

No doubt, as the appellant has contended, it cannot be maintained that, because a settled *raiyat* takes settlement of a piece of land adjacent to his homestead though for purposes not agricultural, the tenancy of the new plot of land is governed by section 182 of the Bengal Tenancy Act. Here, however, the land is used either as a homestead by a *raiyat* or for agricultural purposes. As the District Judge has correctly pointed out a *raiyat* often keeps his cattle on a part of his homestead, and this makes section 182 applicable. On the other hand, if we hold that this land does not form a part of the homestead of the *raiyat*, it is manifestly used for agricultural purposes, because the *raiyat* keeps here cattle used for the purpose of agriculture. This view is in accord with that adopted in the case of *Dina Nath Nag* v. *Sashi Mohan Dey Tarafdar* (1). We hold, accordingly, that the tenancy of the defendant in respect of the disputed land was not terminable and had not been terminated by the notice to quit.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 31 Ind. Cas. 16; 22 C. L. J. 219; 20 C. W. N. 550.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 24 OF 1923.
March 29, 1923.
Present:—Mr. Dalal, A. J. C.
ASHIQ ALI—PLAINTIFF—APPLICANT
versus
GHULAM SARWAR—DEFENDANT—OPOSITE PARTY.

Oudh Rent Act (XXII of 1886), s. 108 (10)—Jurisdiction of Civil and Revenue Courts—Suit to recover occupancy holding on basis of title, whether cognisable by Civil or Revenue Courts.

Section 108 (10) of the Oudh Rent Act has no application to a suit for the recovery of an occupancy tenure based on title, where the plaintiff has not been in actual occupation or possession of the tenure. Such a suit is not, therefore, cognizable by a Revenue Court. [p. 554, col. 2.]

Raghubar Dayal v. *Chandan*, 10 C. C. 23. *Chandrika Bakhsh Singh* v. *Raghunath Kunwar*, 18 Ind Cas. 284; 16 O. C. 105, followed.

Jagra v. *Kalpi*, 33 Ind. Cas. 270; 2 O. L. J. 750, dissented from.

Pahalwan Singh v. *Strupa Kuar*, 2 A. L. J. 471; A. W. N. (1905) 178, referred to.

Revision against an order of the Subordinate Judge, Bara Banki, dated the 3rd November 1922, confirming that of the Munsif, Fatehpur, dated the 27th May 1922.

Mr. *Basudeo Lal*, for the Applicant.
Mr. *M. Wasim*, for the Opposite Party.

JUDGMENT.—The plaintiff who held a non-transferable and heritable occupancy tenure of agricultural land sued the defendant for the recovery of possession of the land. The defendant happened to be the proprietor of the land. The plaint allegations were that the plaintiff had not sufficient means to obtain by suit

ASHIQ ALI v. GHULAM SARWAR.

the estate of a deceased person, one Wahid Ali, and consequently sold half the estate to the defendant, to finance the necessary litigation, under a sale-deed, dated 11th March 1919. The defendant brought a suit according to the agreement but subsequently withdrew from it and did not spend any money in prosecution thereof. The suit was finally compromised and the plaintiff was granted a decree for possession of plots numbers 23/2, 79/1 and 17/2. One of these plots No. 79/1 the plaintiff sub-let to one Debi Chamar and the rent was assigned to the defendant in lieu of interest payable on hypothecation bond dated 26th August 1918 in favour of the defendant. Subsequently, the plaintiff ejected Debi Chamar privately without process of law, and before the plaintiff could get possession the defendant took possession of the land on the strength of the above-mentioned sale-deed. This unlawful possession of the defendant was taken to be the cause of action to the plaintiff for a civil suit.

The Munsif of Fatehpur in whose Court the suit was instituted held that it was triable by a Revenue Court under section 108 (10) of the Oudh Rent Act and returned the plaint to the plaintiff for presentation to the proper Court. On appeal to the Subordinate Judge of Bara Banki exercising appellate jurisdiction the First Court's order was upheld. The plaintiff has come here in revision under section 115, Civil Procedure Code, on the ground that the First Court refused to exercise a jurisdiction vested in it.

Both the Subordinate Courts have treated a ruling of this Court reported in the authorised Law Reports with scant courtesy. The ruling, *Chandrika Bakhsh Singh* v. *Raghunath Kunwar* (1), was mentioned in the Trial Court's judgment; so the Subordinate Judge must have been aware of it. He has, however, made no reference to it in his judgment. The Trial Court has preferred to follow a judgment of the Board of Revenue, contrary to the respect due from that Court to this Court of highest jurisdiction in Oudh.

I see no reason to differ from (if I may be permitted to say so) the well reasoned judgment of the present learned Judicial Commissioner of Oudh. He has drawn a distinction between "occupancy" and "possession" as the two words are used in the Oudh Rent Act. This is further justified by the amendment of the Oudh Rent Act under Act IV of 1921 made subsequent to the learned Judge's decision. An addition is made in clause (10) to include suits by persons in whose favour an ex-proprietary tenancy has arisen under section 7-A of the Act. As regards those suits the word possession is used because a proprietor may not be in occupancy of the *sir* land of which he becomes an ex-proprietor under the conditions described in section 7-A. Clause (10) (*b*) has been added to make suits for occupancy of a holding by a person claiming such occupancy as the heir of a deceased tenant of the holding cognisable by a Revenue Court. This would not have been necessary if occupancy and possession had been considered by the Legislature to be synonymous terms and clause (10) had not been confined to suits by persons in actual cultivation of the land. A Bench of this Court held in the case reported as *Raghubar Dayal* v. *Chandan* (2) that a person must have been in occupation of the land at the time of the ejectment to give jurisdiction to the Revenue Court to try a suit by him for the recovery of occupancy of the land. On this ground a suit for possession by the heirs of an occupancy tenant was held to be triable by the Civil Court. The Legislature has now enacted that such a suit shall be tried by the Revenue Court but has maintained the word occupancy in clause (10) and not substituted the word possession in its place. The Board's decision reported as *Jagra* v. *Kalpi* (3) makes no attempt to meet the arguments of the learned Judicial Commissioner. It merely enunciates a contrary opinion without any reasons in support thereof. The reasoning of this Court in the case reported in 10 and 16 Oudh Cases is similar. Cases capable of summary adjudication are made cognizable by the Revenue Court while those

(1) 18 Ind. Cas. 284; 16 O. C. 105.

(2) 10 O. C. 23.

(3) 33 Ind. Cas. 270; 2 O. L. J. 750.

requiring an elaborate enquiry into questions of title, its origin and devolution are left to the Civil Court. When a person has been in actual cultivating possession it is easy enough to determine his right, but when he is not in occupancy and sues on the basis of his title a long and careful enquiry is necessary. In the present case the questions at issue are of an involved nature as to the effect of the contracts between the parties. The plaint discloses the fact that the plaintiff obtained his title on 14th July 1919 and has not been in occupation since. To such a case the provisions of section 108 (10) of the Oudh Rent Act do not apply.

In *Pahalwan Singh* v. *Satrupa Kuar* (4) it was held in the Province of Agra that the dispossession of a sub-tenant amounted to the dispossession of a tenant and in such a case the tenant must sue in the Revenue Court for possession. The terms, however, of section 79 of the Tenancy Act are different from those of section 108 (10) of the Oudh Rent Act. Under the Tenancy Act revenue suits are not confined to the recovery of occupancy, but any tenant ejected otherwise than in accordance with the provisions of the Tenancy Act has to sue in the Revenue Court for recovery of the possession of the holding. Possibly the distinction is due to the fact that, while clause 10 of section 108 of the Oudh Rent Act includes the case of under-proprietors, section 79 of the Tenancy Act does not. It is likely that an investigation into the origin and devolution of under-proprietary right, necessary in a case where an under-proprietor sues on the basis of his title, was thought to be beyond the competence of Revenue Courts where the exercise of jurisdiction is more or less summary.

I set aside the decrees of the two lower Courts and remand the suit to the Trial Court of the Munsif of Fatehpur for trial on the merits. Costs here and heretofore shall abide the result.

Z. K. *Case remanded.*

(4) 2 A. L. J. 471; A. W. N. (1905) 178.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2048 OF 1920.

July 11, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

SARADAKRIPA LALA—PLAINTIFF—APPELLANT

versus

BEPIN CHANDRA PAL, AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 10, 12—Landlord and tenant—Lease, permanent and heritable—Covenant restrictive of transfer, validity of—Covenant running with land—Itmam, *meaning of.*

A tenancy described as an *itmam* may be assumed to be a permanent, heritable and transferable tenure. [p. 556, col. 1.]

Jogesh Chandra Roy v. *Makbul Ali*, 60 Ind. Cas. 984; 47 C. 979; 25 C. W. N. 857, followed.

As a general principle a covenant is said to run with the land if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him. [p. 556, col. 2.]

Williams v. *Earle*, (1868) 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041, *McEacharn* v. *Colton*, (1902) A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594, *West* v. *Dobb*, (1869) 4 Q. B. 634; 9 B. & S. 755; 38 L. J. Q. B. 289; 20 L. T. 737; 17 W. R. 879, relied upon.

A lease of a permanent, heritable and transferable tenancy, contained a covenant to the effect that if the tenant transferred the property he would pay to the landlord, out of the purchase-money in his hands, one-fourth as *nazar*, and would obtain registration of the name of the transferee, and that if he failed to do so, the transfer would be invalid and the tenant would continue to be liable for the rent:

Held, (1) that having regard to the provisions of sections 10 and 12 of the Transfer of Property Act, the covenant was valid; [p. 556, col. 1.]

Abhiram Goswami v. *Shyama Charan Nandi* 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.), followed.

(2) that the covenant was one running with the land and was binding upon all holders of the tenancy during the entire period of the subsistence of the lease. [p. 556, col. 2.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 25th May 1920, modifying that of the Munsif, Cossim Bazar, dated the 25th April 1919.

Babus *Biraj Mohan Majumdar* and *Chandra Sekhar Sen*, for the Appellant.

Babu *Narendra Kumar Das*, for the Respondent.

SARADAKRIPA LALA v. BEPIN CHANDRA PAL.

JUDGMENT.—This is an appeal by the plaintiff in a suit for rent instituted against two defendants. The Court of first instance decreed the claim against the first defendant alone. Upon appeal the lower Appellate Court has made the second defendant alone liable for arrears. On the present appeal, the plaintiff has contended that the first defendant also is liable for the rent due.

The tenancy was created on the 23rd March 1908 when a *kabuliyat* was executed by the second defendant in favour of the plaintiff. The tenancy is described as an *ilmam* and consequently, on the authority of the decision in *Jogesh Chandra Roy* v. *Makbul Ali* (1), it may be assumed, that the tenancy was a permanent, heritable and transferable tenure. The lease contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one-fourth as *nazar*, and would obtain registration of the name of the transferee. The covenant further provided that f this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. The provisions of sections 10 and 12 of the Transfer of Property Act make it abundantly clear that a restrictive covenant of this description is valid, when inserted in a lease between a landlord and his tenant. Reference may in this connection be made to the decision of the Judicial Committee in *Abhiram Goswami* v. *Shyama Charan Nandi* (2), which shows, that a lessor, even when the lease is a permanent one, may, by apt words, prohibit alienation by the lessee and make a breach of this condition a condition for forfeiture of the lessee's interest. We must consequently proceed on the assumption that this covenant was valid and operative as between the landlord and the tenant.

After the grant of the lease, the lessee executed a mortgage in favour of the first defendant. Before the loan had been repaid, the lessee defaulted with the result that the landlord obtained a decree for arrears of rent and brought the tenure to sale. At the execution sale, the first defendant, the mortgagee, became the purchaser. On the 2nd April 1917, the first defendant transferred the property purchased by him to the second defendant. On the 24th April 1918 the plaintiff instituted this suit for recovery of arrears of rent due. The first defendant urged that he was no longer liable for the rent as he had transferred his interest in the tenancy to the second defendant. The plaintiff contended that the transfer was collusive. The Courts below have arrived at divergent conclusions. The Trial Court held that the transfer was not genuine while the Court of Appeal below has held that the transfer was genuine. We must consequently determine the liabilities of the parties on the assumption that the transaction was genuine.

The first question which requires consideration is, whether the covenant in the lease was binding between the landlord and the original tenant only, or, whether it was a covenant running with the land and binding upon all holders of the tenancy during the entire period of the subsistence of the lease. In our opinion, the covenant is a covenant running with the land. As a general principle, a covenant is deemed to run with the land, if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him. It has been ruled that an express covenant not to transfer the land without the consent of the landlord is a covenant which sufficiently attaches, and concerns, the demised premises, and consequently is a covenant running with the land; *Williams* v. *Earle* (3), *McEacharn* v. *Cotton* (4) and *West* v. *Dobb* (5). There is no doubt in this case, that the landlord must have intended that the restriction he imposed upon the right of alienation of the tenant, would be operative during the entire period of the subsistence of the lease. The lease was

(1) 60 Ind. Cas. 984; 47 C. 979; 25 C. W. N. 857.

(2) 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).

(3) (1868) 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041.

(4) (1902) A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594.

(5) (1869) 4 Q. B. 634; 9 B. & S. 755; 38 L. J. Q. B. 289; 20 L. T. 737; 17 W. R. 879.

permanent and there is no reason why the landlord should have covenanted for payment of *chouth* only in the event of the transfer by the original tenant. It follows accordingly that this covenant was operative not merely between the second defendant and the plaintiff but also between the first defendant and the plaintiff when the former purchased the tenancy at a sale in execution of a rent decree; and if the covenant was operative as against the land in the hands of the first defendant, it would be equally operative when he attempted to transfer the land to the second defendant. The question thus arises, whether, in these circumstances, the first defendant is liab e to pay rent under the terms of the lease. The decision of this Court in *Rup Chand Ghose* v. *Narendra Krishna Ghose* (6), shows, that the answer must be in the affirmative. We must hold accordingly that the first defendant did not divest himself of his liability to pay rent by the execution of the conveyance in favour of the second defendant. We need not consider, whether the conveyance has created a valid title in the second defendant as against the plaintiff. It is sufficient for us to hold, for the purposes of this appeal, that the first defendant has not divested himself of the liability to pay rent. Nor do we set aside the decree for rent made by the lower Appellate Court against the second defendant, inasmuch as the second defendant has not preferred an appeal.

The result is, that this appeal is allowed and the decree of the Subordinate Judge modified. There will be a decree for rent against both the defendants. We direct, however, that the plaintiff do execute this decree in the first instance against the tenure itself. If by the sale of the tenure, the judgment-debt is not satisfied, the plaintiff will be entitled to proceed against either of the defendants at his choice. As the ground on which this appeal has succeeded was not taken in either of the Courts below, each party will pay his own costs throughout the litigation.

Z. K. *Appeal allowed.*

(6) 28 Ind. Cas. 683; 19 C. W. N. 112.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 87 OF 1921.
February 28, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Raja DUTT PRASAD SINGH—DECREE-HOLDER—APPELLANT

versus

SRI NARAIN—JUDGMENT-DEBTOR—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 89—Execution of decree—Sale proclamation—Objection—Sale held before objection disposed of—Application to set aside sale on payment of decretal amount.

An execution sale was held while an objection to the amount stated in the sale proclamation was on the file of the Execution Court and undisposed of and the judgment-debtors were allowed to use the provisions of O. XXI, r. 89 of the Civil Procedure Code; under protest subject to an adjudication after the sale had been held as to the amount for the recovery of which the sale ought really to have been ordered:

Held, that the procedure adopted by the Execution Court was irregular. [p. 558, col. 1.]

Execution first appeal from a decree of the Subordinate Judge, Muttra.

Mr. *Surendra Nath Gupta*, for the Appellant.

Messrs. *Gulzari Lal, Narain Prasad Asthana* and *Satish Chandra Das*, for the Respondent.

JUDGMENT.—We have now before us an appeal by the decree-holder in a suit on a mortgage in which the preliminary decree for sale was passed on the 4th of March 1910 and the decree absolute for sale on the 30th of April 1915. We disposed of yesterday two appeals arising out of the execution of this final decree but the question raised in the present appeal is wholy different. It concerns the liabilities of the three judgment-debtors who appear on the record as defendants Nos. 2, 4 and 5. It is admitted that both in the preliminay decree and in the final decree the liability of these defendants was limited to a certain aggregate sum, made up of no less than six items set forth in detail in the judgment itself. The question raised by this appeal is as o the direction contained in the preliminary and in the final decree on the question of interest. The great point in favour of the decision of the Court below is that it has continued to apply the same method of calculation in the matter of accumulating

interest from the date of the final decree onwards as had undoubtedly been applied in drawing up the final decree for sale. On this ground alone we are disposed to affirm the decision of the Court below, more especially as we are not prepared to say that it was anything but a fairly equitable adjudication of the rights and liabilities of the parties. If we thought it necessary to go further into the arguments which have been addressed to us, there are a good many other questions which we should have to discuss. We only think it necessary to say that our order affirming the decision of the Court below must not be understood as endorsing the very curious procedure followed in that Court over the manner in which the provisions of O. XXI, r. 89 of the Code of Civi Procedure have been applied in that Court. In effect, the property of the judgment-debtors respondents was allowed to go to sale while an objection to the amount stated in the sale proclamation was on the file of the Execution Court and undisposed of. The judgment-debtors concerned were, therefore, allowed to use the provisions of O. XXI, r. 89 of the Civil Procedure Code, under protest, and subject to an adjudication after the sale had been held as to the amount for the recovery of which the sale ought really to have been ordered. We think it sufficient to say that this procedure was, in our opinion, irregular and that we should have felt considerable difficulty about affirming it, if the Memorandum of Appeal before us had contained a plea which explicitly challenged the right of the Execution Court to adopt that procedure. Taking this view of the case we are satisfied that the cross-objections filed by the judgment-debtors must fail, if only for the reason that we are very doubtful whether the Court below was really justified in entertaining their objection at all in the manner in which it did. As regards the pleas taken in the Memorandum of Appeal filed by the decree-holder, they are covered by our finding that the method of calculation applied by the Execution Court in the matter of interest is the method which was adopted in the final decree for sale. On these grounds we dismiss both the appeal and the cross-objections, leaving the parties to bear their own costs in this Court.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 100 OF 1922.
January 3, 1923.

Present:—Pandit Kanhaiya Lal, J. C.

NILKANTH—DEFENDANT—APPELLANT
versus
MAHABIR SINGH—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XX, r. 14, O. XXI, r. 19—Oudh Laws Act (XVIII of 1876), ss. 14, 15—Pre-emption decree—Pre-emptor, whether bound to deposit costs awarded to vendee along with purchase-money—Pre-emptor, whether entitled to deduct costs from amount of purchase-money—Failure to comply with decree—Appeal, whether lies.

Sections 14 and 15 of the Oudh Laws Act contain no provisions similar to that contained in r. 14 of O. XX of the Civil Procedure Code, requiring a pre-emptor decree-holder to pay, in addition to the purchase-money, the costs, if any, awarded to the defendant vendee. [p. 559, col. 2.]

In any case, where the decree itself does not so direct, the defendant vendee is not entitled to claim that the costs awarded to him should be paid with the purchase-money within the time allowed by the decree. On the other hand, a pre-emptor decree-holder is not entitled to deduct from the amount of the purchase-money the costs awarded to him and to deposit only the balance in Court. [p. 559, col. 2.]

Ishri v. *Gopal Saran*, 6 A. 351; A. W. N. (1884) 125; 4 Ind. Dec. (N. S.) 51, *Bechai Singh* v. *Shami Nath Tewari*, 10 Ind. Cas. 454, *Parmanand Raot* v. *Gobardhan Sahai*, 28 A. 676; A. W. N. (1906) 198; 3 A. L. J. 604 and *Kapuria Mal* v. *Wali Muhammad*, 65 Ind. Cas. 250; 2 L. 294; 23 P. L. R. 1922; 4 L. L. J. 354; (1922) A. I. R. (L) 142, dissented from.

Baldeo Parshad v. *Baldeo Singh*, 3 O. C. 323 and *Ali Husain* v. *Amin Ullah*, 15 Ind. Cas. 337; 34 A. 596; 10 A. L. J. 153, distinguished.

The effect of sections 14 and 15 of the Oudh Laws Act is that if a pre-emptor seeks to enforce his decree, he can only do so by paying the purchase-money into Court either before or on the day fixed for such payment before the Court rises, and if he does not so pay the sum, the decree becomes void and the right of pre-emption awarded by it is lost. [p. 560, col. 1.]

Order XXI, r. 19, of the Civil Procedure Code only applies to a case where an application is made

NILKANTH v. MAHABIR SINGH.

to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other. It has no application to a decree for pre-emption under which costs are awarded to the vendee. [p. 560, col. 1.]

A vendee against whom a decree for pre-emption is obtained subject to the payment of the purchase-money within a certain time is not a person entitled to recover that purchase-money from the plaintiff. It is open to the latter to pay that money, if he chooses to enforce his pre-emptive right, within the time allowed by the decree, or withhold payment and allow the decree to lapse. If he adopts the latter course, the vendee cannot compel him to make the payment or seek to recover the purchase-money by an application for execution. He may be able to recover the costs, if any, awarded to him against the plaintiff, but he cannot compel the plaintiff to take advantage of his pre-emptive right. [p. 560, col. 1.]

The question whether the terms of a pre-emption decree have been complied with or not is one affecting the satisfaction or the discharge of the decree within the meaning of section 47 of the Civil Procedure Code, and an adjudication of the question is, therefore, appealble. [p. 561, col. 1.]

Bharath Singh v. *Dharam Singh*, 21 Ind. Cas. 193; 17 O. C. 14 and *Jaggar Nath Pande* v. *Jokhu Tewari*, 18 A, 223; A. W. N. (1896) 43; 8 Ind. Dec. (N. S.) 856, relied on.

Janga Singh v. *Lachhmi Narain*, 57 Ind. Cas. 488; 23 O. C. 254; 7 O. L. J. 378; 2 U. P. L. R. (O) 171, dissented from.

Appeal against the judgment and decree of the Subordinate Judge, Rai Bareli, dated the 16th January 1922, upholding an order of the Munsif, Dalmau, dated the 13th June 1921.

Dr. *J. N.. Misra*, for the Appellant.

Mr. *M. A. Khan*, for Respondent No. 1.

JUDGMENT.—The plaintiff obtained a decree for pre-emption which directed the payment of Rs. 200 to the defendant-vendee within a certain time. It also awarded certain costs to the plaintiff. In pursuance of that decree the plaintiff deposited Rs. 177-4-3 on the 6th November 1920, deducting Rs. 22-11-9 due to him on account of those costs. On appeal the decree was modified and the plaintiff was required to pay Rs. 212 to the defendant-vendee in addition to the amount which he was directed to pay by the Court of first instance. The decree of the Appellate Court awarded the defendant-vendee his costs of the appeal. Within the time allowed by the appellate decree the plaintiff deposited Rs. 212 for payment to the defendant-vendee. The question for consideration is whether the said payments can be regarded as sufficient compliance with the decree.

The Courts-below held that the plaintiff was entitled to deduct the costs awarded to him by the Court of first instance from the amount payable by him to the defendant-vendee and that he was not liable to deposit the costs awarded to the latter by the appellate decree in addition to the pre-emption money.

The learned Counsel for the defendant-appellant relies on O. XX, r. 14, of the Code of Civil Procedure which requires that the decree shall direct that on payment into Court of the purchase-money together with the costs, if any, decreed against the plaintiff on or before the date specified therein the defendant shall deliver possession of the property to the plaintiff. The decree in the present case did not, however, contain any direction for the payment by the plaintiff of the costs incurred by the defendant-vendee in addition to the purchase money. There was an independent order awarding costs incurred by him in his appeal, but the enforcement of the decree for pre-emption was not made contingent on the payment of those costs in addition to the purchase-money. Sections 14 and 15 of the Oudh Laws Act (XVIII of 1876), moreover, contain no similar provision requiring the plaintiff to pay in addition to the purchase-money the costs, if any, awarded to the defendant-vendee. On either ground the defendant-vendee is not entitled to claim that the costs awarded to him by the Appellate Court should also have been paid with the purchase money within the time allowed by the decree.

It is objected, however, on behalf of the defendant-vendee that the payment of Rs. 177-4-3 on the 6th November 1920 followed by another payment of Rs. 212 on the 5th May 1921 was in any case insufficient, because if the defendant-vendee was not entitled to claim a pre-payment of the costs awarded to him by the Appellate Court, the plaintiff was in any case not entitled to deduct the costs awarded to him by the decree of the Court of first instance from the amount which he was liable to pay to the defendant-vendee. On behalf of the plaintiff reliance is placed

on O. XXI, r. 19, of the Code of Civil Procedure and the decision in *Ishri* v. *Gopal Saran* (1) which was followed in *Bechai Singh* v. *Shami Nath Tewari* (2) and *Parmanand Raot* v. *Gobardhan Sahai* (3) and recently in *Kapuria Mal* v. *Wali Muhammad* (4).

Order XXI, r. 19, of the Code of Civil Procedure applies, however, to cases when an application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other. A vendee against whom a decree for pre-emption has been obtained subject to the payment of the purchase money within a certain time is not a person entitled to recover that purchase-money from the plaintiff. It is open to the plaintiff to pay that money, if he chooses, to enforce his pre-emptive right, within the time allowed by the decree or withhold payment and allow the decree to lapse. If he adopts the latter course, the defendant-vendee cannot compel him to make the payment or seek to recover the purchase-money by an application for execution. He may be able to recover the costs, if any, awarded to him against the plaintiff, but he cannot compel the plaintiff to take advantage of his pre-emptive right. The decisions above referred to, extend by analogy the provisions of O. XXI, r. 19, of the Code of Civil Procedure, to decrees for pre-emption; but apart from the difficulty of applying the principle of set off to suits for pre-emption, which stand on a different footing, the effect of sections 14 and 15 of the Oudh Laws Act (XVIII of 1876) which governs cases of this character, is that if the plaintiff seeks to enforce a decree, he can only do so by paying the purchase-money into Court either before or on the day fixed for such payment before it rises and that if he does not so pay the sum, the decree becomes void and the right of pre-emption awarded by it is lost.

The Courts below relied on the decision in *Baldeo Parshad* v. *Baldeo Singh* (5): but in that case, as in the similar case of *Ali Husain* v. *AminU ullah* (6), the plaintiff had deposited the entire pre-emption money within the time allowed by the decree and subsequently withdrew portion thereof by attachment in satisfaction of the costs awarded to him by that decree. There was no such attachment applied for in the present instance. It is also argued on behalf of the plaintiff-respondent that no appeal lay to this Court or to the Court below and reference has been made in support of that contention to the decision in *Janga Singh* v. *Lachhmi Narain* (7). But as pointed out in *Bharath Singh* v. *Dharam Singh* (8) and *Jaggar Nath Pande* v. *Jokhu Tewari* (9) a decree for pre-emption becomes inoperative on the expiry of the time limited for payment without such payment having been made. It is in effect discharged on the happening of such a default. The question whether such a payment was made or not within the time allowed is a question affecting the satisfaction or discharge of the decree and as such it falls within the purview of section 47 of Code of Civil Procedure. In *Janga Singh* v. *Lachhmi Narain* (7) the view taken by Wazir Hasan, A. J. C., was that a decree for pre-emption was complete in itself and that a subsequent order declaring that the decree had become void owing to the failure of the plaintiff to pay the purchase-money within the time fixed by the decree could not be treated as a decree against which an appeal could be preferred. But he did not base his decision on that ground and preferred to go into the merits and came to the conclusion that the decree had become inoperative by reason of the non-compliance with the direction given by that decree. It is true that a decree for pre-emption is complete in itself and that in case of a non-fulfilment of the condition laid

(1) 6 A. 351; A. W. N. (1884) 125; 4 Ind. Dec. (N. S.) 51.
(2) 10 Ind. Cas. 454.
(3) 28 A. 676; A. W. N. (1906) 198; 3 A. L. J. 604.
(4) 65 Ind. Cas. 250; 2 L. 294; 23 P. L. R. 1922; 4 L. L. J. 354; (1922) A. I. R. (L) 142.
(5) 3 O. C. 323.
(6) 15 Ind. Cas. 337; 34 A. 596; 10 A. L. J. 153.
(7) 57 Ind. Cas. 488; 23 O. C. 254; 7 O. L. J. 378; 2 U. P. L. R. (O) 171.
(8) 21 Ind. Cas. 193; 17 O. C. 14.
(9) 18 A. 223; A. W. N. (1896) 43; 8 Ind. Dec. (N. S.) 856.

down by that decree, no final decree is necessary. But a decree may be a conditional decree in so far as it may contain preliminary directions for the doing of certain things, and final or absolute in so far as it may define its scope or operation in the event of a certain contingency happening or not happening. It may combine a preliminary direction with the effect it would finally have, if that direction was not complied with. The question whether in a particular case that direction has been complied with or not is a question which arises independently of that decree and can only be determined under section 47 of the Code of Civil Procedure. Such a determination involves an adjudication of the question whether the decree has been satisfied or discharged and is open to an appeal by force of section 2 of the Code of Civil Procedure which treats such orders as decrees from which an appeal is maintainable.

The learned Counsel for the plaintiff-respondent has also referred to the decision of *Ganga Dhur* v. *Anrudh Singh* (10). But as pointed out in *Bharat Singh* v. *Dharam Singh* (8) it does appear whether the terms of that decree provide for the dismissal of the suit in case of non-payment or left the dismissal to come into operation irrespective of the decree under section 15 of the Oudh Laws Act (XVIII of 1876). Assuming that it did, the view there taken cannot be sustained in view of the provisions of section 47, read with section 27 of the Civil Procedure Code. The appeal must be allowed and it hereby is allowed and the orders of the Courts below set aside. The defendant-appellant will, in the circumstances, get his costs from the plaintiff-respondent throughout.

Appeal allowed.

Z. K.

(10) 11 O. C. 144.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

October 31, 1919.

Present:—Lord Shaw, Sir John Edge, KT., Mr. Ameer Ali, Sir Lawrence Jenkins, KT.,

Mohunt BHAGWAN RAMANUJ—PLAINTIFF—APPELLANT

versus

RAMKRISHNA BOSE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 28, Sch. I, Art. 139—Lease of land for term—Rent not paid for more than 12 years after expiry of term—Suit to recover possession—Plaintiffs' title, whether extinguished.

In a suit to recover possession of certain property it appeared that the defendants' ancestor had a lease of the property in suit, which expired more than 12 years before the date of the suit and that no fresh agreement was entered into between the parties:

Held, (1) that the suit was barred under Art. 139 of the Limitation Act;

(2) that the Statute operated to revoke the estate that was originally vested in the plaintiff and to confer statutory estate on the defendants and, therefore, no declaration of the plaintiff's title could be made.

Madan Mohan Gossain v. *Kumar Rameswar Malia*, 7 C. L. J. 615, *Chandri* v. *Daju Bhan*, 24 B. 504; 2 Bom. L. R. 491, referred to.

Appeal from the judgment and decree of the Calcutta High Court (Fletcher and Richardson, J. J.) dated 28th May 1915 and the 15th July 1915.

FACTS appear from the following judgment of the Calcutta High Court:—

Fletcher, J.—(*May*, 28, 1915).—This is an appeal from a decision of the learned Subordinate Judge of Cuttack, dated the 28th March 1912. The defendants are the appellants before us. The plaintiff brought this suit to recover possession of certain lands from the defendants. One of the issues raised in the case was whether the suit was barred by limitation. The learned Judge found that the suit was barred by limitation, but he considered that as the title was originally in the plaintiff, he ought to give the plaintiff relief by way of making a declaration of title in his favour. Against that decision, the present defendants have appealed to this Court. From the facts found by the learned Judge of the Court below, it is clear that the case is barred by limitation. The learned Judge also

found so. The defendants' ancestor had a lease of this property, which expired more than 12 years ago. At any rate, the learned Judge has found that no fresh agreement was entered into between the parties nor was there any evidence from which it could be inferred that there was a new tenancy. The question, therefore, arises, "Does Art. 139 of the First Schedule to the Indian Limitation Act apply to a case like this?" The decisions of this Court are that Art. 139 does apply. A tenancy by sufferance by a tenant holding over whose lease has expired, does not apply in his country. That has been held in the case of *Madan Mohan Gossain* v. *Kumar Rameswar Maha* (1). A similar view has been adopted by the Bombay High Court in the case of *Chandri* v. *Daji Bhau* (2). The result, therefore, is, that the present suit is, as the learned Subordinate Judge says, clearly barred by limitation. The learned Judge, however, has considered that in a case of this nature, when the suit is barred, the title still remains vested in the plaintiff. That obviously is not so: under section 28 of the Indian Limitation Act, it is expressly provided that at the expiration of the period prescribed by the Act for limitation of suits, not only is the remedy barred but the right is gone. That is quite clear. That being so, the Statute has operated to revoke the estate, that was originally vested in the plaintiff, and to confer a statutory estate upon the defendants. In that view, the judgment appealed from cannot be supported. The present appeal must, therefore, be allowed and the plaintiff's suit dismissed with costs both in this Court as well as in the lower Court. The hearing-fee will be according to the scale of the Court on the value of the suit.

Nobody appearing in support of the cross-appeal it is dismissed.

Richardson, J.—I agree.

An application for review of the judgment was made when the following judgment was delivered; the appeal was reheard in the presence of both parties:—

Fletcher, J.—The point that we dealt with on the last occasion was a point of law arising on the findings of fact made by the learned Subordinate Judge in his judgment. On that occasion, Sir Rash Behari Ghose, on behalf of the appellants, accepted the findings of fact made by the learned Subordinate Judge, and argued that the learned Judge had arrived at a wrong conclusion on a point of law. We accepted the argument put forward by Sir Rash Behari, and decreed the appeal. On the appeal coming on before us for re-hearing both sides agree that on the findings of fact made by the learned Judge of the Court below, his judgment cannot stand. But the learned Counsel for the plaintiff-respondent has asked us to dissent from the findings of fact made by the learned Subordinate Judge, on which his judgment is based. The defendants, who are the appellants before us, claim through their grand-father who had got a lease of the property for 18 years in the *benami* of Bishnupriya. That lease expired in 1880. The story put forward by the plaintiff is that there was a verbal lease or arrangement between one Hari Ballav Bose and the former *Mohunt* Hayagriba in the year 1887. The evidence shows that the late *Mohunt* Hayagriba was gathered to his fathers before the date of the lease. An attempt was made by some of the plaintiff's witnesses to place this verbal arrangement at an earlier date before the death of Hayagriba. That was the case which the plaintiff invited the learned Judge to express his opinion on, and when that case failed as false the learned Judge clearly and rightly refused to enter into a consideration of the case that this man Hari Ballav had entered into some arrangement other than that set up, resulting in his possession of the property as a licensee. In that, I think, the learned Subordinate Judge was quite right. The documentary evidence read to us leaves no doubt in my mind that Hari Ballav was connected with the property solely as a relative or guardian of the two present defendants. The documentary evidence seems to me to be conclusive on that. This story about the verbal lease to Hari Ballav or his entering into possession of the property as a licensee in his own right, I am satisfied, is wholly untrue. On the evidence, I am clearly

(1) 7 C. L. J. 615.
(2) 24 B. 504; 2 Bom. L. R. 491.

of opinion that the learned Subordinate Judge came to a correct conclusion. That being so, the learned Judge was right when he held that the suit was barred by limitation. We pointed out in our former judgment that on that finding the learned Judge was not entitled to give to the plaintiff the relief that he has given. For the second time, I must express my dissent from the result arrived at by the learned Judge of the Court below. The appeal must, therefore, be decreed and the plaintiff s suit dismissed with costs in both Courts.

Richardson, J.—I agree.

Messrs. *L. De Gruyther, K.C.*, and *Dube*, for the Appellant.

Mr. *William Garth*, for the Respondents.

JUDGMENT.

Lord Shaw.—In the opinion of their Lordships, no reason has been shown for disturbing the judgment of the High Court. The question of fact is concluded by the concurrent findings of the Courts below.

Their Lordships will humbly advise His Majesty that tne appeal stand dismissed with costs.

K. S. D. *Appeal dismissed*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 70 OF 1921.

February 12, 1923.

Present:—Mr. Dalal, A. J. C., and Mr. Simpson, A. J. C.

RUP KISHORE—PLAINTIFF—APPELLANT

versus

KANHAIYA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Life-estate only created—Remainder, whether can remain in suspense—Devolution of residue, how effected—Hindu Law—Mortgage by father—Son, liability of—Debt whether immoral—Burden of proof—Suit against manager of joint family—Presumption.

Wherever a life-estate is created by a Will the remainder cannot remain in suspense but must vest in some one immediately on the death of the testator. [p. 566, col. 2.]

Jotendromohun Tagore v. *Ganendromohun Tagore*, 18 W R. 359 at p 371; 9 B L R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.), explained.

Jugmohandas v. *Sir Mangaldas*, 10 B. 528; 5 Ind. Dec. (N. S.) 742, *Tarokessur Roy* v. *Soshi Shikhuressur Roy*, 9 C. 952; 10 I. A. 51; 13 C. L. R. 62; 7 Ind. Jur. 327; 4 Sar. P. C. J. 439; 4 Ind. Dec. (N. S.) 1284 (P. C.), distinguished.

A Hindu son cannot escape liability under a decree obtained by a mortgagee against his father and *karta* of the joint family unless he proves that the mortgage-debt was contracted for immoral or illegal purposes or was of an illusory character, whether the decree had been executed or not. [p. 568; col. 2; p. 569, col. 2.]

Nanomi Babuasin v. *Modhun Mohun*, 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.), *Bhagbut Pershad Singh* v. *Girja Koer*, 15 C. 717; 15 I. A. 99; 12 Ind. Jur. 289; 5 Sar. P. C. J. 186; 7 Ind. Dec. (N. S.) 1062 (P. C.), *Lala Surja Prosad* v. *Golab Chand*, 27 C. 724 at p. 747; 4 C. W. N. 701; 14 Ind. Dec. (N. S.) 475, *Basdeo Lal* v. *Mahablr*, 59 Ind. Cas. 570; 23 O. C. 344; 8 O. L. J. 18; 3 U. P. L. R. (O.) 1, *Sheo Shankar Ram* v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 36 A. 383; 18 C. W N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.) and *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437: 21 C. W. N. 698; 1 P. L. W. 567; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), referred to.

A Hindu executed a Will wherein he made two bequests, one to his wife and the other to his son, both for life without any power of alienation, and without any provision as to the devolution of the absolute estate. The son, on coming into possession, executed certain mortgage-deeds and the mortgagee eventually obtained a decree for sale of the property. Plaintiff, the son of the alienor, thereupon sued for a declaration that the property was not liable to sale in execution of the mortgage-decree:

Held, (1) that, according to the Will, the son succeeded to the life-interest on the death of the wife of the testator, that this life-interest combined with the residue to which he succeeded as heir-at-law and that consequently he became full owner of the property in suit; [p. 567, col. 2.]

(2) that the plaintiff having failed to prove that the mortgage-debt was contracted for immoral or illegal purposes, his suit was liable to be dismissed. [p. 568, col. 2.]

When a suit is brought against the managing member of a joint Hindu family the presumption is that he is sued in a representative capacity. [p. 570, col. 2.]

Bhagwati Prasad v. *Kallu Ram*, 70 Ind. Cas. 941; 25 O. C. 256; (1923) A. I. R. (O) 54 and *Lala Surja Prosad* v. *Golab Chand*, 27 C. 724 at p. 747; 4 C. W. N. 701; 14 Ind. Dec. (N. S.) 475, referred to.

Appeal from the decree of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 22nd August 1921.

Messrs. *A. P. Sen* and *Har Dayal*, for the Appellant.

RUP KISHORE *v.* KANHAIYA LAL.

Messrs. *Wazir Hasan, Wasi Hasan* and *Parbhu Dayal,* for Respondents Nos. 2 and 3.

JUDGMENT.—The plaintiff, Rup Kishore, minor, under the guardianship of his mother instituted a suit for declaration in the Court of the Subordinate Judge of Lucknow on 10th September 1908. The first defendant was his father Kanhaiya Lal and the other defendants were transferees from Kanhaiya Lal and had obtained a decree for sale on foot of two mortgages, one of 7th July and the other of 20th September 1914. The decree was passed against Kanhaiya Lal on 18th July 1917. Kanhaiya Lal was the adopted son of Darogha Kishen Chand, whose wife was *Musammat* Sheo Dei. On 14th July 1884 Darogha Kishen Chand made a Will of which *Musammat* Sheo Dei was appointed executor. There were two bequests in the Will, one to *Musammat* Sheo Dei of all the testator's properties to hold during her life without any power of alienation and the other in favour of Kanhaiya Lal on the termination of the life-estate of *Musammat* Sheo Dei. At the date of the Will Kanhaiya Lal was about eight years of age and the bequest in his favour was of a life-estate without any power of alienation. The testator died in 1884, and *Musammat* Sheo Dei in 1907. The mortgages attacked by the plaintiff in his suit were executed by Kanhaiya Lal after the death of *Musammat* Sheo Dei. The allegations in the plaint on which the plaintiff based his claim for relief were that the property in suit was the ancestral property of the family of the plaintiff and Kanhaiya Lal, that Kanhaiya Lal was addicted to gambling, prostitution and drinking and incurred debts at a heavy rate of interest to meet his expenses, that he executed the two mortgage-deeds without any legal necessity and for immoral purposes, that under the Will Kanhaiya Lal had no power of transfer and that, even if he had, the transfer of joint Hindu family property by the manager for immoral purposes was void and inoperative. The prayer was for a declaration that the property in suit was not liable to sale in execution of the decree obtained by the mortgagees against Kanhaiya Lal on two grounds:—(1) the plaintiff's rights based on the Will of Kishen Chand, and (2) on his rights as a member of a joint Hindu family composed of himself and Kanhaiya Lal.

Kanhaiya Lal did not put in an appearance. The defence of the mortgagee decree-holder was that, under the Will, Kanhaiya Lal was the absolute proprietor of the property in suit because the restraint on alienation contained in the Will was void. Any right of the plaintiff as a member of a joint Hindu family in the property in suit was denied, as also the plaint allegation that the debts were contracted for immoral purposes. It was also urged that the plaintiff was born subsequent to the date of the first mortgage.

The following five issues were framed by the Trial Court:—

1. Was the plaintiff in existence when the deed of 17th July 1914 was executed? If not, can he challenge it? .. .. *Plaintiff*

2. How far is the Will in favour of defendant No. 1 by his father legal and valid? .. .. .. *Defendant.*

3. Had the defendant No. 1 no right under that Will to execute the two deeds in suit? .. .. *Plaintiff.*

4. Was the property in suit the joint family property of the plaintiff and defendant No. 1 when the two deeds in suit were executed?.. .. *Plaintiff.*

5. Were the deeds executed for consideration of debts legally binding on the plaintiff, if issue No. 4 be found in the affirmative? .. .. *Defendant.*

At the request of the parties issues of law Nos. 2 to 4 were first decided under O. XIV, r. 2, Civil Procedure Code. The learned Subordinate Judge held that Kanhaiya Lal was absolute owner of the property in suit under the Will of his father and that, therefore, the property was his self-acquired in which the plaintiff had no interest. It was admitted by both parties that the property was the self-acquired property of Kishen Chand. The plaintiff's suit was, therefore, dismissed.

He appealed from that dismissal and a Bench of this Court set aside the decree of the Trial Court on 10th January 1921 and remitted the suit for trial on the merits under O. XLI, r. 23, Civil

Procedure Code. This Court refused to sustain the Trial Court's finding that Kanhaiya Lal was absolute owner of the property in suit as his self-acquired property independently of the joint family of which the plaintiff was a member.

When the suit was received back by the first Court it added the following issues:—

6. Did the defendant No. 1 borrow the money, and execute the mortgage-deed in suit for illegal and immoral purposes as alleged?

7. Did the defendant No. 1 execute the mortgage-deeds in suit to pay off antecedent debts, as alleged?

8. What interest has the defendant No. 1 in the property in suit since the death of the testator? If he was possessed of mere life-interest, is it saleable in the execution of the decree?

On these issues (the two previously framed Nos. 1 and 5 and the three framed on remand) the findings of the learned Subordinate Judge were that the plaintiff was in existence at the time of the first mortgage; that Kanhaiya Lal and the plaintiff were owners of the property in suit as members of a joint Hindu family; that the property was ancestral in the hands of Kanhaiya Lal; that the deeds were not executed for illegal or immoral purposes; that over 3,000 rupees of the consideration of the first deed was borrowed to pay off the antecedent debts, and that, though the items making up the consideration of the second deed of further charge did not construe antecedent debts, the plaintiff was liable to pay them with interest according to the terms of the deed as a decree for the amount had already been passed against Kanhaiya Lal, the manager of the joint family property.

The plaintiff has appealed from the decree passed on the basis of the above findings. The contesting respondents have not objected by way of appeal.

Put shortly, the grounds of attack on the lower Court's judgment are two:—

1. That Kanhaiya Lal had no interest in the property which he could transfer—

(a) as was held by this Court in its order of remand, and

(b) according to the interpretation of the Will of Kishen Chand.

2. That the burden of proof was wrongly placed by the lower Court on the plaintiff to prove that the debts were contracted for illegal and immoral purposes, and that, in order to make the plaintiff liable under the two mortgage-deeds, the burden lay on the mortgagee to prove that the debts were contracted for family necessity or the payment of antecedent debts.

It was not argued here that the debts were tainted with immorality.

To take up the first ground. The question whether Kanhaiya Lal had power to transfer the property or not was not before this Court to decide in previous proceedings. This Court examined the provisions of the Will with a view to determine whether it gave an absolute title to Kanhaiya Lal or not. In discussing what the intention of the testator was this Court observed: "But the intention of the testator was as much to perpetuate his name and the estate as to keep it intact in the hands of the persons who were to succeed. He made that intention clear by restricting the power of alienation in each instance, and the intention to perpetuate his name and the estate must, therefore, be read with other clauses by which the corpus of the estate was left beyond the control of either *Musammat* Sheo Dei or Kanhaiya Lal. He does not appear to have looked beyond the lifetime of Kanhaiya Lal. Kanhaiya Lal had no son then in existence, and though it is possible that he may have contemplated that the corpus of the estate was to go to anyone who may be born of Kanhaiya Lal after the death of Kanhaiya Lal in order to perpetuate his name and estate, this is mere speculation. In any case, reading it as a whole the Will does not create in favour of Kanhaiya Lal any estate different from that granted to *Musammat* Sheo Dei and a resulting intestacy must, therefore, be presumed."

It was argued that these words indicated a finding by this Court that under the Will Kanhaiya Lal had no power of alienation and that the corpus of the estate had vested in the plaintiff after two life-estates were carved out of the absolute property. We do not agree that this Court arrived at any such findings. It has stated what is obvious, that the Will

restricted Kanhaiya Lal's power of alienation, but the Court did not go on to hold how far this restriction was operative. The Court certainly did not arrive at any decision as regards the rights of the plaintiff under the Will, on the contrary, it was pointed out that the plaintiff was not born at the time of execution of the Will and that it was mere speculation to inquire how the testator intended to dispose of the corpus of the estate. As rightly understood by the learned Judge of the Trial Court, the one finding of this Court was that Kanhaiya Lal was not the absolute owner of the property in suit unhampered by any right of the plaintiff.

The argument on behalf of the plaintiff was that the inheritance remained in suspension during the two life-estates and would be determined at the termination of the life-estate of Kanhaiya Lal. This reasoning was applied to make any transfer by Kanhaiya Lal invalid; it was not yet determined who was to succeed to the corpus of the estate and Kanhaiya Lal not being in possession of it could not transfer it, and as regards his life-interest the Will restrained alienation thereof by him. According to this argument, the plaintiff had a right to a declaration because he was the next reversioner, he would be the full owner as heir of his grandfather, Kishen Chand, if Kanhaiya Lal had died at the time of the institution of the suit. There are many fallacies in this argument. As pointed out by the lower Court in its judgment, obtained in September 1919, "When there was a bequest of a life-interest to Kanhaiya Lal the restraint of alienation thereon was invalid. [*Baikishori Dasi* v. *Debendranath Sircar* (1)]."

Next, the general rule of resulting trust for the heir is thus stated by Jarman,—"If a Will fails to make any effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property" (Wills, Edition 1910, Volume I, p. 704). A little further on he says,—"On the same principle where lands are devised upon trust for particular purposes as for payment of debts, or with a direction to pay the rents to *A* for life, and no further trust is declared all the unexhausted beneficial interest results to the heir, as real estate undisposed of."

In *Brijraj Kuar* v. *Mahadeo Bakhsh Singh* (2) a Bench of this Court had to consider succession to property on the failure of a bequest by reason of provisions of section 13 of Act I of 1869. One learned Judge observed at page 383* of the report: "wherever there is a partial intestacy either on account of no person being alive to claim under the Will, or by reason of a bequest being void or otherwise ineffectual, there is always, as observed by Mayne, a resulting trust in favour of heir-at-law. (Mayne's Hindu Law, 8th Edition page 590). No person can prevent his property or any part of it or any interest in it from devolving upon the heirs constituted by law after his death, except by a valid disposition giving it to some other person. He can only defeat the rights of his natural heirs by making a valid devise in favour of some other person, but not otherwise, for he cannot make it the property of no one, the property must vest in some one and cannot remain in abeyance or suspense without an owner (Trevelyan's Hindu Wills, 3rd Edition, pages 41 and 42)." The observations of the other learned Judge at page 393* are similar- "The testator imagined that he had conveyed the whole estate by giving successive interests ending in a gift... of full ownership in Nirbhai Singh and his heirs. The last three of these gifts.... were invalid by reason of the Will not being registered. To that extent there was an intestacy. No principle can be better established than that the inheritance cannot remain in abeyance. Whatever is not validly disposed of vests at once in the heir." It would follow from these observations that, wherever a life-estate is created by a Will the remainder cannot remain in suspense but must vest in some one immediately on the death of the testator.

(1) 15 C. 409; 15 I. A. 37; 12 Ind Jur 175; 5 Sar. P. C. J. 1001 7 Ind. Dec (N S.) 857 (P. C.).

(2) 50 Ind. Cas. 249; 21 O. C. 374; 6 O. L. J. 101.

* Pages of 21 O. C.—[*Ed.*]

In support of his argument that the vesting and the determinaton of the heir-at-law are postponed to the death of the last life-holder the appellant's learned Counsel quoted the *Tagore case* [*Jotendromohun Tagore* v. *Ganendromohun Tagore* (3)] and a decision of the House of Lords in *Lucas-Tooth* v. *Lucas-Tooth* (4). The *Tagore case* (3) does not support the contention of the learned Counsel. In that case the heir-at-law, Ganendro Mohun Tagore, was immediately determined and the portion of the property undisposed of by the Will was held to have vested in the heir-at-law on the testator's death. The judgment gives no support to the proposition that the determination of the heir-at-law was postponed to the death of the life-holder, Jotendro Mohun Tagore. In the House of Lords' case no decision was called for as to the time of the vesting of an undisposed of residue under a Will. The question was one of the interpretation of a Will whereby a testator bequathed any stocks and shares he might die possessed of to be equally divided between his two brothers *S.* and *L.* to be held fortheir lifetime only and then to pass to the heir to the Baronetcy at present held by Sir R. I or failing an heir, to the eldest daughter of *S.* There was definite direction in the Will as regards persons to whom the property was to pass at the termination of the two life-estates. The residue was not left undisposed of as in the case before us. The House of Lords had not to determine, as we have to determine here, what was to happen to the undisposed of residue. But its enquiry was directed to discover who was designated by the terms of the Will as the successor to the property at the termination of the two life-estates.

Two other rulings quoted by the appellant's learned Counsel are not pertinent to theissue involved here:—*Jugmohandas* v. *Sir Mangaldas* (5) and *Tarokessur Roy* v. *Soshi Shikhuressur Roy* (6). The Bombay case was under the Mayukha Law and decided that a son to whom his father leaves his self-acquired property by Will takes the property under the Will and now by inheritance. There was no undisposed of residue in that case. In the present case it is not denied that Kanhaiya Lal took the life-interest under the Will. The Privy Council ruling reported in the Calcutta series is in favour of the respondents rather than against them. In that case a testator who had a son left his estate to the three sons of his brother. The operative words of the Will were: "The said three nephews shall hold possession of the same in equal shares. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons and their descendants in the male line, shall enjoy the same and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of their ancestors. If any of them die without leaving a male child, then his share shall devolve on the surviving nephews and their male descendants and not on their other heirs." Their Lordships held that the attempt to alter the legal course of inheritance failed and that the estate taken under the above clause by the nephews was only for life. Thus, under the Will only three life-estates were valid and the residue was left undisposed of. The heir-at-law, that is the son of the testator, was considered to be vested with this inheritance and it was not held that the heir-at-law was to be discovered on the termination of the last life-estate.

These principles of law lead to the following conclusions in the present case:—

On the death of Kishen Chand, *Musammat* Sheo Dei succeeded to a life-interest in the property and Kanhaiya Lal, the heir-at-law, to the residue. On the death of *Musammat* Sheo Dei, Kanhaiya Lal succeeded to the life-interest and in his person the life-interest and the residue to which he succeeded as heir-at-law on the death of the testator combined. The result was that he became owner of the property in suit as a Hindu holder of ancestral property. On his birth the plaintiff acquired rights in the property as a member of a joint Hindu family made up of himself and his father.

(3) 18 W. R. 359 at p. 371; 9 B L R 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.)

(4) (1921) A. C. 594; 90 L. J Ch 347; 125; L. T. 225; 65 S. J. 377.

(5) 10 B. 528; 5 Ind Dec. (N. S) 742

(6) 9 C. 952; 10 I. A 51; 13 C L. R 62; 7 Ind Jur. 327; 4 Sar. P C J 439; 4 Ind Dec (N. S.) 1284 (P. C.).

We next proceed to inquire how far the decree obtained by the contesting respondents against Kanhaiya Lal is binding on the plaintiff. There is no difficulty as regards the first mortgage except with respect to a sum of Rs. 750. The property in suit was hypothecated under t for a sum of Rs. 8,000 carrying interest at 10 annas per cent. per mensem. The consideration was made up of the following items:—

(1) Rs. 6,500 due to the mortgagee on account of a pro-note executed by the mortgagor on 10th August 1913.

(2) Rs. 750 left with the mortgagee for payment to Shiam Lal in satisfaction of a pro-note of the 28th of January 1913.

(3) Rs. 750 paid in the presence of the Sub-Registrar.

The second item has been disallowed by the lower Court. The first item consisted of several sums due on prior pro-notes. Every time a prior pro-note was renewed an additional sum was received in cash, and the new note executed for this sum and for the sum due on the previous note. The learned Judge of the lower Court has adopted a very reasonable plan in arriving at the sum equitably due to the mortgagee on the date of the mortgage. He has added up the principal amounts received by the mortgagor under every pro-note and calculated at 2 per cent. per mensem. The sums were advanced by the creditor without any security, so the rate of interest allowed by the lower Court is fair. After the creditor obtained the security of landed property, a very reasonable rate of interest at 7½ per cent. per annum is charged. All these sums constituted antecedent debts as they were borrowed independently of the property mortgaged in 1914.

The third item of Rs. 750 making up the consideration of the first deed and the amount of the consideration of the second deed will be considered together to determine the plaintiff's liability to pay them. The finding of the lower Court is that it did not constitute antecedent debt and that finding is not challenged here. The plaintiff is made liable to pay it because the creditors have obtained a decree and it is said that according to the principles of Hindu Law a Hindu son cannot escape liability under such a decree against his father and *karta* of the family unless he proves that the debts were contracted for immoral or illegal purposes. This principle of law on which the defendants-creditors have taken their stand will have to be examined in some detail.

The distinction between the sons' liability under a mortgage executed by a father in a joint Hindu family and his remedy after proceedings taken against the father on foot of the mortgage was first stated by Lord Hobhouse in the Privy Council judgment of *Nanomi Babuasin* v. *Modhun Mohun* (7): "It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

In 1888 their Lordships quoted in their judgment this principle of law laid down in the previous case *Bhagbut Pershad Singh* v. *Girja Koer* (8). In that case the property had been sold and purchased by a stranger in execution of a decree against the father alone, but the purchaser had notice of the sons' existence, so their Lordships considered what would happen in the execution proceedings. These observations are relevant in the present case where the decree against the father has not so far been executed. Their Lordships observed: "Now, although at the

(7) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.).
(8) 15 C. 717; 15 I. A. 99; 12 Ind. Jur. 289; 5 Sar. P. C. J. 186; 7 Ind. Dec. (N. S.) 1062 (P. C.).

time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the fathers had no right to mortgage it, still the question arises whether under the execution of the decree under which the property was ordered to be attached it was for the purchaser to show that there was a necessity for the loan or whether it was not necessary for those who claimed on behalf of the children to show that the debt was contracted for any immoral or illegal purpose. If it was necessary to show that the debt was so contracted the plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that, according to the decision in the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (9), it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose."

In the case of *Lala Surja Prosad* v. *Golab Chand* (10) a minor son sued for a declaration that a decree against his father to which he was no party on foot of a mortgage executed by the father alone was not binding on him because he was not a party to the suit brought against the father. In considering the state of law existing at the time of the enactment of the Transfer of Property Act in 1885 with a view to interpret the provisions of section 85 of the Act, Mr. Justice Ghose made an elaborate examination of the Hindu Law on the subject of a sons' liability and deduced the following principles from these cases:—

"First, that in the case of a joint Mitakshara family, consisting of a father and minor sons, the father is 'necessarily' the manager of the joint family, and as such, for all purposes, is representative of the family; second, that in the case of a joint Mitakshara family where the father, the managing member, mortgaged family property for an antecedent debt and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him, in his representative capacity; and, third, that if a son, after a decree being obtained against the father, upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution of such a decree, sues to recover possession of his share, he cannot succeed, unless he proves that the debt was contracted for immoral or illegal purposes, or that the debt was of an illusory character"

In *Sheo Shankar Ram* v. *Jaddo Kunwar* (11) an absolute decree for foreclosure was passed against the father and the mortgagee was in possession. Their Lordships held that the sons were bound by the foreclosure decree on the ground that the joint family was effectively represented in the suit. There seems to be no doubt to their Lordships upon the Indian decisions that there are occasions, including foreclosure actions when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."

All these authorities were reviewed by a Bench of this Court in *Gur Narain* v. *Gulzari Lal* (12). In that case a decree was passed against a father and the joint family property had not passed out of the possession of the family. The learned Judges were of opinion that the case was governed by an extension of the principle laid down in the Privy Council case of *Bhagbut Pershad Singh* v. *Girja Koer* (8) and held that it was for the sons who came into Court to escape liability under the decree to prove that the debt was contracted for immoral or illegal purposes or that the debt was of an illusory character.

In *Sahu Ram Chandra* v. *Bhup Singh* (13) the law on the subject was again examined in the Privy Council. The question at issue there was the nature of an antecedent debt. Their Lordships pointed out that;

(9) 6 I. A. 88 at p. 104; 5 C 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(10) 27 C 724 at p 747; 4 C. W N 701; 14 Ind. Dec. (N. S.) 475.

(11) 24 Ind Cas 504; 36 A. 383; 18 C W. N. 968; 16 M. L T. 175; (1914) M W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A L. J 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.)

(12) 25 Ind Ca . 917; 17 O. C. 318; 1 O L. J. 5 3.

(13) 39 Ind. Cas. 280; 39 A. 437; 21 C. W N. 698; 1 P L. W. 567; 15 A. L. J. 437; 19 Bom L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I.A. 126 (P. C.).

so far as the joint family estate was concerned, the law had been invoked for the protection of third parties whose rights in or with regard to it have been acquired in good faith and they went on to observe: "A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

The appellant's learned Counsel referred to a decision of a Single Judge of the Allahabad High Court in *Ali Ahmad* v. *Sohan Lal* (14). That case is distinguishable because on the death of the father the sons were made parties in the execution department. It is not necessary therefore, for us to consider how far that ruling is in conformity with the observations of their Lordships in the case of *Bhagbut Pershad Singh* v. *Girja Koer* (8) referred to above. The learned Counsel admitted that the case reported as *Gur Narain* v. *Gulzari Lal* (12) was an authority in support of the lower Court's decision, but urged that it was not good law. He argued that the law as enunciated there was for the protection of third parties and no third party was involved until the decree in favour of the mortgagee had been executed. Such does not appear to be the principle of law as laid down in the Privy Council ruling referred to above. The same argument may be used even after the property passes out of the possession of the family where the mortgagee himself is auction-purchaser in sale-proceedings in execution of the decree. The principle involved is the protection of new rights created in the decree-holder in pursuance of the decree. We agree with the opinion of a learned Judge of this Court in the case of *Basdeo Lal* v. *Mahabir* (15) that the rule as laid down in *Suraj Bunsi Koer's case* (9) is not limited to cases in which the property had passed out of the hands of the family and gone into the hands of persons who were neither previous creditors when the sale is a private alienation, nor judgment-creditors when the sale is by public auction.

The next distinction the learned Counsel attempted to draw between the facts of the present case and the law laid down in the rulings examined above was that the father did not represent the son in the present case during proceedings in the mortgage suit. It was pointed out that Kanhaiya Lal had given himself out to be sole owner of the property and that the mortgagees had not sued him in a representatve character. In our opinion the law is based on the presumption of the managing member of a family representing the other members and not on the actual facts of every case. To obtain money the *karta* would usually represent himself as the sole owner and the mortgagee may not be aware of the existence of minor sons. In the case of *Bhagwati Prasad* v. *Kallu Ram* (16) the mortgagee was not aware of the existence of the plaintiffs. The learned Judicial Commissioner, however, held that the plaintiff's father effectively represented the plaintiffs in the suit brought against the father. This question was examined by Mr. Justice Ghose at p. 747 in the case quoted above from 27 Calcutta [*Lala Surja Prosad* v. *Golab Chand* (10)]. He pointed out that where the mortgagee was not aware of the existence of a minor son of the mortgagor there is no possibility of such a son being made a party to the mortgage, yet the suit will be considered against the father to be in a representative character because he represented the family made up of himself and his sons as *karta* of the family. It may be pointed out that plaintiff in this suit does not allege any fact such as fraud or misrepresentation which would vitiate the decree passed against his father.

In conclusion we are of opinion that the plaintiff is bound to pay the item of Rs. 750 of the first mortgage and the consideration of the second mortgage as a decree has been obtained by the respond-

(14) 24 Ind. Cas. 6; 12 A. L. J. 613.
(15) 59 Ind. Cas. 570; 23 O. C. 344; 8 O. L. J. 18; 3 U. P. L. R. (O.) 1.
(16) 70 Ind. Cas. 941; 25 O. C. 256; (1923) A. I. R. (O.) 54.

ents-mortgagees and the plaintiff has not proved that the money was borrowed for illegal or immoral purposes.

The respondents' learned Counsel argued that legal necessity must be held to be proved because Kanhaiya Lal carried on cloth and *sarrafa* business and he did not produce his account-books in Court though summoned by the Court to do so at the request of the respondents (Application of 30th May 1917). Plaintiff's own witnesses Nos. 3 and 4 deposed to the existence of Kanhaiya Lal's shop for trading purposes and as he and the plaintiff are members of a joint family the business may be considered to be a joint family business. The books must be presumed to be in the possession of the manager of the family and the plaintiff has not explained why the books were not produced. Kanhaiya Lal did not put in an appearance in Court. In a case in the Madras High Court [*Gurusami Nadan* v. *Gopalaswami Odayar* (17)] where account-books were not produced a presumption was drawn under section 114 (*g*) of the Evidence Act against members of a Hindu Trading family, who resisted a suit on a promissory-note executed by the deceased manager of the family, that the books, if produced, would have been unfavourable to them and it was held that the burden shifted on them of proving that the debt in question was not incurred for joint family purposes. We think that similar reasoning will apply here and, admittedly, the plaintiff has failed to prove absence of family necessity for the two items borrowed by Kanhaiya Lal.

We dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

(17) 50 Ind. Cas. 775; 36 M. L. J. 568; 9 L. W. 547; (1919) M. W. N. 301; 42 M. 629.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 222 OF 1919.

January 30, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

CHATURBHUJ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOBIND RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Antecedent debt—Pre-emption decree, money due under—Civil Procedure Code (Act V of 1908), O. XVI, r. 1—Witnesses served, failure of, to attend—Adjournment.

A pre-emption decree merely gives the pre-emptor the option of acquiring certain property at a certain price. He is laid under no obligation to acquire the property unless he chooses. [p. 572, col. 2.]

Money required to satisfy a pre-emption decree cannot be regarded as an antecedent debt due from the pre-emptor. [p. 572, col. 2.]

Nathu v. *Kundan Lal*, 8 Ind. Cas. 836; 33 A. 282; 7 A. L. J. 1182, dissented from.

Where the witnesses of a party have been duly served but fail to appear an adjournment should be granted for re-summoning the witnesses. [p. 573, col. 1.]

Per *Walsh, J.*—Money payable under a pre-emption decree cannot be regarded as a debt. [p. 573, col. 1.]

To give true effect to the doctrine of antecedency in time there must be real dissociation in fact. [p. 573, col. 2.]

Sohan Lam Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437 at p. 449; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), followed.

Kapildeo v. *Thakur Prasad*, 21 Ind. Cas. 868; 36 A. 17; 11 A. L. J. 961, referred to.

First appeal from a decree of the First Additional Subordinate Judge, Aligarh.

Mr. *Gulzari Lal*, for the Appellants.

Messrs. *Shiam Krishna Dar* and *Panna Lal*, for the Respondents.

JUDGMENT.

Piggott, J.—The plaintiffs, who are the appellants in this Court, sued Gobind Ram and his minor sons upon two mortgages of the 9th of September 1911 and the 25th of June 1912. The question in issue in the Court below and again in this Court was whether the joint ancestral property in the hands of Gobind Ram can be made liable for the whole, or for any part of the consideration under these

two deeds. The essential circumstances are as follows:— On the 20th of July 1911 Gobind Ram had obtained a pre-emption decree entitling him to acquire certain property in a village called Loharra, on condition of his depositing a sum of Rs. 1,072, within a prescribed time. He borrowed this amount from the plaintiffs under the deed of September the 9th, 1911, by hypothecating under the said deed not only the share in village Loharra which he proposed to acquire, but also certain ancestral family property in his hands. He did not confine himself to raising the money necessary to acquire the property in Loharra under the pre-emption decree. He borrowed Rs. 1,246 more in order to pay off two promissory-notes. He acknowledged the previous receipt of Rs. 82 for incidental expenses and other unspecified necessities and he was paid Rs. 1,100 in cash and on registration. The total consideration, for this bond, therefore, comes to Rs. 3,500. Subsequently there was an appeal in the pre-emption case and the result was that, in order to secure the benefit of the pre-emption decree, Gobind Ram had to pay a further sum of Rs. 750. For this purpose, he executed the second of the two mortgages in suit for a nominal consideration of Rs. 800, of which Rs. 45 was received in cash and Rs. 5 was set down as due on account of the interest on the older bond of September the 9th, 1911. The Court below has held that the property acquired by Gobind Ram in village Loharra is liable for the full amount of the debt due under both mortgages according to their terms, and this finding is not challenged by the defendants. With regard to the remainder of the consideration, the finding is that two antecedent debts due under a promissory-note for a total sum of Rs. 1,246 were in fact paid up out of the consideration of Rs. 3,500 received under the bond of September the 9th, 1911. Consequently, the whole of the property hypothecated under the deed, including the joint ancestral family property, has bee made liable for this amount. To this part of the decree again, the defendants have submitted. The appeal before us is by the plaintiffs. They contend,—

Firstly, that the joint ancestral family property ought to have been made liable at least for the two sums of Rs. 1,072 and Rs. 750 applied to the satisfaction of the pre-emption decree. Secondly, that the sum of Rs. 1,100 paid in cash at the registration of the older deed was, in fact, borrowed in order to pay off antecedent unsecured debts and was applied to that purpose. On the first point, there is one authority of this Court, the case of *Nathu* v. *Kundan Lal* (1) which appears to support the contention of the plaintiffs. We do not think that this decision can be regarded as good law in view of the subsequent pronouncements of their Lordships of the Privy Council on the question of antecedent debt to which it is not necessary for us to refer in detail. When all is said and done, the pre-emption decree merely gave Gobind Ram the option of acquiring certain property at a certain price. He was laid under no obligation to acquire the property unless he chose. It seems to us that it would be very dangerous to hold that the money required to satisfy the pre-emption decree was an antecedent debt due from Gobind Ram on the date on which each of these mortgages respectively was executed. On the second point, we have come to the conclusion that we cannot come to a decision without exercising our power under O. XLI, r. 27 of the Civil Procedure Code to call for certain further evidence. We find that as early in the trial of the suit as the 29th of January 1919, the plaintiffs had made a full disclosure of their case regarding this item of Rs. 1,100. They mentioned the names of four creditors of Gobind Ram for whose satisfaction they allege the money to have been borrowed and whom they allege to have been actually paid off by means of this money. The case was set down for hearing on the 20th of March 1919, and, on the 7th of March the plaintiffs applied for summonses to issue against the four creditors whom they had already named to the Court. Summonses were duly served, but the witnesses in question did not present themselves before the Court at the hearing of the 20th of March 1919. The plaintiffs applied for an

(1) 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182.

adjournment to enable them to summon these witnesses but were refused. We cannot agree with the Court below that there was any laches on the part of the plaintiff in this matter. So far as appears from the record, they did their best to get these witnesses before the Court. We think this is a case in which the Court from whose decree the appeal before us is preferred has refused to admit evidence which ought to have been admitted. We accordingly send down the case to the Court below with directions to afford the plaintiffs a further opportunity of requiring the attendance of those four witnesses in such manner as they may think proper. The witnesses should be directed not merely to attend the Court to give evidence, but to bring with them any documents in their possession relating to the alleged transactions between them and Gobind Ram. When this evidence has been duly recorded, the record should be returned and set down for further hearing of the appeal to this Court on the earliest convenient date. The four witnesses in question are Bal Makund, Ganga Nath, Mansukh Ram and Jai Ram mentioned in the Court's *rubkar* of the 29th of January 1919, and summoned at the trial under the plaintiff's application of the 7th of March 1919.

Walsh, J.—I agree. With reference to the case of *Nathu* v. *Kundan Lal* (1) which has been relied on, I find a difficulty in following the reasoning contained in the judgment.

Whatever else it may be, a condition providing that the payment of a sum of money shall depend upon enforcing or taking up a pre-emption decree is certainly not a debt. The transaction, no doubt, was antecedent, but it does not result in debt. There is no person to enforce it if the pre-emptor does not choose to act upon this plea. I entirely agree with what my brother has said that the passage in the judgment of their Lordships of the Privy Council *Sahu Ram Chandra* v. *Bhup Singh* (2), clearly shows that the decision in *Nathu* v. *Kundan Lal* (1) ought not any longer to be followed. "In truth," runs the opinion of Lord Shaw, "to give true effect to the doctrine of antecedency in time, there must be also real dissociation in fact." In *Nathu* v. *Kundan Lal* (1) and in the case before us, there is not only no such dissociation in fact, but there is the most intimate association. In the previous decision of this Court, reliance was placed in the judgment upon the fact that the condition of the decree had been actually complied with and the property had been acquired as the result of the money borrowed in the mortgage transaction which was in question. That seems to be exactly the vice against which the Privy Council has warned the Courts of India. On the other hand, it seems to me that the decision in *Kapildeo* v. *Thakur Prasad* (3) marks very clearly the other side of the dividing line, there being in that case an obligation incurred antecedent in time and dissociated in fact, either to take up the purchase at auction or to pay compensation for default.

Z. K. *Case sent down.*

(2) 39 Ind. Cas. 280; 39 A. 437 at p. 449; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(3) 21 Ind. Cas. 868; 36 A. 17; 11 A. L. J. 961.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 1 OF 1923.

February 9, 1923.

Present:—Mr. Dalal, A. J. C.

GANGA RATAN—JUDGMENT-DEBTOR—**APPELLANT**

versus

CHANDIKA PRASAD—DECREE-HOLDER—**RESPONDENT.**

Civil Procedure Code (Act V of 1908), ss. 47, 148, O. XXXIV, r. 5—Mortgage—Decree for sale—Compromise—Extension of time—Appeal, whether lies.

The general provisions of section 148 of the Civil Procedure Code relate only to proceedings antecedent to the passing of a decree.

GANGA RATAN *v.* CHANDIKA PRASAD.

Where a final decree has been passed, the time fixed by the decree for the payment of money cannot be extended under the general provisions of section 148; any order passed for extension of time by the Court in such a case must be deemed to be passed under the authority given to an Execution Court under section 47 of the Code and is appealable.

After a decree for sale had been passed in a mortgage suit the parties came to a compromise by which the amount of the decree was reduced on condition that the judgment-debtor paid the remaining sum by a certain date. The judgment-debtor failed to make the payment by the date fixed and applied for extension of time:

Held, (1) that time being of the essence of the agreement between the parties, the Court had no power to grant an extension;

(2) that in any case a Court has no power under O. XXXIV, r. 5 of the Civil Procedure Code to extend the time for payment after a final decree has been passed in a suit for sale.

Narendra Bahadur Singh v. *Ajudhya Prasad*, 5 Ind. Cas. 443; 13 O. C. 28, followed.

Appeal against an order of the District Judge, Rae Bareli, dated the 22nd September 1922, reversing an order of the Subordinate Judge, Rae Bareli, dated the 4th February 1922.

Messrs. *A. P. Sen* and *Raj Narayan Shukla*, for the Appellant.

Mr. *Bisheshar Nath Srivastava*, for the Respondent.

JUDGMENT.—I think that this appeal is covered by the ruling in the case of *Narendra Bahadur Singh* v. *Ajudhya Prasad* (1). After a decree for sale, the parties came to a compromise by which the amount of the decree was reduced on condition of the judgment-debtor paying the remaining sum of Rs. 1,600 on 15th May 1921. The judgment-debtor failed to do so and on 16th June 1921 he deposited Rs. 800 and asked the Court executing the decree for time to pay off the balance of Rs. 800. That Court granted time for two months on 4th February 1922. This order was set aside on appeal, by the District Judge of Rae Bareli and the judgment-debtor has come here in second appeal.

The grounds of appeal are two:—1. That on appeal lay to the District Judge from an order passed by the Executing Court under section 148 enlarging the time fixed for the payment of money by the judgment-debtor, (2) that the order of the Execution Court was just.

It has been held in the ruling mentioned above that the general provisions of section 148 relate only to proceedings antecedent to the passing of a decree. Here a final decree was passed and the time for payment of money cannot be extended under the general provisions of section 148. Any order passed for extension of time must be deemed to have been passed under the authority given to the Execution Court under section 47 of the Code. An appeal does lie from such an order, and so the Court of the District Judge has jurisdiction in the matter.

Coming to the merits, the order of the District Judge is justified both on the ground given by him that time was of the essence of the agreement between the parties and also because no authority is given to a Court under O. XXXIV, r. 5 to extend the time for payment after a final decree is passed in a suit for sale. If r. 5 is compared with r. 3 relating to a final decree in a foreclosure suit, it will be seen that under r. 3 a Court is given power upon good cause shown upon such terms as it may think fit to postpone the date fixed for payment from time to time. As no such provision is made in r. 5 it is clear that no such authority is given to the Executing Court as regards a final decree for sale.

The appeal fails and I dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 5 Ind. Cas. 443; 13 O. C. 28.

HABIBULLAH *v.* GOLA ASMOTER KHATUN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2674 OF 1920.

January 15, 1923.

Present :—Mr. Justice C. C. Ghose and Mr. Justice Panton.

Nawab KHAJEH HABIBULLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOLA ASMOTER KHATUN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *ss.* 115, 152—*Revision—Appeal —Unappealable order—Appeal, memorandum of, whether can be treated as revision—Amendment of decree.*

Where an appeal is preferred to the High Court against an order from which no appeal is permitted, it is open to the Court to treat the memorandum of appeal as a petition under section 115 of the Civil Procedure Code, if the case is such that it would amount to a denial of justice if the order which is challenged were not interfered with. [p. 576, col. 2.]

A Court has no power to amend a decree passed by itself, apart from the rectification of a clerical error, etc., and if a Court directs an amendment which varies the operative part of the decree it exercises a jurisdiction which is not vested in it by law and its action is open to revision under section 115 of the Civil Procedure Code. [p. 577, col. 1.]

Appeal against the decree of the Additional District Judge, Tipperah, dated the 28th February 1918, modifying that of the Munsif, Third Court, at Comilla, dated the 30th November 1916.

Babus *Surrendra Nath Guha* and *Sisir Kumar Ghosal*, for the Appellants.

Mr. *A. K. Fazlul Haq* and Babu *Radhika Ranjan Guha*, for the Respondents.

JUDGMENT.—This appeal has arisen under rather peculiar circumstances. The suit out of which this appeal has arisen was brought by the plaintiffs for recovery of possession of two plots of land after establishment of title thereto. In the Court of first instance the suit was decreed in the following manner. The plaintiff's title was declared to one *kani* of plot No. 1 and the entirety of plot No. 2 as against defendants Nos. 1 to 19 and 23 to 26 after contest and *ex parte* as against the remaining defendants. In the Court of Appeal below, the following order was passed: "The suit be decreed in part; the title of plaintiffs Nos. 2 to 7 be declared to 1 *kani* of plot No. 1 and plot No. 2 of the plaint; and plaintiffs Nos. 2 to 7 do remain in possession of the same. So far as plaintiff No. 1 is concerned the suit is dismissed with costs. The parties (except plaintiff No. 1) do get costs in the lower Court in proportion to their success. But all this is dependent upon plaintiffs Nos. 2 to 7 paying within one month from to-day a further Court-fee of Rs. 65. Appeal No. 79 is, therefore, dismissed with costs. Appeal No. 34 is partially allowed with proportionate costs, as against other respondent, plaintiffs' Appeal No. 34 is dismissed with costs, on condition that plaintiffs Nos. 2 to 7 do pay within one month from to-day, a further Court-fee of Rs. 65, in default of which Appeal No. 34 will be allowed in full, *i. e.*, the original suit will be dismissed with costs in both Courts to defendants." This order was made by Mr. C. Sells, Additional District Judge of Tipperah, on the 20th February 1918. On the 26th February, the decree, which was the formal expression of opinion on the part of the Court of Appeal below, was signed by Mr. Sells. This decree is in accordance with the ordering portion of the judgment which has been set out above. It appears that the plaintiffs Nos. 2 to 7 did not carry out the order of the Court by which they were directed to pay a further Court-fee of Rs. 65 within the time limited by the order and by the decree which was signed on the 26th February 1918. On the 5th July 1920 an application was made on behalf of the plaintiffs Nos. 2 to 7 for permission to deposit in Court a further Court-fee of Rs. 65 as mentioned in the judgment which was delivered on the 20th February 1918 and in the decree which was signed on the 26th February 1918. Mr. Sells had been transferred from Tipperah and the matter came on before Mr. Martin, who was acting as an Additional District Judge. The further Court-fee was actually deposited in Court by the plaintiffs Nos. 2 to 7 on the 30th July 1920 and thereupon Mr. Martin ordered that the decree (described as the final decree) should now be passed in this case. In accordance with Mr. Martin's order, dated the 30th July 1920, a clause was inserted in the original decree which ran as follows:—"In accordance with order No. 14 of

the order-sheet dated the 20th July 1918 Court-fee of Rs. 65 having been paid, the decree is made final. The appeal that is being dismissed with costs, is against the other respondents (*sic*) and the plaintiffs Nos. 2 to 7 will get Rs. 65 as costs in addition to that already awarded to them." (*vide* the judgment dated the 20th February 1918). Defendants Nos. 1 to 26 complain that, inasmuch as the plaintiffs Nos. 2 to 7 did not carry out the order made by Mr. Sells on the 20th February 1918 as regards paying into Court a further Court fee of Rs. 65 which was ordered by him to be paid into Court within one month from the 20th February 1918, the decree by Mr. Sells could not be re-opened again and extension of time granted after the expiration of more than two years from the date of the original order on the plaintiffs Nos. 2 to 7 to pay into Court a further Court-fee as referred to above. It is argued on behalf of defendants Nos. 1 to 26 that, notwithstanding the terms of section 148 of the Code of Civil Procedure, the applications of plaintiffs Nos. 2 to 7 made on the 5th July 1920 was incompetent and that the Court below had no jurisdiction whatsoever to amend in July 1920 the decree by Mr. Sells and to enlarge the time granted by the decree of Mr. Sells to pay into Court the further Court-fee of Rs. 65. In support of this contention our attention has been drawn to a number of cases amongst which may be mentioned the cases: *Suranjan Singh* v. *Rambahal Lal* (1), *Sajjadi Begam* v. *Dilawar Husain* (2), *Dharmaraja Aiyar* v. *Srinivasa Mudaliar* (3). Mr. Haq on behalf of the respondents has vigorously contested the appellants' right of appeal to this Court and has argued, firstly, that there was no right of appeal from the order of Mr. Martin which was merely an order for amendment of the previous decree. Secondly, that even if the appeal preferred by defendants Nos. 1 to 26 be treated by the Court as a petition by way of revision under section 115 of the Code of Civil Procedure the appellants cannot get any relief whatsoever for the order complained of, was made by the lower Appellate Court in the exercise of its discretion and it is not usual for this Court to interfere with orders made by the Courts below in the exercise of their discretion. Thirdly, that the decree signed by Mr. Sells on the 26th February 1918 was merely a preliminary decree which had to be made final by a further decree, and that no such decree having been made by the Courts below for a period of more than two years from the 26th February 1918 or, at any rate, before the 5th July 1920. It was open to the plaintiffs Nos. 2 to 7 to apply to the Court to put in a further Court-fees as mentioned in the original order of the 20th February 1918 and to make such application at any time before the final decree was passed. We are of opinion, for the reasons about to be given, that there is no substance, whatever in any of the contentions urged before us on behalf of the respondents, but that the contentions urged on behalf of defendants Nos. 1 to 26 should prevail. In the first place, it is quite unnecessary for us to go into the question as to whether the appellants had a right of appeal to this Court. Assuming, however, that they had not, the circumstances of this case demand of us that we should treat the appeal preferred by the defendants Nos. 1 to 26 as a petition under section 115 of the Code of Civil Procedure. The circumstances are so extraordinary that it would amount to a denial of justice if we were to hold that our powers are so limited that we cannot give any relief to defendants Nos. 1 to 26 in the circumstances which have happened. In the second place, we are of opinion that the decree which was drawn up shortly after the 20th February 1918, namely, on the 26th February 1918 was in itself a final decree. No doubt, it would have been better if the Court after determining that the extra fee was payable, had ordered the fee to be paid within a certain time and had delayed passing the decree until the time limited by the order had expired. But the fact that the decree was drawn before the expiration of one month from the 20th February 1918 did not in any way amount to this that it was to be treated as a preliminary decree and that it was

(1) 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 95.
(2) 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625.
(3) 31 Ind. Cas. 240; 39 M. 876; 29 M. L. J. 708; 18 M. L. T. 486; 2 L. W. 1074.

to be followed by a further formal expression of opinion of the Court, namely, by a further final decree. The default provisions mentioned in the judgment itself of the 20th February 1918, are incorporated in the decree which was signed on the 26th February 1918 and it was a self-contained decree in every sense of the word and it was, to all intents and purposes, the final formal expression of opinion of the Court. That being so, it now remains for us to consider as to whether the appellants before us have brought their case within the four corners of section 115. As we have already held, the decree signed on the 26th February 1918 was a final decree. If it was a final decree, then, subject to such rights of amendment, as, for instance, the rectification of a clerical error and so forth, that decree could not be amended by the Court which passed the decree. That being so, there was clearly an exercise of jurisdiction by the Court below which had not been vested in it. In the circumstances, there is, therefore, no other alternative but to set aside the order made by Mr. Martin on the 2nd August 1920 and we accordingly do so.

The result, therefore, is that the decree as drawn up and signed by Mr. Sells on the 26th February 1918 must stand and all necessary results must follow therefrom.

The appellants have succeeded and they are, therefore, entitled to their costs. We assess the hearing fee at two gold *mohurs*.

W. C. A. & Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 32 OF 1921.

January 24, 1923.

Present:—Mr. Justice Campbell.

MIR KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHARFU AND OTHERS—PLAINTIFFS

PUNNUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. XXII, rr. 3, 4, 12—**Res judicata**—*Matter which ought to have been made ground of defence—Appeal, second, question, whether can be raised in—Execution of decree—Death of judgment-debtor—Abatement.*

A plea of *res judicata* can be entertained in second appeal though not taken in the memorandum of appeal. [p. 581, col. 1.]

Muhammad Ismail v. *Chattar Singh*, 4 A. 69; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 634 (F. B.). *Chhadami Lal* v. *Shyama Charan*, 24 Ind. Cas. 12, relied on.

M. filed a suit against *P.* and *S.* for recovery of a certain share in a village on the allegation that *P.* had transferred that share to *M.* *S.* was made a party on the ground that *P.* had got a portion of the land in dispute mutated in his favour. The suit was decreed and the decree directed that the land should be taken from *P.* In execution it was discovered that *P* was in possession only of a very small portion of land and the share decreed to *M.* was made up from the share in possession of *S.* The latter filed an objection that there was no decree against him, that the transfer in his favour was prior to that in favour of *M.* and he was not, therefore, liable under the decree;

Held, (1) that the question of the ownership of *S.* over the land in dispute was directly and substantially in issue in the suit and the decision in the suit must be regarded as an implied adjudication to the effect that *S.* was not the owner of the share decreed to *M.*; [p. 580, col. 2.]

(2) that the direction in the decree to the effect that *M*'s share should be taken from *P.* was due to the fact that the Court was unaware that *S* claimed to be the owner of the land to which the decree applied; [p. 580, col. 2.]

(3) that the question of the ownership of *S.* was, therefore, *res judicata* under Explanation IV to section 11 of the Civil Procedure Code. [p. 580, col. 2.]

Gobind Lal v. *Baldeo Singh*, 24 Ind. Cas. 931; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914, followed.

Rules 3 and 4 of O. XXII of the Civil Procedure Code have no application to execution proceeding by virtue of the provisions of rule 12 of the Order. [p. 580, col. 1.]

Miscellaneous First Appeal from the order of the Senior Subordinate Judge, Hissar, dated the 23rd August 1922.

Mr. *M. Saleem*, for Dr. *Nand Lal*, for the Appellants.

Mr. *Nanak Chand Pandit*, for the Respondents.

JUDGMENT.—The facts of this case are somewhat complicated and, although they have been stated frequently in the various judgments and orders pronounced in the course of litigation between the parties extending over a number of years, it is necessary to detail them once more.

The village of Dadupur in the Fatehabad Tahsil of the Hissar District comprises a sub-division or hamlet called Dhani Dhangapur, the land attached to which is equivalent to about one-third of the whole village area. The whole village up to 1905 was owned by Mrs. Alice Georgiana Skinner, who in that year sold it to one Narain Singh. Four tenants, Punnun, Piru Rahman and Jiwand, Pachhada Rajputs, brought a suit for pre-emption, which was compromised on 30th April 1906 by an agreement that the plaintiffs and several other persons, including some if not all, of the party hereafter to be designated Muhammad and others or their representatives, were to be recognised as occupancy tenants. These plaintiffs brought a second suit on 11th January 1907 alleging that the agreement had not been fulfilled by Narain Singh, asking for cancellation of the previous compromise for that reason and praying for a decree for possession by pre-emption. The second suit, after various vicissitudes, was also compromised on 26th November 1908, and in accordance with the compromise the plaintiffs, who will be designated hereafter Punnun and others, were granted a decree for possession of the village on payment of Rs. 25,500. Payment was made by due date, the 25th February 1909, and Narain Singh now disappears from the story. Muhammad and others were defendants *pro forma* in this suit as persons affected by the first compromise. They signed the second compromise in such a manner as to indicate that they made themselves responsible for the payment of the Rs. 25,500, but it was not stated in the compromise that they were to acquire any particular rights and no decree was passed in their favour or against them. The decree gave possession to the plaintiffs only, and made them alone responsible for fulfilment of the condition of paying Rs. 25,500 to Narain Singh.

On 30th November 1907 Punnun and others executed a document termed an agreement to the following effect:—

We are the sole plaintiffs in the pre-emption suit but we are being supported by Ram Singh and others, Jats of Dhani Dhangapur, and other residents of the village are also sharing in the expenses of the suit, and shall contribute towards the price to be paid for pre-emption. Ram Singh and others shall pay one-third of the total cost incurred and when the village is decreed they shall have one-third of it. The remaining two-thirds of the village shall be apportioned between us and forty-two other persons named, (Muhammad and others) in shares proportionate to the amount contributed by each individual to the expenses of the suit.

When it came to the time for paying Rs. 25,500 by the 25th February 1909 for the pre-emption decree Punnun and others had not got enough money. The reason which they afterwards alleged was that Ram Singh and others had not paid up their one-third share. They, therefore, approached Mir Khan and others of the neighbouring village of Haroli and got money from them. The result was a sale-deed dated 2nd March 1909 by which Punnun and others sold 7½ out of 20 *bisuas* of the village of Dadupur, *i.e.*, 15-40ths, to Mir Khan and others for Rs. 12,500. The deed recited that the actual area transferred was to be 1043 *bighas* and that Mir Khan and others "shall take the land at Dhani Dhangapur, that the rest of the land shall be given to them from some other place."

The remainder of the story concerns the doings and dealings of the four parties introduced above, *viz.*, (1) Punnun and others, the four pre-emptors; (2) Ram Singh and others, the Jats of Dhani Dhangapur; (3) Muhammad and others of Dadupur, the numerous other residents of the village to whom the pre-emptors had promised shares in proportion to their subscriptions, and (4) Mir Khan and others of Haroli, the vendees of 7½ *bisuas*. These names will be retained in describing the several parties, the actual *personnel* of which has changed from time to time through death inheritance, and other causes.

Later on, in the year 1909, Ram Singh and others sued (1) Punnun and others, (2) Mir Khan and others for possession of one third of Dadupur in terms of the agreement of 30th November 1907 and obtained a decree on 9th February 1910

which was executed, and as a result the proprietor's column in the *Jama bandi* of Dadupur village read, Ram Singh and others 11 shares, Punnun and others 22 shares.

On 1st December 1910 a mutation was sanctioned by which the names of Muhammad and others (who are the plaintiffs in the present proceedings) appeared for the first time in the proprietary column. The 22 shares of Punnun and others were sub-divided into 2,600 shares of which Punnun and others received the following:—Punnun 120 shares, Piru 102 shares, Kamala, son of Jiwand, 60 shares, Rahman and his brother 99 shares, total 381. The remaining 2,219 shares went to Muhammad and others in 31 lots. This entry left Punnun and others, the original pre-emptors, with 381/2,600 of 2/3-127/1,300 of the whole village, or if the share of Rahman's brother be deducted, with 653/7,800 only. The change was stated to have been made at the request of Punnun and others and the shares to be in accordance with the amount paid for pre-emption of the village.

The next event was a suit instituted on 16th December 1910 by Mir Khan and others against (1) Punnun and others, (2) Ram Singh and others, (3) Muhammad and others, claiming possession of 7½ *biswas* of the village of Dadupur on the strength of the sale of 1909. The plaint described Punnun and others as the real vendors and the other defendants as persons in whose favour Punnun and others had caused the land to be mutated and who, therefore, were joind as *pro forma* defendants. Punnun and others pleaded that what had been sold was the land of Dhani Dhangapur and that, as this had been decreed by a Court to Ram Singh and others in a suit to which Mir Khan and others had been parties, they, the defendants, were no longer liable. Ram Singh and others pleaded that, at any rate, the plaintiffs could not have any land which had been decreed to them. Muhammad and others did not appear or file any pleadings and the suit and consequent appeal were heard *ex parte* against them.

The Trial Court dismissed the suit. The Chief Court accepted an appeal by the plaintiffs and decreed their claim subject to the proviso that "the share decreed to the plaintiffs will be taken from the chief defendants, (*i. e.*, Punnun and others) and not from the one-third share belonging to the representatives of Ram Singh and Nidhan Singh.

Mir Khan and others applied for execution. A warrant for possession of 7½ *biswas* was issued against (1) Punnun and others, (2) Muhammad and others, *i. e.*, all the defendants except Ram Singh and others who held the ⅓rd share reserved by the Chief Court. Muhammad and others protested that there was no decree against them and that their names should be struck out of the warrant. This was done, but nevertheless the decree-holders Mir Khan and others were eventually, on 19th May 1914, placed in possession of land which had been mutated to Muhammad and others on the 1st December 1910, and mutation of names followed. This obviously was inevitable if the decree for 7½ *biswas* of the village, *i. e.*, 15/40, was to be executed at all, since the recorded shares of Punnun and others, as stated above, aggregated at the most 127/1,300.

The result was a suit; with which we are directly concerned, filed on 24th July 1915 by Muhammad and others against (1) Mir Khan and others, (2) Punnun and others, claiming restoration to the plaintiffs of the land previously recorded in their names. They based their suit on the agreement of 30th November 1907, pointed out that it was prior in date to the sale to Mir Khan and others, contended that it had been acted on, asserted that Punnun and others were owners of only 186/15/32 shares of 2,600 shares of ⅔rds of the village, and claimed that the decree against Punnun and others could not be satisfied out of their (the plaintiffs') 2413/17/32 shares out of 2,600 shares of ⅔rds. There is no explanation on the record of the difference between the plaintiff's figures regarding the shares and those given earlier in this judgment, which were taken from the text of the mutation of the 1st December 1910, but the event will show that the point is unimportant.

Mir Khan and others replied that they knew nothing about the agreement of 30th November 1907, and that they had their decree for 7½ *biswas* of Dadupur to

MIR KHAN *v.* SHARFU.

be taken out of ⅔rds of the village in a suit to which the plaintiffs had been parties. The unfortunate Punnun and others admitted the claim and disclaimed liability, pleading in effect that Ram Singh and others by not paying their one-third share at the right time for the pre-emption decree had brought about the whole trouble, and that they were not responsible.

The Trial Court held that the suit must be treated as an application in execution proceedings under section 47, Civil Procedure Code, the plaintiffs having been parties to the suit in which the decree in favour of Mir Khan and others had been passed and dismissed it as time-barred. On appeal by the plaintiffs a Division Bench of this Court sustained the finding that a regular suit did not lie, reversed the dismissal of the application under section 47, Civil Procedure Code, on the ground of limitation, and remanded it for a fresh decision on the merits, remarking that if the appellants succeeded in proving that they had acquired a valid title to the whole or part of the land in dispute before the sale in favour of the defendants they would be entitled to be restored to the possession of the land proved to be their property, unless their prior title is defeated on some other ground.

The lower Court proceeded to take fresh evidence and then accepted the application and ordered Muhammad and others to be restored to possession. Mir Khan and others have appealed against this decision and the appeal is before me.

A preliminary objection is raised that Kaman, appellant, and Kahni, Umar, Kaku and Fajju, respondents, have died and that since no application to substitute their legal representatives has been presented in time, the appeal by and against them has abated and consequently the appeal must fail *in toto*. These, however, are proceedings in execution of a decree and r. 12 of O. XXII expressly excludes such proceedings from the operation of rules 3 and 4 of the same Order. Rule 11 does not help the respondents who have raised the objection. It has to be read with rule 12, and its provision "enabling appellant" and "respondent" to be substituted for "plaintiff" and "defendant" in rules 3 and 4 is no good to them unless those rules are applicable.

The first point argued for the appellants is that the question now in issue is *res judicata* in their favour by the decision in the 1910 suit and this appears to me obviously to be so, in the light of Explanation IV to section 11, Code of Civil Procedure. In that suit Mir Khan and others claimed rather more than one-third of the whole village of Dadupur. The present plaintiffs, or applicants as they have been held to be, were defendants. They knew that by the mutation of 1st December 1910 Punnun and others had been reduced to owners of very much less than 7½ *biswas*. They could and should have made it a ground of defence that the greater part of ⅔rds of the village had been recorded in their names in pursuance of the agreement of 1907. Instead of doing so, they absented themselves. A decree was passed in favour of Mir Khan and others for 7½ *biswas* out of ⅔rds, most of which land stood in the names of Muhammad and others in the Revenue Records. The decree ordered that the 7½ *biswas* should be taken from Punnun and others, but this was manifestly because the Court was unaware that Muhammad and others, the present petitioners, claimed to be owners in the ⅔rds of the village to which the decree applied. Their ownership was not admitted in the plaint. The plaint merely stated that Punnun and others had "got the land mutated in the names of" the other defendants. Applying Explanation IV of section 11 the question of the present applicants' rights as owners in the village of Dadupur was a matter directly and substantially in issue, and as was ruled in *Gobind Lal* v. *Baldeo Singh* (1) the decision in the suit must be regarded as an adjudication, either express or by implication, on that matter to the effect that they are not owners in the 7½ *biswas* decreed to Mir Khan and others the plaintiffs.

This point was not raised specifically in the memorandum of appeal, but it was pleaded in the Court below in reply to the plaint and was the subject of an issue which

(1) 24 Ind. Cas. 931; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914.

was decided in favour of the applicants in the judgment set aside by the order of remand. There is authority for holding that a plea of *res judicata* can be entertained in second appeal though not taken in the memorandum of appeal [*Muhammad Ismail* v. *Chattar Singh* (2); *Chhadami Lal* v. *Shyama Charan* (3)]. The learned Counsel for the respondent complains, not unreasonably perhaps, that he has been taken unawares, but he has argued the plea and there is no doubt, I think, that his clients fail upon it. They also fail on the merits. There is no reliable evidence of the acquisition by them of any valid title before the date of the mutation of 1st December 1907 which was subsequent to that of the registered sale-deed in favour of Mir Khan and others. The Court below has relied upon the depositions by Piru, one of the original pre-emptors, and Kamala, son of Jiwand, another original pre-emptor. The former stated that Mir Khan and others when they entered into the sale transaction knew that part of Dadupur was to go to Muhammad and others, knew that the latter had paid their shares of the pre-emption price, and knew that they had obtained possession of their shares of the land. Kamala said that Muhammad and others were in possession when the sale was transacted and that Mir Khan and others were told that Dadupur, exclusive of Dhani Dhangapur, was to be kept by the Pachhadas. These two witnesses are not unbiassed. They showed by their pleadings that they are supporting their fellow-villagers, and all along they have persisted in trying to make out that the sale gave Mir Khan and others no rights except in Dhani Dhangapur.

There is no evidence of any date on which Muhammad and others obtained possession of any particular plots. They are said to have been tenants under Mrs. Skinner but there is no evidence that there several tenancy holdings corresponded with the shares which they now claim to possess as proprietors. For this reason and also because there is no proof of any oral agreement to transfer to them they can derive no advantage from the ruling, cited by their learned Counsel, *Kannan* v. *Krishnan* (4) where it was held, with reference to section 48 of the Registration Act, that an oral agreement to sell by a mortgagee in possession can be enforced against a subsequent registered purchaser because the previous possession of the mortgagee together with the agreement to sell is equivalent to transfer of possession under the agreement of sale.

The agreement of 1907 created no present rights in the applicants' favour, and no rights of any kind in any particular area of land within the village of Dadupur. The decree of the 26th November 1908 clearly conferred no title to land in Dadupur on any one except Punnun, Piru, Jiwand and Rahman. The compromise which preceded it also conferred no right specifically and if it can be read as creating or declaring any right, title or interest in what the petitioners now claim, these were terms which were not incorporated in the decree, and the rights being admittedly of value largely exceeding Rs. 100, and the compromise being unregistered, it is inadmissible in evidence to substantiate a claim by the petitioner to the land in suit [*Pranal Anni* v. *Lakshmi Anni* (5)].

In short, there is no proof of any transfer of proprietary rights in the land in suit to the petitioners prior to the date of the registered conveyance to Mir Khan and others, and without this the question of applying the doctrine laid down in *Shankar Das* v. *Sher Zaman* (6) by which the learned Subordinate Judge appears to have been guided, does not arise.

For these reasons, I accept the appeal, set aside the order of the lower Court and dismiss the application with costs throughout.

Z. K. *Appeal accepted.*

(2) 4 A. 69; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 634 (F. B.).
(3) 22 Ind. Cas. 12.
(4) 13 M. 324; 4 Ind. Dec. (N. S.) 938.
(5) 22 M. 508; 1 Bom. L. R. 394; 3 C. W. N. 485; 26 I. A. 101; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.).
(6) 56 P. R. 1900; P. L. R. 1900 p. 105 (F. B.).

AJODHYA SINGH *v.* KHUSRO BEGAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 27 OF 1922.

July 14, 1922.

Present:—Mr. Ashworth, J. C.

AJODHYA SINGH—DEFENDANT—APPELLANT

versus

Kalwan Babu Nawab KHUSRO BEGUM—PLAINTIFF—RESPONDENT.

Landlord and tenant—Rent, suit for—Lease not proved—Decree for compensation for use and occupation, whether can be granted—Registration Act (XVI of 1908), ss. 17, 49 (c)—Thekanama, unregistered, whether can be used as evidence of value of property.

Where a plaintiff in a suit for rent fails to prove a lease, he can be given a decree on the basis of use and occupation if the defendant is proved to have held the land. [p. 582, col. 2.]

Sheo Karan Singh v. *Parbhu Narain Singh*, 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347, relied on.

A *thekanama* which is inadmissible in evidence for want of registration cannot be used as evidence of the value of the property for the purpose of determining the amount of compensation for use and occupation. [p. 583, col. 1.]

Appeal against an order of the Third Additional District Judge, Lucknow, dated the 28th February 1922, reversing the decree of the Assistant Collector of the First Class, Unao, dated the 9th August 1921.

Mr. *Syed Mohammad*, for the Appellant.

Mr. *Jagmohan Nath Chak*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for arrears of rent brought by the plaintiff-respondent against the defendants as *thekedars*. In proof of the *theka* a registered document was put in Court by the plaintiff. It had, however, previously been held in a civil case that this document could not be deemed to be effective as a registered document by reason of its having been registered in a wrong District. The Court of first instance accordingly, holding that there was no proof of the *theka*, held that the plaintiff was not entitled to obtain rent. On appeal to the Additional District Judge of Lucknow it was held that, although the *thekanama* was not admissible as evidence of the contract of *theka*, one of the defendants Ajudhia Singh had admitted the fact of the *theka*, and that this fact justified a decree against him as *thekadar*. The lower Appellate Court further held that the claim could be treated as one for compensation for use and occupation of land and that the *thekanama* might be looked at to estimate the measure of compensation. It relied on *Sheo Karan Singh* v. *Parbhu Narain Singh* (1). Ultimately, the lower Appellate Court, holding that the suit had been improperly dismissed by the Court of first instance on the preliminary finding that the registered *thekanama* was inadmissible in evidence, remanded the case for decision on the merits.

The first ground taken in the Memorandum of Appeal is that the lower Appellate Court acted wrongly in remanding the case. This objection appears to me to be well founded. The Court of first hearing appears to have decided every issue and it cannot be said that it dismissed the suit on a preliminary point. The fact that its decision on a preliminary point covered the decision on the remaining points does not justify its being held that the decision was only on a preliminary point.

The second ground is that the lower Appellate Court was not justified in making out a case for the respondent which has not been set up in the pleadings. There is abundant authority, including the case in *Sheo Karan Singh* v. *Parbhu Narain Singh* (1), referred to above, for allowing a plaintiff, who fails to prove a lease, a decree on the basis of use and occupation where the defendants are proved to have held the land.

The third ground is that the lower Appellate Court has misapplied the law. The lower Appellate Court was not correct in taking the admission of one of the defendants that he was *thekedar* as dispensing with proof by the plaintiff of the *theka*, in view of the fact that the written statement clearly raised the objection that the *thekanama* was inadmissible in evidence. Apart from this, the only question that appears to arise as to the law is whether the lower Appellate Court was justified in holding that the measure of compensa-

(1) 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347.

tion could be based on the improperly registered *thekanama* and on the *kabuliyat*. Under section 49 (*c*) of the Registration Act (XVI of 1908) no document required by section 17 of the Act to be registered shall, unless it has been registered, be received as evidence of any transaction affecting immoveable property. The *thekanama* was a transaction which *inter alia* affected the property by assessing its rental value. I consider that the *thekanama* could not be used as evidence of the value of the property at all. The *kabuliyat*, however, also mentions the amount for which the defendants were willing to accept the property under lease. There was no necessity to register this *kabuliyat* inasmuch as it did not create, etc., any right or title in the property. It is only the person having rights in the property who can create rights in favour of another in that property. I am, therefore, of the opinion that the *kabuliyat* was relevant in evidence as to the measure of compensation for use and occupation. It operated as an admission by the defendants of the rental value of the holding.

It is ordered accordingly that the order of remand by the lower Appellate Court be set aside and that the case be sent back to the lower Appellate Court for deciding the appeal. The lower Appellate Court will be at liberty to take action under O. XLI, r. 24 or 25, if it is of the opinion that it cannot pronounce judgment on the evidence recorded and on the facts determined by the lower Court. The costs of this appeal will abide the result.

Z. K.

Case sent back.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 597 OF 1917.

April 18, 1921.

Present :—Mr. Justice Leslie-Jones and Mr. Justice Wilberforce.

MUHAMMAD JAN—DEFENDANT—APPELLANT

versus

DULI CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Cross-suits—Question directly and substantially in issue in both suits—Appeal from one decree—Decree not appealed from, whether operates as bar.

One *J.* brought a suit for pre-emption against *D* and *M*. basing his claim on the ground that he was the owner of the whole of the adjoining *Katra*. *D.* and *M.* resisted the suit and instituted a cross-suit for possession and partition of the *Katra* on the ground that after the institution of the pre-emption suit they had themselves purchased a portion of the *Katra* from a third person *C. J.* contested th right of *C.* to make the sale and the suits were, at the instance of the parties, tried together. The Court of first instance held that *C.* had no title in the *Katra* and not only dismissed the suit of *D.* and *M.* but also passed a decree for pre-emption in *J.'s* favour. *D.* and *M.* appealed only against the dismissal of their own suit:

Held, that there being no appeal from the decree in *J.'s* suit, the decree in that suit had become final and as the question of title was directly and substantially in issue in the pre-emption case, it was *res judicata* as between the parties and against *D* and *M*. [p. 584, col. 1.]

Zaharia v. *Debi*, 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861, *Anant Das* v. *Udaibhan*, 19 Ind. Cas. 76; 35 A. 187; 11 A. L. J. 214, referred to.

Second appeal from the decree of the Additional District Judge, Delhi, dated the 24th November 1916, reversing that of the Subordinate Judge, Second Class, Delhi, dated the 10th July 1916.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—It is not necessary to re-state all the facts of this case which are given at length in the judgments of the Court below.

Briefly, Muhammad Jan, defendant-appellant, brought a suit for the pre-emption of a house, basing his right on the ground that he was the owner of the whole of an adjoining *Katra*. This suit was at first resisted by the defendants-respondents, Duli Chand and Munshi Lal, on various untenable grounds but, later, they put in a plea that after the institution of the suit they had themselves purchased a portion of the *Katra* from one Chet Ram. They also themselves instituted another suit against Muhammad Jan for possession, by partition, of their share in the *Katra* which they alleged they had purchased from Chet Ram. The right of Chet Ram, however, to sell any portion of the *Katra* was disputed by Muhammad Jan, and at the instance of both parties both suits were tried together on the ground that

their decision depended on the question whether Chet Ram had a saleable interest on the *Katra* and the suit for pre-emption was accordingly delayed for this reason.

The Subordinate Judge held that Chet Ram had no title in the *Katra* and he, therefore, not only dismissed the suit of the plaintiff-respondent for possession by partition but also granted Muhammad Jan a decree for pre-emption.

The plaintiffs-respondents filed an appeal in the Court of the Additional District Judge but only against the dismissal of their own suit for possession and they obtained a decree against which Muhammad Jan has now filed a second appeal in this Court.

In our opinion the appeal must succeed. The decree in the pre-emption suit against which the plaintiff-respondents omitted to appeal still stands. The question of title was there directly and substantially in issue and it was raised at the instance of the plaintiffs-respondents themselves. That question is, therefore, *res judicata* as between the parties and against the plaintiffs-respondents. See *Zaharia* v. *Debi* (1) and *Anant Das* v. *Udaibhan* (2).

The case is not one in which we think there is any sufficient reason for directing that costs should not follow the event. We, therefore, accept the appeal and dismiss the plaintiffs' suit with costs throughout.

R. N. & Z. K. *Appeal accepted.*

(1) 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861.
(2) 19 Ind. Cas. 761 35 A. 187; 11 A. L. J. 214.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 14, 1922.

Present:—Viscount Cave, Lord Shaw, Sir John Edge, Kt., and Mr. Ameer Ali.

RADHAKRISHNA AYYAR AND ANOTHER —DEFENDANTS—APPELLANTS

versus

SUNDARASWAMIER, SUBSTITUTED FOR SWAMINATHA AYYAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Subject-matter of suit, value of—Method of determination—Certificate, when can be granted —Landlord and tenant—Pattah—*Terms, fair and equitable, how fixed—Construction—Rent, rate of—Madras Estates Land Act (I of 1908), ss. 27, 28.*

The High Court may with propriety grant a certificate for leave to appeal to His Majesty in Council where the proceeding in question raises the entire question of the contract relations between the parties and that question, settled one way or the other, affects a much greater value, and its determination governs rights and liabilities of a value beyond the limit. [p. 586, col. 1.]

Banarsi Prasad v. *Kashi Krishna Narain*, 28 I. A. 11; 23 A. 227; 8 Sar. P. C. J. 447; 11 M. L. J. 56; 3 Bom. L. R. 154; 5 C. W. N. 193; 7 Sar. P. C. J. 825 (P. C.), referred to.

Past practice is one of the elements to be taken into consideration in fixing, under the Madras Estates Land Act, 1908, what are the fair and equitable conditions of a particular *pattah*. [p. 586, col. 2.]

Parthasarathi Appa Row v. *Chevendra Venkata Narasayya*, 6 Ind. Cas. 988; 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233; (1910) M. W. N. 466; 12 Bom. L. R. 648 (P. C.), referred to.

Under sections 27 and 28 of the Madras Estates Land Act the old rent continues until reduced or enhanced by special applications under the Statute. [p. 587, col. 2.]

Even in regard to penal provisions with a strict construction, no construction is open to a Court of Law which is in violation of what that Court considers to be the true meaning of the provision. [p. 588, col. 2.]

Plaintiff sued for recovery of rent said to have accrued and to be due by the defendants in respect of their holdings in accordance with the terms of a *pattah* which provided that the defendants shall cultivate the specified area of land, harvest the crops and apportion the plaintiff's dues. A further clause added that if the yield be carried away without acting in accordance with the above provisions then the defendants will pay at an average rate of 170 *kalams* 4 *marakals* per *veli* of *nanja*:

Held, that the rent of 170 *kalams* was not a penal rent but was a substituted rent and the plaintiff was entitled to recover at that rate. [p. 588, col. 2.]

Appeal from a decree of the High Court of Judicature at Madras, (Oldfield and Phillips, JJ.), published as 40 Ind. Cas. 587, dated 14th November 1916, against the decree of the District Court, Tanjore, in Appeal Suit Nos. 842 and 832 of 1913, preferred against those of the Court of the Revenue Divisional Officer, Kumbakonam in Summary Suit Nos. 3 and 4 of 1912.

Mr. *Kenworthy Brown*, for the Appellants.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Respondents.

JUDGMENT.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 14th November 1916.

It varied a decree of the District Judge of Tanjore dated the 18th January 1915. The suit between the parties was brought in the Revenue Court of Kumbakonam under the Madras Estates Land Act, No. I of 1908, section 77. The claim of the plaintiff was for rent said to have accrued and to be due by the defendants in respect of their holdings in accordance with the terms of a *pattah* which will be afterwards noted. No further reference is required to the various stages of the litigation.

A preliminary question, however, is raised as to whether the appeal is competent. It is pointed out by the respondent, who makes the objection, that the rent sued for amounted to Rs. 4,560 being rent for three years in arrear. The respondent accordingly contends that it sufficiently appears that the amount or value of the subject-matter of the suit is not Rs. 10,000, as required by sections 109 and 110 of the Code of Civil Procedure, 1908; and upon the case reaching this Board their Lordships, on the 3rd December 1920, held that the certificate *quoad* value was at least ambiguous, and that such certificates "ought to be given in such a form that it is impossible to mistake their meaning on their face."

The only order then before the Board was in these terms:—

"It is hereby certified that as regards the value of the subject-matter and the nature of the question involved the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council,"

and upon that the previous judgment of the Board proceeded. It now appears, however, that the above was not the only order, and that the parties had failed to bring up the order embracing the actual certificate and granted on the same day.

It is admitted by both parties that there did exist in the proceedings an order of the 21st September 1917, in the following terms:—

"We hold that the subject-matter is of a value greater than Rs. 10,000, with reference to *Gooroopersad Khoond* v. *Juggut-chunder* (1), and that a substantial question of law is involved. We, therefore, certify that the case is a fit one for appeal to His Majesty in Council with reference to sections 109 and 110 of the Civil Procedure Code."

In their Lordships' opinion, this certificate is sufficiently clear, and is not open to the objections under which the former certificate under argument before the Board stood condemned.

The point, however, which still remains is whether that certificate must be accepted by the Board as conclusive, the actual sum in figures which is sued for being what it is, and so much smaller than Rs. 10,000.

The ruling provision as to certificates of value was No. 2 of the Schedule to the Order in Council of the 10th April 1838. It is to the following effect:—

"That in all cases in which any of such Courts shall admit an appeal to Her Majesty, her heirs and successors, in Council, it shall specially certify on the proceedings that the value of the matter in dispute in such appeal amounts to the sum of Rs. 10,000 Company's rupees or upwards, which certificate shall be deemed conclusive of the fact, and not be liable to be questioned on such appeal by any party to the suit appealed."

It is admitted that at the date of the appeal this order was in operation, and it accordingly governs the case; and, so far as the Board is concerned, it concludes the question of competency *quoad* value. In some of the cases which have occurred, it would rather appear as if the provisions of this Order had been left out of view.

On a date subsequent to the filing of this appeal, namely, the 9th February 1920, the order was repealed by an Order in Council, passed by His Majesty on the date mentioned. While, however, in cases subsequent to that date, the value of the subject-matter of the appeal is not concluded by the certificate of the Court below, their Lordships desire to make these two observations:— In the first place, the sum of money actually at stake may

(1) 8 M. I. A 166; 13 Moo. P. C. 472; 3 W. R. (P. C.) 14; 1 Suth. P. C. J. 399; 1 Sar. P. C. J. 742; 19 E. R. 493; 15 E. R. 177; 152 R. R. 150.

not represent the true value. The proceeding may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit [*Banarsi Prasad* v. *Kashi Krishna Narain* (2)]. The Courts below may accordingly with propriety, as was done in this case, make the necessary certificate. In the second place, whether they did so or not, while their Lordships would, of course, be free, if greater value in the sense mentioned were established, to proceed with the appeal, yet they will always naturally and very greatly defer, on a subject of this nature, to the certificate given by the High Court.

The objection to the competency of the appeal is accordingly repelled.

Their Lordships proceed to the merits of the appeal.

The original plaintiff in the suit was a Receiver appointed by the Court and the plaintiff-respondent is his successor and represents the proprietors of an *Inam* village called Kadiramangalam. It is matter of admission that the appellants are occupancy *ryots* of certain of the village lands, having the permanency of tenure and the other rights attaching to that position under the law of Madras. Their Lordships desire to make it clear that nothing that has passed between these litigants during the long course of years, in which the law has been so frequently invoked, constitutes a derogation from the status, privileges, rights and obligations of parties under the Madras Land Acts. The provisions, for instance, of Chapter V of the Act as to the payment of arrears of rent, and the appraisement and division of produce, as also those of Chapter IV, dealing with *pattahs* and *muchilkas* can be appealed to and are plainly applicable.

In particular, it should be noted that Chapter IV of the Act as is specially provided for by section 50, applies to all *ryots* with a permanent right of occupancy, and by section 52 accordingly *pattahs* and *muchilkas* may be exchanged, for periods of one or more revenue years; but no landholder shall be bound to tender, and no *ryot* to accept, a *pattah* for a period of more than one revenue year. It appeared to be maintained for the appellants that payment made during the course of 20 years should form the lines and limits of the *ryot's* obligations for all time. Setting aside the manifest contradiction by this of the actual relations of these parties, the Board has, in view of the argument, thought it right to express its opinion that the statutory rights and obligations of parties have not been thus impinged upon. Past practice may, of course, have its weight as one of the elements which are considered in fixing under the Act what are the fair and equitable conditions of a particular *pattah*, [*Parthasarathi Appa* v. *Chevendra Venkata Narasayya* (3)].

Under the Madras Estates Land Act, I of 1908, the *Inamdar*, on the 28th October 1908, tendered a *pattah* for *Fasli* 1318 to the tenants and demanded from them a *muchilka*, but the tenants refused to accept the *pattah*, or to execute a *muchilka*. *Pattahs*, in identical terms having been also offered and refused, and no *muchilkas* having been executed for the two following years, *Faslis* 1319 and 1320, the suit was instituted on the 15th December 1911. It resulted in a decree for Rs. 4,367-7-3.

It may be stated that it was admitted that there had been numerous suits and numerous decrees in which the rights of the *Inamdar* had been determined in accordance with *pattahs* substantially, if not entirely, in the same terms as those tendered in the present suit. The plaint correctly states: "*Pattahs* were tendered for the undermentioned occupancy-right lands in the enjoyment of the defendants for *Faslis* 1318, 1319 and 1320 duly according to custom and in conformity with the previous judgments, by the first

(2) 28 I. A. 11; 23 A. 227; 8 Sar. P. C. J. 447; 11 M. L. J. 56; 3 Bom. L. R. 154; 15 C. W. N. 193; 7 Sar. P. C. J. 825 (P. C.).

(3) 6 Ind. Cas. 988; 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233; (1910) M. W. N. 466; 12 Bom. L. R. 648 (P. C.).

defendant in Original Suit No. 61 of 1904, who was managing during the said *Faslis*."

In 1902, the *Inamdar* had sued and on the 19th April 1904, the Divisional Officer pronounced judgment in the plaintiff's favour, and he expressed himself thus:—

"I consider that the dispute between the parties relating to the suit *Fasli* is identical with those decided in the previous *Faslis* in the judgments referred to above, and that no special pleas or circumstances are urged with reference to the suit *Fasli* for any fresh adjudication." Their Lordships pause to say that they may repeat in terms this *dictum* which was pronounced 18 years ago. It is a truly deplorable circumstance that judicial time should have been occupied and the substance of parties wasted by litigation over a further period of 18 years, for settling practically the same point. The careful provisions made by legislation for the steady protection from year to year of the rights of occupancy *ryots* on the one hand, and *Inamdars* and other landlords on the other, have been put on one side and fruitless and repeated litigations indulged in.

But in the judgment referred to, the Divisional Officer proceeds:—

"I, therefore, find that the previous judgments are *res judicata* in these suits as they have gone fully into the question of custom relating to the different stipulations in the *pattah*."

However natural it may have been to treat the position thus, their Lordships cannot sustain on legal grounds, the plea of *res judicata* here suggested. In the language of the High Court:—

"The answer is that the general doctrine of *res judicata* is not in question, but the application of the special rule stated in section 52 (3), Estates Land Act, under which *muchilkas* decreed for any revenue year remain in force until the beginning of the year, for which fresh ones are exchanged or decreed and that there is no reason for restricting the scope of the general reference to *muchilkas* decreed to those decreed by any particular description of Court."

With this view the Board is in full agreement.

The *Inamdar* having again tendered *pattahs* in terms of section 54 and the other relative sections, and the tenants having notwithstanding previous decrees again refused to accept the terms or to grant *muchilkas* and the terms of the *pattahs* having been entirely approved by the Collector, the present suit had to be brought. The *Pattahs* tendered are in terms of previous *pattahs* upon which judgment and decree was passed. It stands to reason, and it is in accordance with section 27 and 28, that the old rent thus decreed shall continue, until reduced or enhanced by special applications under the Statute. No such applications have been made. All that remains in the case is the correct interpretation of the *pattahs*.

The argument presented to the Board involved the construction of the two clause 1 and 8. These clauses are as follows:—

"1. Out of the 32 *pangus* in the aforesaid village, the lands comprised in the 5-8 *pangu* which is in your enjoyment, *viz.*, *Ayan nanja* of the extent of 2 *velis* 3 *mahs* 4 *kulis* and 13 cents and *padugai punja nanja* of the extent of 5 *mahs* 38 *kulis* and 59 cents, in all, *nanja* of the extent of 2 *velis* 8 *mahs* 43 *kulis* and 8 cents, you shall cultivate at the proper seasons fertilizing them in all ways; harvest the crops that are grown after the same have been estimated by our agents in the presence of (our) agents and others and under their orders and supervision, leave the stubbles as is the practice with the Government *Amani* lands: stock in heaps on the threshing-floor the residue of the total yield of paddy that is left after paying the reapers' wages at the rate of 1-2 *marakal* per *kalam* and the *Thalaiyari Suvandiram* paddy payable at the threshing-floor at the rate of 1 *marakal* per 15 *kalams*: and after the harvesting has been completed, you shall apportion in heaps our *melvaram* due at the rate of 60 *kalams* for 100 *kalams* of paddy in the case of *Ayan nanja* and at the rate of 57 *kalams* for 100 *kalams* in the case of *Padugai punja nanja* under the Sudder Court decree in Suit No. 68 of 1847 and in acknowledgment of our having received the *melvaram* paddy, obtain a receipt from our agents.

"8. Even if the aforesaid *nanja* lands be not cultivated at the proper seasons, even if they be cultivated negligently, if they be allowed to lie fallow without being cultivated, even if damage of crops be caused by failure to harvest the crops at the right time, even if the yield be carried away, either without acting in accordance with the conditions specified in paragraph 1 herein, or without division of *varam*, and even if *nanja* land be filled up (and raised in level) and *punja* cultivation made there on, you shall pay at the rate specified in paragraph 1 herein our *melvaram* paddy in respect of the total yield of paddy calculated at an average of 170 *kulams* and 4 *marakals* per *veli* of *nanja*, the *kadappu* and *kar* produce being payable within the 15th December, and the *samba* and *pisanam* produce by the 15th March."

What had happened in the present case was, that during the *Fasli* years in question, the tenants in contravention of the terms of these *pattahs* had carried away the yield, without any of the proceedings with regard to the apportionment, in heaps, of the *melvaram* due to the landlord, having taken place.

The obligations under clause 2 having thus not been complied with, clause 8 came into operation which applied to various contingencies, including the following: "If the yield be carried away.... without acting in accordance with the conditions specified in paragraph 1." In that contingency: "you shall pay at the rate specified in paragraph 1 herein our *melvaram* paddy in respect of the total yield of paddy calculated at an average of 170 *kalams* and 4 *marakals* per *veli* of *nanja*, the *kadappu* and *kar* produce being payable within the 15th of December, and the *samba* and *pisanam* produce by the 15th of March."

The question is: In this stipulation, what is the meaning of the expression "the total yield of paddy"; and in particular what is the application of the stipulation to the case of an *oodu* crop, that is, a crop sown together, one part of which takes only 3 months to ripen and be reaped, and another part of which takes eight months to ripen and be reaped? Is the return as to "the total yield of paddy" satisfied by payment of 170 *halams* for the total yield of one of the portions. The appellants maintain that it is.

It is well to have clearly in view what is the practice with regard to such a paddy crop. It is thus described in Mr. Hemingway's work on Tanjore in the Madras District *Gazetteer*, page 93:

"It has become usual in a good many places to mix a *kuruvai* and a *samba* crop on what is called the *oodu* or *ottadan* system of cultivation. The species of *samba* used is the *ottadai* paddy, an eight months' crop from which the name of the system is derived. The amount of *kuruvai* used in this combination exceeds the *samba* largely, sometimes by as much as five to one. *Ottadai* is generally sown in the first crop season. The more quickly matured variety is harvested first, and *ryot* thereby secures a return for his labour both at the *kuruvai* and the *samba* harvests. The two kinds of grain are mixed in the seed-beds and the seedlings are planted indiscriminately."

The appellants' Counsel forcibly maintain that the payment of 170 *kalams* was a penal provision, and that, therefore, that provision ought to be most strictly construed.

It must not be forgotten that even in regard to penal provisions with a strict construction, no construction is open to a Court of Law which is in violation of what that Court considers to be the true meaning of the provision. That is a sound general principle.

But the Board, having considered the argument upon the clause, are of opinion that the rent of 170 *kalams* was not a penal rent, but was a substituted rent. The true rent, had the tenants complied with their obligations, would have been a percentage of the yield: but were the harvest to be bodily carried away, it was necessary to provide for such a case, and this was done by clause 8 which imposed no penalty as such, but simply set forth a figure which, upon the whole, might be reckoned a reasonable pactional substitute for the actual percentage, which, owing to the tenants' conduct, had been rendered unascertainable.

Is, however, the stipulation applicable to the whole harvest of a mixed crop reaped at separate times, or is it applicable only

to the first harvesting? "You shall pay," says clause 8, "at the rate specified in paragraph 1 in respect of the total yield of paddy calculated at an average of 170 *kalams*," but then it is added that the early rice (*kadappu kar*) produce is payable in December and the *samba*, which is the late harvest produce, is payable in March. Putting that alongside of the subsequent obligation which was, under clause 1, to stock in heaps on the threshing-floor the residue of the total *yield of paddy*" (the same phrase as is used in clause 8), their Lordships have no doubt that the substituted rent applied to the yield of each portion of the crop, exactly as the setting aside or the threshing-floor was applicable to each portion. They are of opinion that the High Court has come to a correct conclusion upon this topic.

Their Lordships desire to add that a question of straw, insignificant in amount, was not argued, the very proper arrangement of both parties at the Bar being that that would stand or fall with the judgment of the Court below.

Their Lordships will humbly advise His Majesty that the appeal be refused with costs.

Appeal dismissed.

K. S. D. & Z. K.

Solicitor for the Appellants:—Mr. *Douglas Grant.*

Solicitors for the Respondents:—Messrs. *Chapman, Walker* and *Shephard.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 697 OF 1919.
December 20, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

NAMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RATAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption of sister's son—Hindu Jats of Hoshiarpur District—Riwaj-i-am, entry in, value of.

Among Hindu *Jats* of the Hoshiarpur District the adoption of a sister's son in the presence of near collaterals is valid by custom. [p. 590, col. 2.]

Where a statement in the *riwaj-i-am* as to the existence of a custom is supported by instances, it affords sufficient proof of that custom unless rebutted by the party who denies it. [p. 490, col. 1.]

Ishar Kuar v. *Raja Singh*, 9 Ind. Cas. 608; 94 P. L. R. 1911; 29 P. R. 1911; 124 P. W. R. 1911, *Chuttan* v. *Hazari Lal*, 30 Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916, *Beg* v. *Allah Ditta*, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), *Wazira* v. *Maryan*, 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918, followed.

Ralla v. *Budha*, 50 P. R. 1893 (F. B.), distinguished.

Budhu v. *Bur*, 84 P. R. 1895, dissented from.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 13th December 1918, reversing that of the Munsif, First Class, Hoshiarpur, dated the 7th December 1917.

Mr. *Har Gopal*, for Bakshi *Tek Chand*, for the Appellants.

Mr. *Nank Chand*, for the Respondents.

JUDGMENT.—Kanhaya, a sonless Hindu *Jat* proprietor of the village Kukran, District Hoshiarpur, having adopted his sister's sons, his first cousins on the father's side, sued to have it declared that the adoption was invalid by custom and would not affect their rights as reversioners.

The *riwaj-i-am* of the Hoshiarpur District prepared in 1884 declared that adoption of a sister's son had the sanction of custom and this was repeated in the *riwaj-i-am* compiled in 1914 which cited several instances in support of the said custom. However, the Trial Court (Munsif of Hoshiarpur) placed the *onus* of proving the custom on the defendants and eventually came to the conclusion that they had failed to discharge it. On appeal the learned District Judge held that the burden of proof was wrongly placed on the defendants and should be placed on the plaintiffs, and remanded the case to enable the latter to discharge the *onus* thus placed on them. Both parties produced further evidence before the Munsif who reported that that adduced by the plaintiffs was not sufficient to discharge the

NAMAN *v.* RATAN SINGH.

onus laid on them. On receiving this return to the order of remand, the learned District Judge issued a commission to the Revenue Assistant, Hoshiarpur, for a local enquiry which he accordingly made and submitted a report. When this was received, Counsel for the plaintiffs admitted before the District Judge that they had failed to discharge the burden of proof placed on them, and, therefore, he accepted the appeal and dismissed their suit. They preferred a second appeal to this Court which was admitted on a certificate which though originally refused was granted subsequently by the District Judge in pursuance of an order of this Court.

It is again contended before us on the authority of *Ralla* v. *Budha* (1) that the initial burden of proof lay on the defendants who alleged that the adoption of a sister's son was valid and that the District Judge was wrong in shifting the burden on to the plaintiffs. In the case refered to the parties were *Arains* of a village in the Nawanshar Tahsil of the Jullundur District and the adoption contested was of a daughter's son. According to the *riwaj-i-am* of the Jullundur District, a daughter's or sister's son could not be adopted, as stated in the penultimate paragraph at page 228 of the said judgment itself, and, therefore, the *onus* of proving that the adoption of a daughter's son was valid by custom was rightly thrown on the party who set up that custom contrary to the *riwaj-i-am*. This ruling, therefore, lends no support to plaintiff's contention as to burden of proof. Another ruling cited on this point was *Budhu* v. *Bur* (2) in which it was held that the *onus* of proving the validity of the adoption of a daughter's son lay on the person asserting it, and that the *riwaj-i-am* of 1884 did not correctly represent existing custom; but the latest decisions of this Court relating to the evidential value of a *riwaj-i-am* are that, where a statement in a *riwaj-i-am* as to the existence of a custom is supported by instances it affords sufficient proof of that custom unless rebutted by the party who denies it see *Ishar Kuar* v. *Raja Singh* (3) *Chhuttan* v. *Hazari Lal* (4) and *Wazira* v. *Maryan* (5). Apart from these decisions, there is the ruling of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (6) that an entry in a *riwaj-i-am* as to a custom is a strong piece of evidence in support of that custom, and that it lay on the person denying that custom to rebut that evidence. We are, therefore, of opinion that the *onus* of proving that the adoption of a sister's son was not valid lay on the plaintiffs and was rightly placed on them by the learned District Judge.

Next it is argued that the plaintiffs did succeed in discharging the *onus* placed on them, but we are of opinion that they did not. Undoubtedly, there is evidence either way, but there is a preponderance of evidence in support of the custom. In the first place, this custom is stated in the two *riwaj-i-ams* prepared in 1884 and 1914 successively which shows that general opinion has uniformly been in favour of the custom. Secondly, the *riwaj-i-am* compiled in 1914 cites no less than eight judicial instances (Nos. 130 to 133, 135, 137, 139 and 142) and three from registers of mutation (Nos. 313 to 315) in support of the custom. As against these eleven there are only six instances to the contrary (Nos. 129, 134, 136, 138, 140 and 141). To give further instances the plaintiffs produced copies of judgments marked P-2 to P-13. P-3 relates to instance No. 134; P. 5 to No. 129 and P-6 and P-7 to No. 141 of the *riwaj-i-am*. P-8 is the same as P-2 and P-9, 10 and 11 relate to the same instance. Thus only five new instances were cited by the plaintiffs but instance No. 141 is not relevant because it is of an adoption

(1) 50 P. R. 1893 (F.B.).
(2) 84 P. R. 1895.

(3) 9 Ind. Cas. 608; 94 P. L. R. 1911; 29 P. R. 1911; 124 P. W. R. 1911.
(4) 30 Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916.
(5) 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918.
(6) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

of a sister's son by a sonless occupancy tenant in whose case succession was governed by section 59 of the Tenancy Act. The defendants also produced copies of judgments relating to two new instances. These judgments are marked D-4 and D-5. In this way there were 13 instances in support of the custom as against ten to the contrary. Thirdly, in the course of the enquiry made by the Revenue Assistant it transpired—

(1) that the plaintiffs themselves had lately gifted 8 *kanals* and 3 *marlas* of land to their sister's son, and

(2) that one Diwan Singh of the village of the parties and a member of their *got* had adopted his daughter's son, Surat Singh, that lately Diwan Singh's son brought a suit to have the adoption cancelled, but that the suit ended in a compromise according to which Surat Singh's uncles (the sons of Diwan Singh) gave him 80 *kanals* of land in 1916-17.

These gifts to sisters' sons, though not instances of adoption, strongly illustrate the force of the custom recognising the claims of sisters' sons. Having regard to these instances and other evidence taken by the Revenue Assistant he arrived at the conclusion that the defendants' evidence outweighed that adduced by the plaintiffs. Fourthly, though the instances of adoption of daughters' sons given in the *riwaj-i-am* are not directly in point, they undoubtedly may be taken into consideration as indicating that the agricultural tribes of the Hoshiarpur District are not devoted votaries of the agnatic theory, and that the general custom is so far modified amongst them that it does not look with disfavour upon the drifting of ancestral land into the hands of such non-agnates as are related through daughters or sisters.

Taking into consideration all the evidence reviewed above we are of opinion that the custom stated in the *riwaj-i-am* does obtain, and that the plaintiffs have failed to prove that it does not. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2241 OF 1920.

August 7, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

ISUP ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOUR CHANDRA DEB—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—"Former suit", meaning of—Two suits decided by common judgment—Appeal in one suit—Decision in other suit, whether operates as res judicata *in appeal.*

If the same question is in controversy between the same parties in two distinct litigations instituted, one after the other, but simultaneously pending, the final decision in the later suit, if given earlier, operates as *res judicata* in the earlier suit whose final stage is reached later. [p. 595, col. 2.]

The rule of *res judicata* is applicable to all the stages of a suit, till it is finally terminated and is not confined to Courts of first instance. [p. 596, col. 1.]

Case-law discussed.

The expression "former suit" in section 11 of the Civil Procedure Code means a previously decided suit, and the same rule applies to appeals. [p. 593, col. 2.]

Plaintiffs instituted a suit against defendant for confirmation of possession of land upon establishment of title. A few days later, defendant and his brothers instituted a suit against the plaintiffs for establishment of their title to a portion of the property involved in the first litigation. The two suits were tried jointly at the desire of the parties. The first suit was dismissed, and the second was decreed. Thereupon plaintiffs preferred an appeal to the District Judge. The appeal was directed against the decrees in both the suits, and copies of both decrees were attached to the Memorandum of Appeal, which, however, set out the name of defendant alone as the respondent, and his brothers, who were co-plaintiffs with him in the second suit were not impleaded:

Held, (1) that the appeal must be deemed to have been an effective appeal only in respect of the decree in the first suit and no effective appeal having been preferred so far as the second suit was concerned, the decree made therein became final; [p. 593, col. 1.]

(2) that the decision of the question of title in the suit under appeal was barred by the decision in the subsequent suit between the same parties and others, which had terminated earlier in a victory for the defendant. [p. 596, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 10th of May 1920 affirming that of the Munsif, Hathazari, dated the 3rd of August 1918.

Babu *Narendra Kumar Das,* for the Respondent.—I have a preliminary

objection to the hearing of the appeal. There were two suits (1) No. 531 in which plaintiff-appellant wanted confirmation of possession, and (2) No. 559 in which they wanted *khas* possession. These were two cross-suits. My point, therefore, is that there having been no appeal from one of them and all the parties not having been joined, the present appeal is not maintainable. The subject-matter in both the suits is the same. See *Kali Dayal* v. *Nagendra Nath* (1).

Babu *Mahendranath Roy* (with him *Moulvi Nurul Huq Chaudhury*), for the Appellants.—The lands are not exactly the same. They are common to a certain extent as appears from the First Court's judgment. We have not got the plaint in the other suit. The present suit was for confirmation of possession. The other suit was for recovery of possession. The suits were valued differently in the First Court. But the appeal in the lower Appellate Court was valued at the total amount of the valuation in the two suits. There having been no appeal against one of the cases, the results will be inconsistent. The question is would the principle of *res judicata* apply in such circumstances. The reasons given in *Zaharia* v. *Debi* (2) are not sufficient. See also *Dakhni Din* v. *Ali Asghar* (3). It has been held in some cases that the later judgment would operate as *res judicata*. There is no law to make an appeal incompetent merely because there would be two inconsistent decrees. See *Mariamnissa Bibi* v. *Joynab Bibi* (4) and *Gangadhar Kalwar* v. *Sekali Telini* (5). The effect of the absence of some of the parties would amount to this that there was no appeal as against them. The rule of *res judicata* would not apply in a case like this. It is neither a case of two suits nor between the same parties.

As regards the merits of the appeal the point involved is very short. The suit was for confirmation of possession on declaration of plaintiff's *taluka* right or recovery of possession in the alternative. The Court of Appeal has omitted to try one element of my title alleged, *viz.*, title by adverse possession. The Court ought to have gone definitely into the question and tried it.

Babu *Narendra Kumar Das*, for the Respondent.—The decision in *Mariamnissa Bibi* v. *Joynab Bibi* (4), is rather in my favour. The question of *res judicata* does not arise in that case. See *Anant Das* v. *Udaibhan Pargas* (6).

As regards the question of adverse possession it is a mere myth and has no foundation at all. Both Courts have gone into the question and have found against the plaintiff.

Babu *Mahendra Nath Roy*, replied in brief.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for confirmation of recovery of possession or alternatively establishment of title by inheritance and adverse possession of land. The suit was instituted on the 3rd July 1917 by Isup Ali, Goja Ali and Basaratulla, sons of Basir Mohammad, *Talukdar*, against Gour Chandra Deb, the son of Nelal Krishna Deb. A few days later, Gour Chandra Deb and his brothers instituted a suit against Isup Ali and his brothers for establishment of their title to the homestead portion of the property involved in the first litigation. The relief in the first suit was valued at Rs. 348, and that in the second suit at Rs. 200. The two suits were tried jointly at the desire of the parties, as the disputed land and the causes of action were common to a certain extent. The first suit was dismissed, while the second was decreed. Thereupon the plaintiffs in the first suit, who were the defendants in the second suit, preferred an appeal to the District Judge. The appeal was directed against the decrees in both the suits and was valued at Rs. 548. Copies of both the decrees were attached to the memorandum, which, however, set out the name of Gour Chandra Deb alone as the respondent. The memorandum could not, consequently, be treated as a valid Memorandum of Appeal against the decree in the second suit. That decree

(1) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44.
(2) 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861.
(3) 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995.
(4) 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149.
(5) 64 Ind. Cas. 574; 34 C. L. J. 281; 27 C. W. N. 141.
(6) 19 Ind. Cas. 761; 35 A. 187; 11 A. L. J. 204.

enured to the benefit of Gourchandra Deb and his brothers, and as the latter were not made parties to the appeal they could not be prejudiced, even if the decree of the primary Court were reversed. Indeed, as pointed out in *Kali Dayal* v. *Nagendra Nath* (1), the appeal, treated as an appeal in the second suit, could not be heard as, even if successful, it would be infructuous, because such of the plaintiffs as were not brought before the Court as respondents, would still retain the benefit of the decree of the primary Court. The appeal preferred to the lower Appellate Court was, consequently, defective in two respects, namely, first, that, contrary to established procedure, as explained in *Rakhal Chandra Tewary* v. *Manmatha Nath Mitter* (7), *Rakhal Chandra Tewari* v. *Monmotha Nath* (8) and *Mahabir Prasad* v. *Bisheshwar Prasad* (9), one appeal was preferred, without an order for consolidation by the Court, against two distinct decrees in two separate suits; secondly, that even treated as otherwise valid, the appeal was defective, in so far as it was intended to be an appeal in the second suit, inasmuch as some of the successful plaintiffs had not been joined as parties respondents. In these circumstances, the appellants in this Court have conceded that the appeal to the District Judge must be deemed to have been an effective appeal, only in respect of the decree in the first suit, and that the attempt to make it an appeal against the decree in the second suit was abortive. The District Judge has dismissed the appeal on the merits. The position thus is that, though there were two suits in the primary Court, decided by a common judgment, an appeal and a second appeal have been preferred in the first suit, while no appeal has been preferred in the second suit, with the result that the decree made therein has become final. On these facts, the respondent in the present appeal, which is directed against the decree of the District Judge made in affirmance of the decree of the primary Court in the first suit, contends that the trial of the question in controversy is barred by *res judicata*. The substantial matter in dispute in the first suit, as in the second, was, whether one Aleyer Khan was the real or beneficial owner of the property. This question has been answered in favour of the plaintiffs in the second suit, one of whom, as we have seen, is the defendant in the first suit. He is the respondent in this appeal, and he urges that the decision of this fundamental question, which forms the basis of the decree made in favour of himself and his brothers in the second suit, cannot now be reagitated; in other words, he contends that if the matter were now reinvestigated, the decree in the second suit, which has never been directly challenged by way of appeal, would be collaterally attacked and imperilled.

The principle applicable to cases of this character was investigated in *Balkishan* v. *Kishan Lal* (10), by Mahmood, J., who had considered the matter also in his earlier judgments in *Chajju* v. *Sheo Sahai* (11) and *Kashi Nath* v. *Mukhta Prasad* (12). At that time, there was some controversy as to the meaning of the expression "former suit," the decision wherein may operate as *res judicata* in a subsequent suit. The doubt has now been set at rest by Explanation I to section 11 of the Civil Procedure Code, 1908, which provides that the expression "former suit," denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. To put the matter tersely, the expression "former suit," means a previously decided suit, and the same rule applies to appeals. This was in fact the view adopted by Mahmood, J., in *Balkishan* v. *Kishan Lal* (10), and has been subsequently followed; *Ram Lal* v. *Chhab Nath* (13), *Beni Madho* v. *Indar Sahai* (14) and *Gururajammah* v. *Venkatakrishnama Chetti* (15). As Herman puts

(7) 10 Ind. Cas. 415; 15 C. W. N. 994.
(8) 24 Ind. Cas. 438.
(9) 42 Ind. Cas. 424; 4 O. L. J. 512.

(10) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523.
(11) 10 A. 123; A. W. N. (1887) 301; 6 Ind. Dec. (N. S.) 83.
(12) 6 A. 370; A. W. N. (1884) 119; 4 Ind. Dec. (N. S.) 38.
(13) 12 A. 578; A. W. N. (1890) 183; 8 Ind. Dec. (N. S.) 1114.
(14) 3 Ind. Cas. 707; 32 A. 67; 6 A. L. J. 991.
(15) 24 M. 250.

it in his Commentaries on the Law of Res judicata (Vol. I, p. 126), it is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment when given, whether in the action commenced first or last, extinguished the original cause of action, and gives to the plaintiff, in lieu thereof, one of a higher nature. *Mutual Life Insurance Co.* v. *Harris* (16) *Barber* v. *Morris* (17), (Van Fleet on Former Adjudications, Vol. I, p. 87). From this stand point, Mahmood, J., held in *Balkishan* v. *Kishan Lal* (10), that the doctrine of *res judicata*, so far as it relates to prohibiting the re-trial on an issue, must refer, not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue; and the rule is not limited to the Courts of first instance, it applies equally to the procedure of the first and second Appellate Courts, and, indeed, even to the miscellaneous proceedings; see the decision of the Judicial Committee in *George Henry Hook* v. *Administrator-General of Bengal* (18). We are in complete agreement with the exposition of the law given by Mahmood, J., in the following passage of his judgment in *Balkishan* v. *Kishan Lal* (10):—

"It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt*. This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa*, and the broader maxim *interest reipublicæ ut sit finis litium*. This being so, the doctrine, so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For, even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a final judgment pronounced meanwhile in such previous litigation by a competent Court, (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code, 1882, is concerned, I may say that the rule contained in section 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second Appellate Courts by reason of sections 582 and 587 respectively, and, indeed, even to miscellaneous proceedings by reason of the general provisions of section 647 of the Code."

This view has been repeatedly reaffirmed by the Allahabad High Court; *Ram Lal* v. *Chhab Nath* (13), *Zaharia* v. *Debi* (2), *Dakhni Din* v. *Ali Asghar* (3), *Anant Das* v. *Udaibhan Pargas* (6), *Ram Faqir* v. *Bindeshri Singh* (19) and *Balhari Pande* v. *Shiva Sampat Pande* (20). A similar view has been adopted in the Punjab and in Burma; *Nur Muhammad* v. *Jamun* (21), *Muhammad Jan* v. *Duli Chand* (22) and *Raman Chetty* v. *Mutuveerappa Chetty* (23). A different rule was, however, adopted in *Panchanada Velan* v. *Vaithinatha Sastrial* (24). There, cross-suits between the same parties on the same facts, were tried together, and judgment was given on the same day, but separate decrees were drawn up, and an appeal was preferred against one of the decrees alone. It was ruled that the decree unappealed did not operate as a bar, so as to preclude the Appellate Court from dealing with the decree appealed against, because, it was said, the doctrine of *res judicata* has no application when the very object of the appeal, in substance, if not

(16) (1877) 97 U. S., XXIV, 959; 7 Otto 331.
(17) (1904) 67 L. R. A. 761; 132 Fed. 945.
(18) 60 Ind. Cas. 631; 48 I. A. 187; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.).
(19) 47 Ind. Cas. 837; 41 A. 54; 16 A. L. J. 782.
(20) 18 A. L. J. 40.
(21) 153 P. R. 1890.
(22) 74 Ind. Cas. 583; 3 L. L. J. 473.
(23) 17 Ind. Cas. 860; 6 L. B. R. 93; 5 Bur. L. T. 199.
(24) 29 M. 333; 16 M. L. J. 63.

in form, is to get rid of the decision which is pleaded in bar. The opinion of the Court states that it would lead to startling results, if the Court were to hold that an Appellate Tribunal is precluded from dealing with a question, which comes before it on appeal, because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a decision, which had not been appealed against at the same time as the decision in the case under appeal. Two observations are pertinent in this connection; first, that the requirements of the rules of procedure cannot always be ignored on the allegation that they are technical and are matters of form, not of substance; secondly, that a non-appealable decree may operate as *res judicata*, as Explanation II to section 11 of the Civil Procedure Code, 1908, prescribes that the competence of a Court shall be determined, irrespective of any provisions as to a right of appeal from the decision of such Court. This supersedes the decision to the contrary effect of the Madras High Court, in *Avanasi Gounden* v. *Nachammal* (25), and of the Bombay High Court in *Govind* v. *Dhondbarav* (26). It is worthy of note that the decisions in *Panchanada Velan* v. *Vaithinatha Sastrial* (24) and *Avanasi Gounden* v. *Nachammal* (25), were pronounced by the same Bench on the same date, and both proceeded on the assumption that the appealability of a decision affects the competence of a Court for purposes of *res judicata*. The effect of Explanation II, which affirms the contrary view that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decisions *Ram Faqir* v. *Bindeshri Singh* (19), *Musaddi Lal* v. *Jwala Prasad* (27), was overlooked, when the decision in *Panchanada Velan* v. *Vaithinatha Sastrial* (24) was followed in *Ramasamy Chetty* v. *Karuppan Chetty* (28). The later decision of the Madras High Court in *Bommadevara Venakata Narasimha Naidu Bahadur* v. *Venkatappayya* (29) is of no assistance in the solution of the question raised before us, as it merely lays down that where there are subordinate and dependent decrees, the reversal of the principal decree operates as a supersession of the subordinate decree; see *Asutosh Goswami* v. *Upendra Prosad Mitra* (30). Reliance, however, has been placed by the appellants on the decisions of this Court in *Abdul Majid* v. *Jew Narain* (31). *Mariamnissa Bibi* v. *Joynab Bibi* (4). The dicta in *Abdul Majid* v. *Jew Narain* (31), cannot be reconciled with the decision of the Judicial Committee in *Sri Raja Rao Venkata Mahipati Gangadhara Rama Rau, Raja of Pittapur* v. *Sri Raja Rao Buchi Sitayya* (32), namely, that an estoppel is binding, notwithstanding that the suit which raises it relates to a different property. The decision is further based on the untenable view that the question of *res judicata* depends upon the state of facts as they exist at the date of the trial in the primary Court. On the other hand, the decision of the majority in *Mariamnissa Bibi* v. *Joynab Bibi* (4) was dependent upon its special facts, although an opinion was expressed that, when two suits have been tried together, either of them cannot be treated as the former suit in relation to the other. This view, as we have seen, cannot be maintained, when Explanation I to section 11 is taken into account. The substance of the matter, then, is that the *dicta* in favour of the appellants to be found in the cases of *Abdul Majid* v. *Jew Narain* (31) and *Mariamnissa Bibi* v. *Joynab Bibi* (4) were pronounced, while the Code of 1882 was in force and before Explanations I and II to section 11 of the Code of 1908 had been enacted. We cannot further overlook that the decision of this Court in *Midnapore Zemindary Company* v. *Nitya Kali Dasi* (33) shows that if the same question is in controversy between the same parties in two distinct litigations, one after the other, but simultaneously pending, the final decision in the latter suit, if given earlier, operates as *res judicata*

(25) 29 M. 195; 16 M. L. J. 41; 1 M. L. T. 25.
(26) 15 B. 104; 8 Ind. Dec. (N. S.) 70.
(27) 16 Ind. Cas. 496; 10 A. L. J. 106.
(28) 31 Ind. Cas. 216; 29 M. L. J. 551.
(29) 54 Ind. Cas. 647; 37 M. L. J. 591
(30) 38 Ind. Cas. 17; 24 C. L. J. 467; 21 C. W. N. 564.
(31) 16 C 233; 8 Ind. Dec. (N. S.) 154.
(32) 8 M. 219; 12 I. A. 16; 4 Sar. P. C. J. 598; 9 Ind. Jur. 121; 3 Ind. Dec. (N. S.) 152 (P. C.).
(33) 24 Ind. Cas. 243.

in the earlier suit whose final stage is reached later. The rule of *res judicata* is, moreover, applicable to all the stages of a suit, till it is finally terminated and is not confined to Courts of first instance. We are clearly of opinion that, on principle, there is no escape from this position, and section 11 unquestionably does not authorise a departure therefrom. The conclusion follows that the decision of the question of title in the suit now under appeal, is barred by the decision in the subsequent suit between the same parties and others, which has terminated earlier in a victory for the present respondent. The decision could have been, but never has be en challenged, and cannot now be collaterally attacked or implicitly ignored.

The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs.

B. N. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 3514 OF 1921.

September 1, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

O. S. N. RAGHUNATHASWAMI IYENGAR AND ANOTHER—PETITIONERS—APPELLANTS

versus

S. GOPAUL RAO AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Subject-matter of suit—Interest between date of institution and date of decree, whether to be included.

Although interest between the date of the institution of a suit and the date of the decree is not nscertained in the plaint and the total amount claimable on account of it cannot be ascertained until the decree is passed, it is a part of the amount claimed in the suit and must be taken into account for the purpose of determining the value of the subject-matter of the suit under section 110 of the Civil Procedure Code. [p. 597, col. 1.]

Radhakrishna Ayyar v. *Sundaraswamier*, 74 Ind. Cas. 584; 16 L. W. 18; 31 M. L. T. 31; 45 M. 475; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 207; 20 A. L. J. 937; 36 C. L. J. 450 (P. C.), *Mathura Prasad Singh* v. *Ram Prasad Tewary*, 60 Ind. Cas. 523 at p. 524; 2 P. L. T. 340, relied upon.

Subramania Ayyar v. *Sellammal*, 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M.L.T. 450; (1915) M. W. N. 941; 30 M. L. J. 317, *Moti Chand* v. *Ganga Prasad Singh*, 24 A. 174 at p. 177; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.), referred to.

Petition, under sections 109 and 110 and O. XLV, rr. 2, 3 and 8, of the Code of Civil Procedure, praying that, in the circumstances stated therein, the High Court will be pleased to grant a certificate enabling the petitioners herein to appeal to His Majesty in Council against the judgment and decree, dated 31st August 1921, of the High Court in Appeal Suit No. 377 of 1919, preferred against a decree of the Court of the Temporary Subordinate Judge, Salem, in Original Suit No. 9 of 1919.

Messrs. *K. Bashyam Iyengar* and *N. C. Vijayaraghavachariar*, for the Petitioners.

Mr. *A. Ganesa Iyer*, for Respondent No. 1.

ORDER.—Ths is an application for leave to appeal to the Judicial Committee against an affirming judgment. We have then to see whether the requirements of section 110, Civil Procedure Code, are satisfied, both as to the value of the subject-matter and as to there being some substantial question of law for disposal.

As regards the subject-matter, the suit, one for recovery by sale on a mortgage, was brought for the principal amount of Rs. 9,942-4-9 and also for subsequent interest, including, in the ordinary use of that expression, both interest up to and subsequent to the decree. The argument for the petitioner is that, if to the principal amount be added interest up to the decree, the necessary Rs. 10,000 will be made out. It is not disputed that this would be so. This contention is opposed on the ground that the amount of interest between plaint and decree cannot be thus taken in calculation. It seems to us that, although interest between plaint and decree is not ascertained in the plaint and although the total amount claimable on account of it cannot be ascertained until the decree, still it is certainly a part, it may be a very substantial part, of the amount claimed in the suit, and it comes then within the description of one of the classes of suits referred to by Lord Shaw

In *Radhakrishna Ayyar* v. *Sundaraswamier* (1), of which he said that for the purpose of ascertaining the value of the subject-matter, the interest between plaint and decree must be regarded as part of the sum of money actually at stake. We have not been shown any distinct authority against this view. Amongst other cases we have been referred to *Subramania Aiyar* v. *Sellammal* (2). There the learned Judges, for the purpose of their decision, did not find it necessary to distinguish between interest before and interest subsequent to the decree. In *Moti Chand* v. *Ganga Prasad Singh* (3) Lord Davey said: "In the present case the amount or value of the subject-matter of the suit in the Court of first instance, construing that in the manner most favourable to the proposed appellant, was at the outside the the amount for which he recovered his decree." The question in that case was whether not merely interest before decree but also interest after decree could be included in the subject-matter. But it is significant that for the purpose of argument nothing was said which would preclude the inclusion of the former. Lastly, there is a case in *Mathura Prasad Singh* v. *Ram Prasad Tewary* (4) in which the Patna High Court held that the proper construction to be placed on section 110 must be taken to be the amount or value which the plaintiff either obtained, or, had he been successful, would have obtained in his suit at the date when the decree was passed. The question then under decision was that which we have now to decide and, following this authority, we hold that the requirements of section 110 are satisfied as regards the value of subject-matter.

We hold, further, that the appeal involves a substantial question of law, since our judgments deal with questions relating to legal representation and to Court sales, regarding which there is difference of opinion between the Courts in this country.

(1) 74 Ind. Cas. 584; 16 L. W. 18; 31 M. L. T. 31; 45 M. 475; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 207; 20 A. L. J. 937; 36 C. L. J. 450 (P. C.).

(2) 31 Ind. Cas. 296; 39 M. 843; 2. L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 517.

(3) 24 A. 174 at p. 177; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.).

(4) 60 Ind. Cas. 523 at p. 524; 2 P. L. T. 340.

We, therefore, certify that the cases is, under section 110, Civil Procedure Code, a fit case for appeal to His Majesty in Council.

V. N. V. *Leave granted.*
Z. K.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 14, 1922.

Present:—Lord Atkinson, Lord Phillimore, Sir John Edge, KT., and Mr. Ameer Ali.

SRIPAT SINGH DUGAR AND ANOTHER —APPELLANTS

versus

Rai HARIRAM GOENKA AND OTHERS —RESPONDENTS.

Insolvency—Adjudication, effect of—Judgment-debtor adjudicated insolvent —Attachment in execution — Receiver not impleaded — Attachment, whether operative.

An adjudication of invsolvency of a judgment-debtor divests the rights of his decree-holder as such and remits him to the position of an ordinary creditor. [p. 600, col. 1.]

In execution of a decree a house belonging to the judgment-debtor was attached on the 24th December 1915. On the 3rd March 1916 the judgment-debtor applied to have the attatchment set aside on the grounds that no notice of attachment was served on him and that the decree was barred by the law of limitation. The application was dismissed, but on appeal a remand was ordered on the 23rd November 1916. Nothing further was done and, in the meanwhile, the judgment-debtor died on the 5th April 1918. On the 5th August 1918 the decree-holder took out summons against the sons and heirs of the deceased judgment-debtor to show cause why the decree should not be executed as against them. The matter of remand was thus brought on for hearing and it appeared that the judgment-debtor had been declared an insolvent on the 23rd November 1916, and the Receiver was not made a party, but the point was not specifically taken in the Trial Court:

Held, that the point could not be raised in appeal and that the execution could proceed; [p. 599, col. 2.]

(2) but that if the adjudication was still subsisting, the order of attachment made in the absence of the Receiver was inoperative against him. [p. 600, col. 1.]

Appeal from the judgment and decree of the Calcutta High Court, dated the 9th July 1919, affirming those of Mr. Justice Chaudhuri, dated the 26th February 1919.

SRIPAT SINGH DUGAR *v.* HARIRAM GOENKA.

Sir *George Lowndes, K. C.*, and Mr. *Kenworthy Brown*, for the Appellants.

Messrs. *Dunne, K. C.*, and *Dube*, for the Respondents.

JUDGMENT.

Lord Phillimore.—The late Ramchandra Goenka, for himself and his partners, obtained in 1896 a decree against the late Chatrapat Singh for a considerable sum of money. Some money appears to have been recovered from time to time under this decree, but on the 21st December 1915, it was still in part unsatisfied, and on that date the decree-holder applied to attach a house belonging to the judgment-debtor in Calcutta. On the 3rd March 1916 the judgment-debtor applied to have the order of attachment which had been thus obtained set aside, saying that no notice of execution had been served upon him and that the decree was barred by the law of limitation. The decree being one made by the High Court of Judicature at Fort William, in Bengal, would be kept alive for twelve years, and thereafter by revivor if the proper proceeding was taken. The decree-holder replied that the judgment had been revived in 1904 by a writ of attachment issued on the 3rd February 1904, and that before twelve years from the 3rd February 1904 had expired, the notice of execution taken out in December had been served on the 12th January 1916, that is, just within the further period of twelve years.

The application of the judgment-debtor came on for hearing before Fletcher, J. on the 22nd May 1916. He decided in favour of the decree-holder and dismissed the application. The judgment-debtor appealed.

On appeal it could not be gathered from the judgment of Fletcher, J., that he had considered the dispute as to the question of service on the 12th January 1916. His written judgment was wholly concerned with what took place in 1904. And so on the 23rd November 1916, (the date is important) a remand was ordered.

No steps were taken for some time under this remand, and meanwhile the judgment-debtor died on the 25th April 1918. On the 5th August 1918 the decree-holder took out a summons against the present appellants, the sons and heirs of the judgment-debtor, to show cause why the original decree should not be executed against them as sons and heirs and having thus revived against them brought the matter of the remand on for hearing. It was heard by Chaudhuri, J., who decided in favour of the decree-holder and held that, the order of attachment, called the prohibitory order, ought not to be set aside. From this decision an appeal was taken. During the course of the appeal the decree-holder died, and his place was taken by the present respondents. The decision of Chaudhuri, J., was affirmed by the High Court, and it is from this affirmation that the present appeal is brought.

With regard to what took place in 1904, the only materials for their Lordships' consideration are certain affidavits and the judgment of Fletcher, J., and it is not very clear whether he decided the question as matter of law or matter of fact. But on whatever ground he decided, the High Court must be taken to have agreed with him on this point, for if it had been otherwise it would not have been necessary to remand the case for the consideration of the other point.

It was contended before their Lordships that the remand was general, but this is not their opinion. It was a remand to settle the matter of 1916, the consideration of which was only important if the decree-holder had successfully maintained his point with regard to what took place in 1904. This being so, from the very scanty materials which present themselves, their Lordships can find no reason for disagreeing with the opinion of Fletcher, J., affirmed on this point by the High Court.

With regard to the question of fact as to whether or not Chatrapat Singh had been served, as contended, with a notice of execution on the 12th January 1916, Chaudhuri, J., after hearing the evidence on both sides, came to the conclusion that he had been served, and the High Court accepted his finding, and there is nothing exceptional to cause their Lordships to interfere with two concurrent findings of fact.

This being so, there would be a short end to the matter, and the appeal would

be dismissed without further trouble but for one circumstance. It is contended by the appellants that the proceedings subsequent to the remand were ineffective, and that the judgment of Chaudhuri, J., on remand and of the High Court on appeal must be set aside because of the absence of a material or the material party. It is said that on the 23rd November 1916 the precise date of the order of remand, Chatrapat Singh was adjudged insolvent, and that thereupon the Insolvent Court, through its officer or the Receiver—if one were appointed under the then existing Insolvency Act—ought to have been served and have had an opportunity of being present and raising his points in objection to the attachment when the matter was heard before Chaudhuri, J.

The first observation which occurs upon this is that if the appellants were making this point they should have given proper proof of the material documents and have raised the point distinctly at the hearing before Chaudhuri, J. But the only indication of the point being raised is to be found in the two questions following put to the process-server, apparently to lead up to the contention that the judgment debtor could not have been living in the house in which the service is said to have taken place, and as the answers to these questions were in the negative, nothing was proved. Questions and answers are as follows:—

"Do you know that Chatrapat was made an insolvent by an order of the Privy Council?

"I do not know.

"And a Receiver was appointed of his estate on the 2nd August 1917.

"No."

While there is thus nothing to show that the point was even taken before Chaudhuri, J., there is at no stage in the case adequate and regular proof that Chatrapat Singh was adjudicated insolvent. On the other hand, in the grounds of appeal from the judgment of Chaudhuri, J., to the High Court, and again in the petition for leave to appeal to His Majesty in Council, the point was expressly made, and in the latter document some detail is given, it being stated that a Receiver was appointed by order dated the 2nd August 1917; and the statements in this petition are supported by an affidavit.

Moreover, however much the appellants may have precluded themselves personally from raising the point, it is hardly possible for their Lordships, in a matter which may concern third parties, to pass it wholly by, for the adjudication of insolvency in this particular case was a remarkable one. The application was made by the would-be insolvent himself. It was refused by both Courts in India, who treated it as an unfounded application made for some fraudulent purpose. But this Board upon appeal felt bound by the terms of the Act, as it then stood, to grant the petition and to declare Chatrapat Singh insolvent. The case is reported as *Chhtrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1). It was decided on the 20th November 1916 and the order in Council confirming the report of the Judicial Committee has been before their Lordships and is dated the 23rd November 1916.

As to what happened after this order of adjudication was made there is no information. Whether it was afterwards annulled under the provisions of the Insolvency Act or came to a termination in some other way, before or after the death of Chatrapat Singh, and, if so, when, their Lordships have no information. It seems unlikely that if the state of insolvency was continuing and was brought to the attention of the Court, it should have been passed over in silence by the various learned Judges, or that a decision in favour of the validity of the attachment should have been delivered in the absence of Receiver or other officer to whom under the Statute the assets of Chatrapat Singh should have passed. Moreover, if Chatrapat Singh remained insolvent, there would be no property to pass to his heirs, and no inducement to them to appear, except for the sake of getting their costs. Whereas they not only appeared, but called witnesses, and appealed, and are now appealing to their Lordships' Board, though urging as

(1) 39 Ind. Cas. 788; 44 I. A. 11; 44 C. 535; 21 M. L. T. 36; 15 A. L. J. 87; (1917) M. W. N. 100; 32 M. L. J. 1; 19 Bom. L. R. 174; 25 C. L. J. 215; 21 C. W. N. 497; 10 Bur L. T. 25 (P. C.).

SRI NARAIN v. LIQUIDATOR, UNION BANK OF INDIA.

one of their grounds of appeal a state of facts which would preclude them from having any interest in the matter.

On the other hand, it is not easy to see why the adjudication of insolvency did not divest the rights of the decree-holder as such and remit him to the position of an ordinary creditor.

In these difficult circumstances their Lordships, having no doubt what the decision as between the two parties to this appeal should be, but desiring that their judgment and His Majesty's order should be so expressed as not to prejudice the rights of other persons, have concluded that the right course is for them, while recommending that this appeal should be dismissed with costs, to recommend also that the dismissal should be accompanied by a declaration in the following words: "that if adjudication of the insolvency of Chatrapat made on the 23rd November 1916 had not been annulled or the insolvency had not otherwise terminated on or before the 19th February 1919 the order then made by Chaudhuri, J., would, owing to the absence of the Receiver or other representative of the Insolvency Court, be inoperative except in so far as it decided against any asserted interest of the sons and heirs of Chatrapat parties to the proceedings." And they will humbly recommend His Majesty accordingly.

K. S. D. & Z. K.

Appeal dismissed.

Solicitor for the Appellants:—Mr. *G. C. Farr.*

Solicitors for the Respondents:—Messrs. *W. W. Box & Co.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 13 OF 1922.

December 24, 1922.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fforde.

SRI NARAIN—DEFENDANT—APPELLANT

versus

LIQUIDATOR, UNION BANK OF INDIA—APPLICANT—RESPONDENT.

Companies Ac (VII of 1913), s. 186 (1)—Order directing contributory to pay barred debt, legality of.

Section 186 (1) of the Indian Companies Act does nothing more than create a new machinery for bringing in debts due by a contributory to the Company. It does not create new liabilities or confer new rights; it merely provides a summary procedure for enforcing existing legal liabilities.

The words "at any time" in section 186 (1) of the Indian Companies Act do not authorise the Court to order the payment of a Statute-barred debt, they can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding up order.

Letters Patent Appeal from the judgment of Mr. Justice Chevis, dated the 2nd December 1921.

Mr. *M. N. Mukerji*, for the Appellant.

Mr. *Prem Lal*, for the Respondent.

JUDGMENT.—The appellant, B. Sri Narain, is a contributory of the Union Bank of India, Delhi, which is now in course of liquidation. The Official Liquidator has called upon B. Sri Narain under the provisions of section 186 of the Indian Companies Act to pay to him certain sums of money amongst which is an item of Rs. 2,000. This sum of Rs. 2,000 is expressed to be payable upon foot of a promissory note, dated the 13th of April 1911 made by the appellant, and payable to the order of the Union Bank of India on demand.

The District Judge of Delhi made an order under section 186 calling upon the appellant to pay to the Official Liquidator the several sums demanded, and the appeal is brought in respect of the item of Rs. 2,000.

Under the Indian Limitation Act a suit to enforce payment of this note would be barred by time. This is admitted; but it is claimed on behalf of the Liquidator that this Statute barred debt may be enforced against the contributory by an order under section 186, sub-section (1) of the Indian Companies Act.

The relevant part of the section reads as follows:—

"The Court may at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, to pay, in manner directed by the order, any money due from him....to the Company exclusive of any money payable by him.....by virtue of any call in pursuance of this Act."

It is contended by Counsel for the Liquidator that the words "at any time" exclude the idea that there is any period of limitation within which the order may be made. In other words, that the Court by virtue of this section may order the payment of any debt due by a contributory to the Company in Liquidation regardless of the time when that debt was incurred. We are asked to hold that this section overrides the provisions of the Limitation Act, that it enables the Court to enforce by a summary order the payment of a debt which it could not have enforced in an action at law. We cannot accept this view of the powers conferred upon the Court by section 186. This section does not create new liabilities or confer new rights. It merely provides a summary procedure for enforcing existing legal liabilities. The words "at any time" can only mean at any time in the course of liquidation proceedings—commencing from the date of the winding-up order. The section creates a new machinery for bringing in debts due by a contributory to the Company, and nothing more.

We, therefore, hold that the payment to the Liquidator of the Rs. 2,000 represented by the promissory-note cannot be enforced in the manner sought. We accordingly allow the appeal with costs throughout.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 696 OF 1922.
January 3, 1923.

Present:—Mr. Justice Rankin.

RAKHAL CHANDRA CHATTERJEE—PETITIONER

versus

ROHINI KUMAR CHATTERJEE—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit on chit—Allegations of conversion and theft in plaint—Suit, whether cognisable by Small Cause Court—Interest, high rate of.

A plaint alleged that the defendant in collusion with Railway Officials had taken certain coal belonging to the plaintiff and had misappropriated it or converted it to his own use; that on the plaintiff discussing the matter with him the defendant had executed a *chit* in his favour promising to pay a certain sum. Plaintiff sued to recover this sum from the defendant:

Held, (1) that the suit was one for recovery of a sum of money shown by the *chit* and was not a suit for recovery of damages either for the theft or the conversion of the coal; [p. 602, col. 2.]

(2) that the suit did not, therefore, fall within the purview of Art. 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act and was cognisable by a Small Cause Court. [p. 602, col. 2.]

Where a Court is properly seized of a suit, it has full jurisdiction over all matters comprised in the plaint, and can, in the absence of a contract between the parties or of evidence of a customary rate of interest, award a high rate of interest having regard to the circumstances of a case. [p. 602, col. 2.]

Civil Rule against the decree of the Additional Subordinate Judge, Barisal, dated the 8th July 1922.

Babu *Brojo Lal Chakravarti* (with him Babu *Radhika Ranjan Guha*), for the Petitioner.

Babu *Sailendra Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—This Rule was issued on two grounds, the first being that the Court below had no jurisdiction, and the second being that the judgment was erroneous in law, as the learned Judge had failed to decide various questions raised in the pleadings. The learned Pleader for the petitioner has put his case thus: that in the plaint there are really to be found two causes of action—one being an action for damages for the wrongful misappropriation of certain coal belonging to the plaintiff—that wrongful misappropriation resulting in a criminal offence and, therefore, coming within clause 35, sub-clause (*ii*) of the Second Schedule to the Provincial Small Cause Courts Act; and the second being a claim upon a contract evidenced by a document called a *chit* said to have been executed by the defendant to pay a certain price for the coal in question. The complaint made is that, although the suit, considered as a claim upon a *chit*, was within the competence of the Small Cause Court, the learned Judge, while purporting to give judgment upon that cause of action,

has allowed himself to be influenced by the other aspect of the case and has in particular dealt with the question if interest upon a view which shows that he had not only in his mind the cause of action on the *chit* but the other cause of action which is not proper to a Small Cause Court.

Now, I have not the advantage of being able to render the vernacular of the plaint in this case, but I have had the paragraphs explained to me and in my opinion, the plaint properly read is a plaint upon the *chit* and is not a suit for damages either for theft of coal or for the conversion of the coal in any sense. It is quite true that in the third paragraph of the plaint it is alleged that the defendant in collusion with the Railway Officers took the coal and misappropriated it or converted it to his own use. I will assume that the meaning of that is exactly the same as if the plaint had stated that the defendant had stolen the property. Nevertheless, when one reads the plaint fairly, one sees that that paragraph is followed by a statement of subsequent facts, namely, that the plaintiff went to the defendant, that they discussed the matter, that the defendant executed the *chit* promising to pay, not damages at the market-value but a particular sum made up in a particular way. There is nothing in the plaint to show that the transaction is represented as two alternative causes of action. At the end of the plaint, it is true, there is a reference to the place at which the cause of action arose and reference is made to the fact that within the jurisdiction of the Court the *chit* was executed and the goods were delivered. It has been suggested to me that that reference to the place where the goods were delivered shows that the plaintiff was harking back to a claim for damages for the conversion of the coal. I do not think so. Reference to the place of delivery would be one of the circumstances which would tend to show that the suit was properly brought if brought only and solely on the *chit*. In my view the plaint was intended to be, when carefully looked at, a claim for a particular sum of money shown by the *chit* and not a claim for damages either for conversion or for compensation for theft. That being so, neither of the ways in which the petitioner put his case when applying for the Rule, nor the very much better way in which his case was put before me by the learned Pleader, can stand. I think there is no objection in law to the case being tried in a Small Cause Court.

The matter really ends there as there is no substance at all in the second ground mentioned in the petition. But the learned Judge in dealing with the question of interest uses the following language: As regards interest, "I think it proper, under the circumstances of this case, as the defendant's conduct was most heinous from the very beginning, to grant it. The rate is not high." I think what the learned Judge meant was this: First of all, I do not think he was referring merely to the circumstances under which the coal was originally taken. He was referring to the fact that in his view the defendant had signed the *chit* and afterwards repudiated it. I think, moreover, the remark is to explain why he thinks it a proper case to grant interest at all.

As regards the rule of interest, what he says is, that the rate is not high and he allowed the rate claimed; that is, two per cent. per mensem. Now, there is something to be said as a matter of discretion under the Civil Procedure Code against allowing a rate of interest as high as 24 per cent. per annum except in the presence of a contract to that effect, or some evidence that that was the ususal rate in the particular market concerned. There was no such allegation in the plaint and though it has been stated that it is the usual rate, the only finding of the learned Judge is that the rate is not high. I should rather have thought a rate of 24 per cent. per annum a very high rate of interest but this matter is not in any way affected in my judgment by the fact that the learned Judge has entertained a kind of case which was not within his jurisdiction. I think he had full jurisdiction over all matters comprised in the plaint when the plaint is properly understood although, in the absence of evidence of custom, 24 per cent. per annum is a high rate, I think he had jurisdiction to grant

it. I, therefore, do not think it fit in this case to interfere.

The result is that the Rule is discharged with costs,—one gold *mohur*.

Z. K. *Rule discharged.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2322 OF 1922.
January 19, 1922.

Present:—Mr. Justice Le Rossignol.

GHULAM NABI—PLAINTIFF—APPELLANT
versus
BASHESHAR MAL, SON AND LEGAL REPRESENTATIVE OF NIKKA MAL, DECEASED, AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Compromise by guardian—Suit to set aside compromise on ground that plaintiff had attained majority before compromise, whether maintainable.

A *quondam* minor cannot maintain a suit for a declaration that a decree passed against him on a compromise accepted on his behalf by his guardian *ad litem* with the consent of the Court shall be of no effect on the ground that at the time of the compromise and decree the plaintiff had become *sui juris* and, consequently, was not represented before the Court. [p. 604, col. 1.]

Khadija v. *Fidya-tuz-zohra*, 49 Ind. Cas. 707; 24 P. R. 1919 and *Seshagiri Rao* v. *Tangaturi Jagannadham*, 32 Ind. Cas. 391; 39 M. 1031; 19 M. L. T. 93, referred to.

Bibee Solomon v. *Abdool Azeez*, 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446, *Biraj Mohini Dasi* v. *Chinta Moni Dasi*, 5 C. W. N. 877 and *Surendra Nath Ghose* v. *Hemangini Dasi*, 34 C. 83, distinguished.

Second appeal from a decree of the Additional Judge, Lahore, dated the 14th June 1920, reversing that of the Subordinate Judge, First Class, Lahore, dated the 7th March 1919.

Mr. *Aziz Ahmad*, for the Appellant.

Mr. *C. H. Oertel*, Lala *Ramanand* and Mr. *G. S. Salariya* for Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—At present the only question for decision in this second appeal is, whether a *quondam* minor may maintain a suit for a declaration that a decree passed against him on a compromise accepted on his behalf by his guardian *ad litem* with the consent of the Court, shall be of no effect, on the ground that at the time of the compromise and decree, the plaintiff had become *sui juris*, and consequently was not represented before the Court.

The District Judge has answered the question in the negative and bases his conclusions mainly on *Khadija* v. *Fidya-tuz-zohra* (1), wherein is laid down the proposition that a minor party who at the date of decree has attained majority may not avail himself of the rule of law which entitles an infant to impeach a decree passed against him by a separate suit on the ground of fraud, or gross negligence of his guardian.

The plaintiff does not in his plaint allege that his guardian deliberately concealed the fact that plaintiff had attained majority and there can be no reasonable doubt that the plaintiff himself was unacquainted till later with his correct age, so that the basis of the present appeal is not that the decree was obtained by fraud, but it is urged before this Court that the suit was maintainable because the decree impeached was issued against a person (plaintiff) who was not represented, and attempt has been made to distinguish between a decree on adjudication and a decree on a compromise.

Fraud was alleged in the plaint, but the Trial Court found there was no fraud and this point was not urged by plaintiffs in the lower Appellate Court in support of the decree.

In *Seshagiri Rao* v. *Tangaturi Jagannadham* (2) it was held that a decree passed against a minor at a time when he was in reality a major is not a nullity.

Appellant refers me to *Bibee Solomon* v. *Abdool Azeez* (3), *Biraj Mohini Dasi* v. *Chinta Moni Dasi* (4) and *Surendra Nath Ghose* v. *Hemangini Dasi* (5) as authority for his view that

(1) 49 Ind. Cas. 707; 24 P. R. 1919.
(2) 32 Ind. Cas. 391; 39 M. 1031; 19 M. L. T. 93.
(3) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.
(4) 5 C. W. N. 877.
(5) 34 C. 83.

a decree can be impeached by a regular suit on grounds other than fraud.

The authority first cited, however, was a case by a minor and so irrelevant to the present problem.

From the second is quoted a *dictum* that a consent decree cannot be attacked in appeal, but must be attacked in an entirely distinct case, *if a proper case for setting it aside can be made out.* This affords appellant no help.

The third case also is a minor's, and the *dicta* found therein are confined in their application to the circumstances peculiar to that suit. That authority does not go further than *Khadija Fidya-tuz-zohra* (1) which concedes that a *quondam* minor in seeking to avoid a decree is not confined to a plea of fraud, but may also plead gross negligence on the part of his guardian.

A compromise once embodied in a decree is merged in the decree, which may be challenged in review on the ground of fraud or of mistake, but not on the ground that fresh evidence has been discovered, unless such discovery before judgment could not reasonably be expected.

The act of consenting to a decree is not an informal matter and should not be lightly undertaken. The decree issued upon a compromise is a solemn act of the Court, and for that reason may not be challenged by adults except on grounds, which amount to an averment that fraud has been practised on the Court.

The law is very tender to minor, so that it permits them to avoid a decree not only when fraud is established, but also when the Court has been even unintentionally misled by the neglect of the guardian.

As the plaintiff in this case must be regarded as having been an adult judgment-debtor, who could have applied for a review of the decree he now challenges, he is not competent to maintain a suit to avoid that decree except on grounds of fraud and fraud he has not established.

I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 31, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Carson and Sir John Edge, KT.

MEDAI DALAVOI THIRUMALAIYAPPA MUDALIAR—APPELLANT

versus

NAINAR TEVAN AND OTHERS—RESPONDENTS.

Hindu Law—Alienation by widow—Necessity—Vendee, whether bound to see to the application of money—Fair price, how calculated.

A Hindu widow in possession of her deceased husband's estate sold certain immoveable property in order to satisfy a decree for sale obtained on the footing of a mortgage executed by the husband in regard to this property. Plaintiff, a reversioner of the husband, sued for a declaration that the sale will not affect his interest and contended that the sale was a bogus transaction and the property had been alienated for less than its real value:

Held, (1) that, although the vendees bought the property as a speculation, the sale was a genuine and not a sham sale: [p. 606, col. 2.]

(2) that it was no part of the duty of the vendees to see how the purchase-money was used: [p. 606, col. 1.]

(3) that the mere fact that the vendees had subsequently sold the same land in small plots to competing tenants at a higher price did not shew that the widow had not got a fair price:

(4) that, under the circumstances, the plaintiffs' suit was liable to be dismissed.

Appeal against a decree and judgment of the Madras High Court, dated the 9th December 1914, reversing that of the Court of the District Judge, Tinnevelly, dated the 22nd April 1912.

Mr. *De Gruyther, K. C.*, for the Appellant.

Messrs. *Dunne, K. C.*, and *Kenworthy Brown*, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal by the plaintiff in the suit against a decree, dated the 9th December 1914, of the High Court at Madras, which reversed a decree, dated the 22nd April 1912, of the Subordinate Judge of Tinnevelly and dismissed the suit. The parties to the suit are Hindus, and the suit is for a declaration to protect the interests of the plaintiff as a reversioner in certain immoveable property which was sold for Rs. 5,300 on the 22nd November 1897, by the defendant No. 1 to the defendants Nos. 3 and 4.

The defendants Nos. 1 and 2 are the widows of one Medai Dalavoi Shanmuga Kumaraswami Mudaliar (hereafter referred to as Shanmuga), who died childless in 1892. Shanmuga was a separated Hindu, and at the time of his death was possessed of a considerable estate, which was more or less encumbered. That estate included a one-third share in the village Aiyanarkulam. That village will be hereafter referred to as the *Mouza*. On the death of Shanmuga the defendants Nos. 1 and 2 succeeded to his estate as Hindu widows. After the defendants Nos. 1 and 2 had succeeded to the estate they divided the estate or part of it between them, and thereafter each of them enjoyed separately those parts of the estate which had fallen to her on the division. Part of the estate which was so divided was the one-third share in the *Mouza*, and thereupon each of the defendants Nos. 1 and 2, as between themselves, was entitled to and enjoyed separately her moiety of that one-third share. That one-third share was subject to a mortgage which Shanmuga and a brother of his had granted on the 25th May 1879; on that mortgage the mortgagees had obtained a decree for sale on the 30th March 1897, if the amount due with interest thereon should not be paid on the 15th August 1897. There was also due on the 22nd November 1897, the sum of Rs. 1,605-5-0 the first defendant's agreed share of liabilities under a mortgage of the 6th November 1888, which Shanmuga had granted. The total amount due by the first defendant under those two mortgages on the 22nd November 1897, was Rs. 4,588-2-2, and in order to provide for the discharge of those debts the defendant No. 1 sold, on the 22nd November 1897, to the defendants Nos. 3 and 4 her moiety of the one-third share in the *Mouza* for Rs. 5,300. The balance of Rs. 711-13-10 of the Rs. 5,300 it is alleged, on behalf of the defendant No. 1, that she appropriated to reimburse herself for expenses which had been incurred in connection with the marriage, three years before the sale of a daughter of Shanmuga's brother. That is the sale which the plaintiff alleges was invalid as against him as a reversioner.

The plaintiff is a son of a separated uncle of Shanmuga, and he admittedly is the nearest surviving agnate of Shanmuga. The plaintiff brought this suit on the 13th December 1909, to obtain a declaration that the sale of the 22nd November 1897 is void as against him as a reversioner. In his plaint he stated that his cause of action arose on the 22nd November 1897; he was of full age in 1897, but no explanation is given of the cause of the delay in bringing the suit. He is a co-sharer in the *Mouza*, and it appears to their Lordships that it would have been idle for the plaintiff to have suggested, if he had given evidence in the suit, that he did not know of the sale at the time of the sale or very soon afterwards. The sale was affected by a registered deed. The other 94 defendants are persons whose titles to parts of the lands in question depend on the validity of the sale of the 22nd November 1897.

In the plaint it is alleged,—

"VIII. The small debt owed by the said estate could have been discharged by defendants Nos. 1 and 2 from the surplus income of the said estate and from the outstandings due to it. But without doing so, defendants Nos. 1 and 2 have, with the evil intention of causing damage to the reversioner's right and fraudulently and against law and justice, been making separate alienations, by way of sale, mortgage, etc., of the properties forming their respective shares, having secretly received larger sums than those mentioned in the particulars of payment set forth in the several deeds, and have been causing damage to the plaintiff's right.

"IX. In like manner, the first defendant, on 22nd November 1897, intentionally sold to defendants Nos. 3 and 4 her half-share of the entire properties mentioned in the schedule hereof and situate within the jurisdiction of this Court, for the low price of Rs. 5,300, of which the sum of Rs. 4,588-2-2 was directed in the deed to be paid towards the debt incurred by the original owner and Rs. 711-13-10 was received in cash, and she executed the sale-deed and had it registered. The

said properties are worth more than Rs. 15,000. Further, the sale, made as it was by the first defendant without the permission of the second defendant, cannot be valid after the lifetime of the first defendant. According to Hindu Law she is not entitled to make such a sale."

The case which the plaintiff endeavoured to make out at the trial was that the price for which the defendant No. 1 had in fact sold her half of the one-third share was Rs. 7,300, and that Rs. 2,000 of that price was secretly paid to her by the defendants Nos. 3 and 4 as an inducement to her to sell her one-half of the one-third share to them.

The witnesses who were called on behalf of the plaintiff in support of that case of fraud were not believed by the Subordinate Judge or by the High Court. Their evidence has not been relied upon in support of this appeal, and it may be taken that the charge of fraud had no foundation.

The Subordinate Judge who tried the suit, found as fact that Rs. 4,588-2-2 was employed in discharging debts of Shanmuga, and that to that extent there was a legal necessity for selling the moiety of the one-third share in the *Mouza*. With that, so far as it goes, the High Court and their Lordships agree. As to the sum of Rs. 711-13-10, the Subordinate Judge was not satisfied that the defendant No. 1 was legally bound to pay the expenses of the marriage or that there was any necessity for raising money to the extent of Rs. 711-13-10 by selling the property. He overlooked the fact that the Rs. 711-13-10 merely represented the balance of the sale price of Rs. 5,300, and that it was not to raise that Rs. 711-13-10 that the property was sold. The High Court Judges were of opinion that it might be accepted that the Rs. 711-13-10 had been required for the marriage of Shanmuga's brother's daughter. From this conclusion their Lordships are not prepared to differ, and the sale would not have been invalid no matter what may have been the purpose to which the defendant No. 1 applied that Rs. 711-13-10. The purchasers, defendants Nos. 3 and 4, were not bound to see that the defendant No. 1 applied it to any particular purpose.

The Subordinate Judge came to the conclusion that the defendant No. 1's moiety of the one-third share was, at the time of the sale, worth Rs. 12,100, and consequently that the defendant No. 1 had sold it for less than half its value. He came to that conclusion partly from the fact that the defendants Nos. 3 and 4 had re-sold the lands which represented the moiety of that one-third share for some Rs. 11,500. The defendant No. 3 had been in the employment of Shanmuga and afterwards in the employment of the defendant No. 1, at and before the date of the sale, and neither of the defendants Nos. 3 and 4 had apparently any capital: they obviously purchased the moiety of the one-third share as a speculation, and they sold it bit by bit to the cultivating *raiyats*, among whom it is reasonable to conclude that there was great competition to acquire lands suitable for cultivation. The defendant No. 3, from his having been in the employment of Shanmuga and afterwards in that of the defendant No. 1, must have known all the *raiyats* who would be competing for the purchase in small quantities of land suitable for cultivation. It is not reasonable to suggest that the defendant No. 1 should have gone about endeavouring to find persons who would purchase her moiety of the one-third share in small quantities; it was urgently necessary to satisfy the decree for sale which had been made. Although the defendants Nos. 3 and 4 bought the moiety of the one-third share as a speculation, the sale was a genuine and not a sham sale.

The conclusion of the Subordinate Judge that Rs. 12,100 was the value of the moiety of the one-third share was, no doubt, as the High Court pointed out, largely based on a valuation which was made in 1892 by a Revenue Inspector of the one-third share which had belonged to Shanmuga in his lifetime. That valuation was made by the Revenue Inspector for the purpose of ascertaining the stamp-duty payable on a deed which related to that one-third share. The valuation was not a valuation of a moiety of the one-third share; it was a valuation of the whole one-third share, which the Revenue Inspector valued at Rs. 24,200. As to that valua-

tion the Subordinate Judge in his judgment said:

'I think that the valuation made by the Revenue Inspector in 1892 under Exhibit F ['Copy of statement showing the estimated value of lands'] should be accepted as correct. According to this valuation the first defendant's moiety was worth Rs. 12,100. This price would have been paid by a *bona fide* purchaser if the vendor—that is, the first defendant—could confer on him an absolute title. A prudent man will not, perhaps, go in for a transaction of this kind, and a widow desiring to part with her husband's lands partly for paying her husband's debts and partly for her private purposes will not certainly get the best price for it."

The "private purposes" to which the Subordinate Judge referred had reference to the balance of Rs. 711-13-10 of the sale price of Rs. 5,300. The Revenue Inspector in making that valuation was assisted by the two local men, the Village Munsif and an Assistant Karnam. The Revenue Inspector valued each field, wet and dry, and each tree separately, with a total result of Rs. 24,200. That Revenue Inspector was not called as a witness, and there is nothing to explain on what principle he valued, but the two local men who assisted him say that the valuation is correct. It appears, however, from their evidence that no one on behalf of the defendant No. 1 was present when the valuation was being made, and that neither of the local men nor the Revenue Inspector asked the owners for any accounts showing income and expenditure for the purpose of valuing the lands. One of those local men, giving his evidence on the 12th April 1912, twenty years after the valuation was made, said in re-examination:

"The land has become dear, and there are many tenants competing. The Revenue Inspector verbally asked the *ratyats* about the price of lands." The 'price of lands." What price? The price which competing cultivating *raiyats* would give for small portions of land adjoining or near to their holdings, or the price which the buyer of an area representing the one-third share of the *Mouza* would give? How would an ordinary *ratyat* know anything about the price which a man would be likely to give for an area of land representing the one-third share of the *Mouza*?

Their Lordships agree with the learned Judges of the High Court that it would be easy to attach an exaggerated importance to that valuation as a piece of evidence in the case. As those learned Judges observe in their judgment, the price "at a private sale of a considerable extent of land purchased in lump would depend not so much on the valuation of its component parts, calculated on a regular scale, as on the need of the vendor for money and the competition for lands in that locality at the time of the sale." It would be interesting to know what the Revenue Inspector would have said had he been a witness in this suit and been cross-examined as to his knowledge, if any, of the prices paid for similar areas of similar lands in that District.

At the time of the sale the defendant No. 1 was living with her father at Idakal. At the hearing of this appeal their Lordships were informed that the father of the defendant No. 1 was a Village Munsif. Whether he was a Village Munsif or not, there is nothing to suggest that he was not a respectable man who would give impartial advice to his daughter, and it is proved that he arranged the sale. It is fair to assume that he arranged the sale for the best price which was in his opinion obtainable. As the Judges of the High Court point out: "No obvious motive is apparent for the first defendant to wish to benefit the third and fourth defendants, who are not related in any way to her." They also observe: "The fact that the vendor in this case was a widow would tend rather to low values (prices) being obtained owing to the risk of litigation which intended purchasers might apprehend." They also refer to some other transactions relating to lands, from which it might be inferred that the price obtained by the defendant No. 1 for the sale of the 22nd November 1897 was under the circumstances a reasonable price and they say: "The increased values (prices) obtained in recent years on the shares of both widows appear to be commensurate with the natural rise in prices that has obtained generally in recent years in this Presidency." In

JUANENDRA NATH GHOSH v. KUMAR JOGENDRA NARAIN SINHA.

conclusion, the learned Judges of the High Court stated. "We are of opinion that the plaintiff failed to prove that the price realised under Exhibit A (the sale-deed of the 22nd November 1897) was an improper price or that it indicated that the defendants Nos. 3 and 4 were not *bona fide* purchasers."

The High Court by its decree dismissed the suit, and from that decree this appeal has been brought.

At the hearing of this appeal it was, on behalf of the plaintiff (appellant), contended that Shanmuga was a wealthy man when he died and the defendant No. 1 could have been under no necessity to sell the moiety of the one-third share, and that she, as his widow, should have paid the Rs. 4,588-2-2, out of the personal property which he left at his death and not by a sale of the immoveable property. As to that contention, the short answer is that there is no reliable evidence that at his death Shanmuga was a wealthy man or left personal property out of which his debts could have been paid; there are some vague statements of witnesses that he had been a wealthy man. He died on the 15th January 1892, and he had been borrowing money on a mortgage on the 25th May 1879, and further money on a hypothecation bond on the 6th November 1888, and he died leaving those debts unpaid, and it was to satisfy the debts secured by those mortgages that the defendant No. 1 sold her moiety of the one-third share in the *Mouza*. In their Lordships' opinion there was necessity in law and in fact for the sale of the moiety of the one-third share. They are much impressed with the fact that it was on the advice of her father that the defendant No. 1 accepted Rs. 5,300 as the price of her moiety of the one-third share, and with the fact that she had no apparent motive for benefiting, to her own loss, the defendants Nos. 3 and 4 by selling to them her moiety of the one-third share at an under-value. It may be observed that the plaintiff, who must have known all about the sale in 1897, did not bring his suit to challenge the validity of that sale until the 13th December 1909. The plaintiff's contention relating to the Rs. 711-13-10 was again put forward in this appeal; their Lordships need not repeat what they have already said on that subject.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

K. S. D. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *John Joscelyn.*

Solicitor for the Respondent:—Mr. *Douglas Grant.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 8 OF 1922.

November 7, 1922.

Present:—Mr. Justice Adami and Mr. Justice Das.

JUANENDRA NATH GHOSH—DECREE-HOLDER—APPELLANT

versus

Kumar JOGENDRA NARAIN SINHA—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Civil Procedure Code (Act V of 1908), ss. 38, 39—Execution of decree—Decree transferred—Application in Court which passed decree, whether step-in-aid of execution—Limitation.

Under the provisions of sections 38 and 39 of the Civil Procedure Code a decree may be executed either by the Court which passes it or by the Court to which it is sent for execution; it cannot be executed simultaneously in two Courts. [p. 609, cols. 1 & 2.]

Maharajah of Bobbili v. *Sree Rajah Narasaraju Peda Baliara Simhulu Bahadur Garu*, 36 Ind. Cas. 682; 39 M. 640; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 909; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P.C.), relied on.

Where, therefore, a decree has been transferred to another Court for execution, an applicaton made to the Court which passed it cannot be regarded as a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, so as to save limitation. [p. 609, col. 1.]

Appeal from an order of the District Judge, Santal Parganas, dated the 29th September 1921, setting aside an order of the Subordinate Judge, Pakaur, dated the 19th August 1921.

Mr. S. K. *Mitter*, for Mr. *Saroshi Charan Mitter*, for the Appellant.

Messrs. *Kulwant Sahay* and *N. C. Roy*, for the Respondents.

JUDGMENT.

Das, J.—The only question which arises in this appeal is whether the Court below has rightly dismissed the execution petition of the appellant on the ground that it was presented beyond time.

The appellant obtained a decree as against the respondent so far back as the 8th of July 1912, in the Small Cause Court in Calcutta. It appears that the execution case was first transferred to the Pakaur Court and then re-transferred to the Small Cause Court sometime between 1912 and the 10th January 1916. On the 10th January 1916, the decree-holder obtained another transfer of the execution case to the Pakaur Court.

Now, it is admitted that between the 10th January 1916 and the 4th of April 1921 no steps were taken by the decree-holder for execution of his decree in the Pakaur Court. On the 4th of April 1921, however, he did present an application for execution of his decree in the Pakaur Court.

The learned Judge in the Court below has come to the conclusion that that application could not be entertained by him as it was clearly barred by limitation. But it appears that the decree-holder sometime in September 1918 applied to the Small Cause Court in Calcutta for the issue of a sealed warrant in connection with the decree which had been obtained by him against the respondent. Nothing seems to have come out of that application, but the appellant contends that the application which was made by him in September 1918, in the Small Cause Court in Calcutta was an application asking the Court to take some step-in-aid of execution, then his present application is within time.

It seems to me that the contention advanced before us on behalf of the appellant must fail. Section 38 of the Civil Procedure Code provides that a decree may be executed either by the Court which passes it or by the Court to which it is sent for execution. Section 39 gives power to the Court to send the decree for execution to another Court on the happening of certain conditions which are specified in that section. It seems to me that on a consideration of these two sections it must follow that the decree cannot be executed simultaneously in two Courts. This view was taken by the Judicial Committee in the case of *Maharajah of Bobbili* v. *Sree Rajah Narasaraju Peda Bahara Simhulu Bahadur Garu* (1). In my opinion the decision of the learned Judge in the Court below is right and must be affirmed.

I would dismiss this appeal with costs.

Adami, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 36 Ind. Cas. 682; 39 M. 640; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 109; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEAL No. 15 1922.
APPEAL AGAINST ORDER No. 14 OF 1922.
February 21, 1923.

Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

ALAGU PILLAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

VELUCHAMI *alias* MAYILAPPA PILLAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Arbitration—Award, partial, validity of—Intention of parties—Party preventing completion of award, whether can object—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Award whether can be recorded as adjustment.

There is no rule of law that a partial award is invalid. The question has to be decided on the intention of the parties, the matter being a subject of contract between them. [p. 611, col. 2.]

Randall v. *Randall*, (1805) 103 E. R. 321; 7 East 81; 3 Smith 90; 8 R. R. 601, *Bradford* v. *Bryan*, (1741) 125 E. R. 1167; Willes 268; *Risden* v. *Inglet*, 78 E. R. 1065; Cro. Eliz. 839, *Wrightson* v. *Bywater*, (1838) 150 E. R. 1114 at p. 1117; 6 Dowl. P. C. 359; 1 H. & H. 50; 7 L. J. (N. S.) Ex. 83; 3 M. & W. 199; 49 R. R. 570, *Simmonds* v. *Swaine*, (1809) 127 E. R. 947; 1 Taunt. 549, referred to.

Where one of the parties prevents the completion of the award by his own conduct, he cannot afterwards plead that the award is incomplete; the principle being that when a party to a contract wrongly prevents a thing being done by another party, that thing is deemed to be done. [p. 611, col. 2; p. 612, col. 1.]

Mackay v. *Dick*, (1881) 6 App. Cas. 251; 29 W. R. 541, followed.

ALAGU PILLAI v. VELUCHAMI.

Where, after the time for submission of an award had expired the Court on application recorded the award under O. XXIII, r. 3 of the Civil Procedure Code:

Held, that the Court must be deemed to have exercised its powers to supersede the arbitration and deal with the suit and the order was, therefore, perfectly valid. [p. 612, col. 1.]

Appeal against a decree and order, dated the 19th August 1921, of the Court of the Subordinate Judge, Shivaganga, in Original Suit No. 5 of 1918 and in I. A. No. 123 of 1920 in the said Original Suit No. 5 of 1918 respectively.

Mr. *C. S. Venkatachariar*, for the Appellants:—This is an appeal by defendants Nos. 1 and 5 in a suit for a declaration that a sale-deed by one *M.* in favour of the first defendant is not binding on the one-half share claimed by the plaintiff and dedefendants Nos. 2 and 3 jointly. Afer issues were framed in the case and on the application by all the parties, the matters in controvensy in the suit were referred by the lower Court to the arbitration of three named persons and the records sent to one of these three, one Servai, P. W. No. 1, in the case. Pending this reference, the two other arbitrators having never done anything in respect thereof the plaintiffs set up a private reference to the sole arbitration of the aforesaid Servai alone of all matters in dispute between them. We deny there was any such private reference and even if there were it is invalid and cannot bind the parties. The plaintiff's case further is that, purporting to act as sole arbitrator the said Servai decided a portion of the disputes—that relating to the suit lands and another piece of land and reported his decision to the Court, Exhibit C. On the aplication of the plaintiffs Exhibit C has been accepted as an adjustment of the suit under O. XXIII, r. 3 and decree has been passed in terms thereof. Against the decree and the order recording adjustment above appeal and civil miscellaneous appeal have been preferred.

Firstly, the report, Exhibit C, does not purport to be a final decision on all matters referred and being an incomplete award leaving open matters referred, cannot be acted upon even on adjustment.

See *Randall* v. *Randall* (1); *Bradford* v. *Bryan* (2); *Samuel* v. *Cooper* (3), Banerji's Law of Arbitration, page 251; *Ramji Ram* v. *Salig Ram* (4), *Ganes Narain* v. *Malida Koer* (5), and *Mukund Ram Sukul* v. *Salig Ram Sukul* (6).

Not only the matters in the suit but also other matters were referred to him and as he admits in Exhibit C he had not disposed of all of them but have adjourned the hearing to a future date, there ought to be a decision on all points and a decision in one of several connected matters cannot be final or binding.

Secondly, the parties could not refer the matter to a private arbitration, while a reference through Court is pending. The arbtrators are properly seised of the case and there is no suit to be dealt with by the parties. *Jamna Kunwar* v. *Nasib Ali* (7) is a clear case in point. *Sheoambar* v. *Deodat* (8) says Courts have no jurisdiction. There is no "suit" which could be compromised. Paragragh 3 (2) Schedule II. See also *Penrice* v. *Williams* (9) and *Doleman* v. *Ossett Corporation* (10).

Thirdly, an award cannot be filed except under the provsions of the Second Schedule to the Civil Procedure Code and O. XXIII, r. 3 has no application. Section 89 of the Civil Procedure Code is new. *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (11) is against me but the effect of section 89 is not there considered. But the decision in *Amar Chand* v *Banwari Lal* (12) considers the position from all points of view.

(1) (1805) 103 E. R. 32; 7 East 81; 3 Smith 90; 8 R. R. 601.
(2) (1741) 125 E. R. 1167; Willes 268.
(3) (1835) 111 E. R. 290; 2 A. & E. 752; 1 H. & W. 86; 4 N. & M. 520; 41 R. R. 520.
(4) 11 Ind. Cas. 481; 14 C. L. J. 188 at p. 208.
(5) 10 Ind. Cas. 450; 13 C. L. J. 399 at p. 403.
(6) 21 C. 590; 21 I. A. 47; 6 Sar. P. C. J. 423; 10 Ind. Dec. (N. S.) 1023 (P. C.)
(7) 24 A. 312; A. W. N. (1902) 72.
(8) 9 A. 168; A. W. N. (1887) 13; 5 Ind. Dec. (N. S.) 545.
(9) (1883) 23 Ch. D. 353; 52 L. J. Ch. 593; 48 L. T. 868; 31 W. R. 496.
(10) (1912) 3 K. B 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.
(11) 51 Ind. Cas. 827; 42 M. 625; 36 M. L. J. 291; (1919) M. W. N. 221; 25 M. L. T. 397.
(12) 69 Ind. Cas. 808; 49 C. 608; (1922) A. I. R. (C.) 404.

ALAGU PILLAI v. VELUCHAMI.

Mr. *K. V. Krishnaswamy Aiyar*, for the Respondent:—The point about the incompleteness of the award is newly set up. Nor is there any room for such a contention. The English cases have held that this must depend largely on the intention of the parties whether they bargained for and contracted to have a complete decision on all matters and nothing short of it. See *Risden* v. *Inglet* (13), *Ormelade* v. *Coke* (14), *Wrightson* v. *Bywater* (15) and *Simmonds* v. *Swaine* (16). In this case there is no evidence and it was never before set up that the parties insisted on a final and comprehensive award in the first instance. It is a case of the parties agreeing to take a piecemeal award.

Further, the incompleteness, if any, is due to the fraudulent conduct of the appellant in refusing to complete it. He cannot take advantage of his own wrong and say it is not binding because it is incomplete. See *Mackay* v. *Dick* (17).

On the question of jurisdiction, the suit is still before the Court for certain purposes and there is nothing to take away the inherent power of the parties to settle it in any way they like. The provisions of Schedule II are clear.

On the applicability of O. XXIII, r. 3, I submit *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (11) should be followed in preference to the view taken by the other Courts. The latter is by no means uniform. See *Manilal Motilal* v. *Gokaldas Rowji* (18).

Mr. *C. S. Venkatachariar* in reply:—My case rests on the meaning to be given to Exhibit C. It admits having left open many matters and does not on its face purport to be final. It will be most inequitable to snatch upon a decision half way and bind my clients therewith.

JUDGMENT.—In this case, a suit was referred to arbitration—three arbitrators being appointed. As two of the arbitrators were absent, the parties agreed to abide by the decision of the third alone. He was accordingly requested to decide this suit, and other matters. He gave his decision so far as this suit is concerned, and deferred his enquiry into other matters, but owing to defendants' obstruction, no award was made in those matters. On application, the lower Court has recorded the award under O. XXIII' r. 3. Defendants appeal.

The greater portion of their argument has been addressed to the plea that as the award was only partial it is not valid and has referred to *Randall* v. *Randall* (1) and *Bradford* v. *Bryan* (2). An examination of these and other cases on the point [*i. e.*, *Risden* v. *Inglet* (13), *Ormelade* v. *Coke* (14), *Wrightson* v. *Bywater* (15) and *Simmonds* v. *Swaine* (16)] shows that there is no rule of law that a partial award is invalid, but that the question has to be decided on the intention of the parties, the matter being a subject of contract between them. In the earlier cases, an express contract was required but later an implied contract that the award should be given on all points referred was held sufficient. We, therefore, have to determine the intention of the parties in the present case. The defendants do not seem to have placed much reliance on this implied contract until they came up in appeal and even in their appeal memorandum, the ground is not taken clealy and unambiguously. The arbitrator's report (Exhibit C) and his report (Exhibit G) as well as first defendant's letter (Exhibit D) and Exhibit F show that the matter involved in this suit was decided, and the decision accepted by both parties. The reference in Exhibit C to certain contentions put forward by defendants shows that they were pleas in *miseri cordium* after the decision and could in no way affect the award. Taking all the circumstances into consideration, we think that there was no implied agreement that the award should be void unless an award were given in respect of all the matters referred for decision. Further, defendants prevented the completion of the award by their own conduct, and on the principle that when a party to a contract wrongly prevents a thing being done by another party that thing is deemed to be

(13) 78 E. R. 1065; Cro. Eliz. 839.
(14) 79 E. R. 303; Cro. Jac. 355.
(15) (1838) 150 E. R. 1114 at p. 1117; 6 Dowl. P. C. 359; 1 H. & H. 50; 7 L. J. (N. S.) Ex. 83; 3 M. & W. 199; 49 R. R. 570.
(16) (1809) 127 E. R. 947; 1 Taunt. 549.
(17) (1181) 6 App. Cas. 251; 29 W. R. 541.
(18) 59 Ind. Cas. 53; 45 B. 245; 22 Bom. L. R. 1048.

done [*Vide Mackay* v. *Dick* (17)] and defendants cannot now plead that the award is is incomplete. A further point was taken that as a reference had been made to arbitration, the Court could not act under O. XXIII, r. 3, but only in accordance with Schedule II, Civil Procedure Code. The time for submision of the award had expired when the Court passed its order. It must, therefore, be deemed to have exercised its power to supersede the arbitration and to deal with the suit.

The second reference to private arbitration was made before the time expired, and it is argued that there was then no suit to be compromised as the suit was only pending for certain limited purposes specified in Schedule II. Even conceding this proposition, the suit must still exist and the compromise was a compromise of that suit.

Chinna Venkatasami Naicken v. *Venkatasami Naicken* (11) is authority against the further proposition that the Court was bound to act under Schedule II and not under O. XXIII, r. 3.

The appeal is accordingly dismissed, with costs and the civil miscellaneous appeal is also dismissed, printing costs alone being allowed.

V. N. V. *Appeal dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 264 OF 1920.

March 9, 1923.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Rankin.

CHANDRAKISORE DATTA MAJUMDAR —PLAINTIFF—APPELLANT

versus

Kumar UPENDRA CHANDRA CHOUDHURY AND OTHERS—DEFENDANTS —RESPONDENTS.

Hindu Law—Widow—Alienation—Legal necessity—Evidence—Inquiry by alienee—Recitals, value of.

When a person claims title under an alienation affected by a Hindu widow in respect of the estate of her deceased husband, the burden lies on him to establish either that there was legal necessity in fact which justified the alienation, or that he made proper and *bona fide* inquiries and did all that was reasonable to satisfy himself as to the existence of such necessity. [p. 613, cols. 1 & 2.]

Bhagwat Dayal Singh v. *Debi Dayal Sahu*, 35 I. A. 48; 35 C. 420; 7 C. L. J. 335; 10 Bom. L. R. 230; 12 C. W. N. 393; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49 (P. C.), *Amarnath Sah* v. *Achan Kuar*, 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. S.) 637 (P. C.), *Nabakishore* v. *Upendrakishore*, 65 Ind. Cas. 305; 35 C. L. J. 116; 26 C. W. N. 322; 20 A. L. J. 22, (1922) M. W. N. 95; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.), relied on.

In applying this rule, however, it must be borne in mind that recitals in conveyances and mortgages of the existence of legal necessity are not, by themselves, evidence of the fact, and there must ordinarily be some evidence to substantiate the allegations *aliunde*. [p. 613, col. 2.]

Thakur Vasonji Morarji v. *Chanda Bibi*, 29 Ind. Cas. 781; 37 A. 369 at p. 376; 22 C. L. J. 180; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 29 M. L. J. 130, followed.

But when, by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and other circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and when evidence of actual inquiry by him has become impossible, the recital, coupled with circumstances which justify a reasonable belief that an inquiry would have confirmed its truth, is sufficient evidence to support the transaction. [p. 613, col. 2; p. 614 col. 1.]

Chintamanibhatla v. *Rani Saheba of Wadhwan*, 55 Ind. Cas. 538; 47 I. A. 6; 43 M. 541; 38 M. L. J. 393; 11 L. W. 451; 18 A. L. J. 367; (1920) M. W. N. 315; 22 Bom. L. R. 541; 2 U. P. L. R. (P. C.) 77; 28 M. L. T. 457 (P. C.), *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh*, 36 Ind. Cas. 499; 43 C. 417 (P. C.), *Nanda Lal* v. *Jagat Kishore*, 36 Ind. Cas. 420; 43 I. A. 249; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177 (P. C.), *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh*, 12 Ind. Cas. 931; 38 C. 721, relied on.

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 25th September 1920.

Babus *Joges Chunder Roy*, *Gobinda Chandra Dey Roy*, *Annada Charan Karkun* and *Pramatha Nath Banerjee*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty*, *Satis Chandra Bhattacharyya* and *Rama Prosad Mookerjee*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is one-fifth share in immoveable properties described in the schedule to the plaint, which formed part of the estate of one Kamal Narain Nandy Chowdhury, who died on the 26th December 1853. He left a widow, Parmeshwari Chowdhurani, who died on the 22nd September 1913. The present suit was instituted on the 20th September 1918 by Chandrakisore Datta Majumdar, the son of a sister of the original proprietor, who claimed title to the estate of his maternal uncle as the sole surviving reversionary heir. The claim was resisted by Upendra Chandra Choudhury and his wife on the basis of purchase at a sale held in execution of a mortgage-decree. It appears that on the 28th July 1880 Parmeshwari, along with other members of the Nandy Chowdhury family, had executed a mortgage in favour of Harendra Lal Roy Chowdhury to secure a loan of Rs. 16,500 on the security of the properties inherited by her from her husband. The loan was not repaid in due course, with the result that the mortgagee instituted a suit on the 19th December 1887 to enforce his security, obtained the usual mortgage-decree on the 4th June 1888 and brought the hypothecated properties to sale on the 20th August 1889 when the first defendant became the purchaser. The question, consequently, arises whether the sale so brought about binds the inheritance claimed by the plaintiff as the reversionary heir to the estate of his maternal uncle. The defendants successfully urged in the Court below that the question should be answered in the affirmative. They further argued—and their contention found favour with the Subordinate Judge—that Kamal Narain, on the day previous to his death, executed in favour of Parmeshwari a document called an *Anumati Patra* which, in the events that have happened, effectively excluded the plaintiff from the line of succession as reversionary heir. On the present appeal the plaintiff has reiterated the contentions which were found untenable by the Trial Court.

It is well-settled that, when a person claims title under an alienation effected by a Hindu widow in respect of the estate of her husband, the burden lies upon him to establish either that there was legal necessity in fact which justified the alienation, or that he made proper and *bona fide* enquiries and did all that was reasonable to satisfy himself as to the existence of such necessity. This position is supported by the decisions of the Judicial Committee in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (1); *Amarnath Sah* v. *Achan Kuar* (2) and *Nabakishore* v. *Upendrakishore* (3). In the application of this primary rule, it is to be borne in mind that recitals in conveyances or mortgages of the existence of legal necessity are not by themselves evidence of the fact, and there must ordinarily be some evidence to substantiate the *aliunde* allegations: *Brij Lal* v. *Inda Kunwar* (4); *Thakur Vasonji Morarji* v. *Chanda Bibi* (5). The inflexible application of this view may and does in fact place the alienee at a serious disadvantage when the transaction falls to be challeneged after a long series of years. Hence it has been ruled that, though lapse of time does not affect the question of onus of proof regarding legal necessity, it may give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scantiness of the evidence offered on his behalf. To put the matter in an other way, when by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and when evidence of actual enquiry by him has become impossible,

(1) 35 I. A. 48; 35 C. 420; 7 C. L. J. 335; 10 Bom. L. R. 230; 12 C. W. N. 393; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49 (P. C.).

(2) 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. S.) 637 (P. C.).

(3) 65 Ind. Cas. 305; 35 C. L. J. 116; 26 C. W. N. 322; 20 A. L. J. 22; (1222) M. W. N. 95; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.).

(4) 23 Ind. Cas. 715; 36 A. 187; 19 C. L. J. 469; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 495; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 (P. C.).

(5) 29 Ind. Cas. 781; 37 A. 369 at p. 376; 22 C. L. J. 180; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 2 M. L. J. 130.

the recital, coupled with circumstances which justify a reasonable belief that an enquiry would have confirmed its truth, is sufficient evidence to support the transaction; see *Chintamanibhatla* v. *Rani Saheba of Wadhwan* (6), where the Court was invited to investigate the circumstances of a transaction which had taken place more than eighty-two years before the initiation of the suit; see also *Nanda Lal* v. *Jagat Kishore* (7); *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (8), which affirms *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (9). The Subordinate Judge, we are satisfied, has kept these principles in view in the course of his examination of the evidence adduced in this case.

The mortgage-bond which was executed by Parmeshwari on the 28th July 1880, and which ultimately led up to the sale held on the 20th August 1889 contains an elaborate recital of previous transactions which rendered necessary the loan of Rs. 16,500. References are made to a mortgage-bond of Purna Chandra Chowdhury, a mortgage-bond in favour of Haro Mohan Bose, a mortgage-bond in favour of Gobinda Chandra Chowdhury, a bond in favour of Krishnamangal Chakravarti, a bond in favour of Mohasukh Agusti, a debt of Kunja Debi, a debt of Sarat Chandra Sarkar, a debt of Brindaban Chandra Sahu, a debt of Ananda Mohan Majumdar and arrears of rent due to Jagat Kishore Acharyya Chowdhury. Most of these creditors had established their claims by suits in Court and had obtained decrees which had been put into execution. The loan was taken by the members of the family jointly to enable them to satisfy these debts, and the transaction was regarded as one needed for the protection of the joint family estate. The appellant has urged, however, that this is not sufficient to establish the validity of the claim put forward by the purchaser, and that he is bound to trace the history of each of the previous transactions so as to show by documentary evidence that each constituted a legal necessity binding upon the inheritance. The respondent has pointed out, on the other hand, that as the judicial records have been destroyed under statutory rules, detailed information of this character cannot be made available even, if it be assumed that such documentary proof is needed to fulfil the requirements of the rule. He has urged further that a substantial body of oral evidence was adduced at the trial, so as to leave no room for doubt that the loan was contracted under circumstances which constituted legal necessity and that the lender satisfied himself on this point after due enquiry. In our opinion, it is not necessary to consider the abstract question whether the whole chain of transactions must be traced back to the beginning notwithstanding the contrary opinion indicated in *Sheoraj Kooer* v. *Nuckchedee Lall* (10) and *Mahabir Kower* v. *Jubha Singh* (11); for, notwithstanding lapse of time, we have abundant proof, oral and documentary, of the history of the family for many years past. After the death of Kamal Narain on the 26th December 1853, the present plaintiff, along with his brother and cousin, instituted a suit in 1861 against their maternal aunt Parmeshwari for declaration that she had never been legally married to Kamal Narain and was consequently not entitled either to take his estate by right of inheritance or to adopt a son under the authority conferred by the *Anumati Patra*. The members of the Nandi Chowdhury family were all joined as defendants in the action. After a protracted trial, the suit was dismissed by the Principal Sadar Ameen on the 17th September 1862. His decree was affirmed by the District Judge on the 25th February 1863 and a second appeal to this Court was dismissed on the 9th May 1864. The judgment of the Princi-

(6) 55 Ind. Cas. 538; 47 I. A. 6; 43 M. 541; 38 M. L. J. 393; 11 L. W. 451; 18 A. L. J. 367; (1920) M. W. N. 315; 22 Bom. L. R. 541; 2 U. P. L. R. (P. C.) 77; 28 M. L. T. 457 (P. C.).

(7) 36 Ind. Cas. 420; 43 I. A. 249; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177 (P. C.).

(8) 36 Ind. Cas. 499; 43 C. 417 (P. C.).

(9) 12 Ind. Cas. 931; 38 C. 721.

(10) 14 W. R. 72.

(11) 8 B. L. R. 38; 16 W. R. 221.

pal Sadar Ameen shows clearly that Kamal Narain had left debts and that creditors enforced their claims against Parmeshwari who was consequently obliged to satisfy the judgment-debts. There is also oral evidence to show that the result of the litigation commenced by the plaintiff against his maternal aunt and her co-sharers was to involve the family in heavy expenditure. Mathura Narain, the surviving son of a first cousin of Kamal Narain, who was himself a defendant in that litigation has been examined as a witness on behalf of the plaintiff. He was also a defendant in two suits instituted by the plaintiff in 1915 for recovery of properties of his maternal uncle other than those included in the present suit. In those suits, Mathura Narain, jointly with his co-sharers, filed written statements, which narrated with considerable fullness the history of the transactions of the family from the time of the death of Kamal Narain. Mathura Narain has, in the present suit, affirmed the truth of the statements made by him in the previous litigations, and we see no reason why he should not be believed. The evidence of Mathura Narain shows that Kamal Narain died indebted, that the suit instituted by the plaintiff to contest the validity of the marriage of Parmeshwari led to additional debts, and that the position of the family became so embarrassed that collection of rent was seriously impeded. In such circumstances, though the Nandi Chowdhuries managed to pay the Government dues to avert a complete destruction of the family estate by sale for arrears of revenue, the rent payable to the superior landlords fell into arrears. The estate gradually became involved in debts which carried interest and were renewed from time to time. We need not set out here at length the story as narrated by Mathura Narain, which leaves no doubt in our mind that the trouble was traceable, not merely to the debts left by Kamal Narain, but also to the heavy expenses of the litigation commenced by the plaintiff and the inevitable troubles consequent thereon. In such circumstances, it is not necessary to determine whether the estate might have been kept free from debts by prudent management: *Maheshar Baksh Singh* v. *Ratan Singh* (12); *Dharam Chand Lal* v. *Bhawani Misrain* (13); *Tika Ram* v. *Deputy Commissioner of Bara Banki* (14). There is, further, direct oral evidence to show that the lender acted *bona fide* and enquired into the necessities for the loan. On this part of the case, we see no reason to distrust the testimony of Umes Chandra Sarkar, who pledged his oath that he along with other officers of his master, the lender, made enquiries as to the debts, the mortgages, the decrees and the properties of the borrowers. This oral evidence lends support to the theory that the detailed recitals inserted in the mortgage-bond did in fact constitute the representations which on the occasion were made to the creditor. This would be sufficient to make the transaction binding upon the inheritance: *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (15); *Kameswar Persaud* v. *Ran Bahadur Singh* (16); *Rameswar Mandal* v. *Provabati Debi* (17); *Rames Chandra Chakrabarti* v. *Sasi Bhusan Upadhay* (18); *Stevens*, v. *Janki Balhab Prasad* (19). We may further point out that if the transaction was, in the main for legal necessity, as it unquestionably was, it would not be impeachable on the ground that a smaller sum might have been sufficient to remove the pressure at the time: *Medai Dalavoi Thirumalaiyeppa Mudaliar* v. *Nainar Tevan* (20). We hold accord-

(12) 23 I. A. 57; 23 C. 766; 7 Sar. P. C. J. 19; 6 M. L. J. 127; 12 Ind. Dec. (N. S.) 508 (P. C.).

(13) 24 I. A. 183; 25 C. 189; 1 C. W. N. 697; 7 Sar. P. C. J. 249; 13 Ind. Dec. (N. S.) 128 (P. C.).

(14) 26 I. A. 97; 26 C. 707; 3 C. W. N. 573; 1 Bom. L. R. 692; 7 Sar. P. C. J. 520; 13 Ind. Dec. (N. S.) 1052 P. C.

(15) 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253*n*. 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.)

(16) 8 I. A. 8; 6 C. 843; 8 C. L. R. 361; 4 Shome L. R. 81; 4 Sar. P. C. J. 210; 5 Ind. Jur. 157; 3 Ind. Dec. (N. S.) 545 (P. C.).

(17) 25 Ind. Cas. 84; 20 C. L. J. 23; 19 C. W. N. 313.

(18) 53 Ind. Cas. 654; 30 C. L. J. 56; 23 C. W. N. 1025.

(19) 22 Ind. Cas. 304; 19 C. W. N. 80

(20) 74 Ind. Cas. 604; 27 C. W. N. 365; 40 I. W. 478; 2 U. P. L. R. (P. C.) 92; (1922) A. I. R. (P. C.) 307; (1922) M. W. N. 804; 21 A. L. J. 282 (P. C.).

ingly that the Subordinate Judge has correctly found that there was legal necessity for the mortgage and that the creditor satisfied himself as to the existence of necessity by proper and adequate enquiry.

In view of our conclusion upon the question of legal necessity and the enquiry, it is not necessary to deal at length with the point raised in the sixth issue, namely, the legal effect of the *Anumati Patra* alleged to have been executed by Kamal Narain in favour of Parmeshwari on the 25th December 1853. It cannot be disputed that such a document was in fact executed. Indeed, the plaintiff instituted the suit of 1861 for recovery of possession of the estate of his maternal uncle upon cancellation of the *Anumati Patra*. The main question in controversy is whether the contents of the *Anumati Patra* have been proved by legal evidence. There were two *Anumati Patras* executed by Kamal Narain, one on the 9th March 1851 in favour of his wife Sonamoni, the other on the 25th December 1853 in favour of Parmeshwari whom he married after the death of Sonamoni. The second document incorporates in substance the terms of the first. Both these deeds were produced in the litigation of 1861. Since then the originals have disappeared; but copies are in existence and have been produced. As to one set of copies, the question has been raised whether they are copies of copies and consequently inadmissible under the provisions of the Indian Evidence Act. As to another set, no such difficulty, however, arises, and we accept the allegation of Umes Chandra Sarkar that he made accurate copies from the originals. We also accept the version of Aswini Kumar Banerjee who was able to narrate the contents from memory. There is further no doubt that the Subordinate Judge has correctly held that the plaintiff has withheld the copies which he obtained when the suits of 1915 were compromised. It is significant that the Registration Office at Mymensingh was destroyed by fire in 1917, and the plaintiff probably was under the impression that as the records had been burnt, a certified copy could no longer be procured from the Registration Office. He was evidently not aware that accurate copies were in existence and were accessible to the defendants. There is, in our opinion, ample evidence, oral and documentary, as to the contents of the *Anumati Patras*. As regards their legal effect, the plaintiff appears to have correctly appreciated the situation in the suit of 1861, when he asserted that the stipulation contained in the *Anumati Patra* was that if Parmeshwari did not take a son in adoption, the property would pass into the hands of the defendants in that litigation. There is really no room for argument on the terms of the *Anumati Patra* that if the widow should die without taking a son in adoption, the estate would vest entirely in the family idols, whose worship would be managed by the *shebaits* specified. The plaintiff is not in the line of *shebaits*, and in this view the present suit is liable to dismissal as instituted by a person no way interested in the estate. We need not, however, discuss the matter further from this point of view nor investigate the position, if the *Debutter* should turn out to be, not a dedication of the completest character but rather the creation of a religious charge: *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (21). We hold accordingly that the Subordinate Judge has rightly dismissed the suit and this appeal must be dismissed with costs.

W. C. A. *Appeal dismissed.*

(21) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 7, 1922.

Present:—Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge, KT., and Mr. Ameer Ali.

L. OPPENHEIM AND COMPANY—PLAINTIFFS—APPELLANTS

versus

MAHOMED HANEEF, DECEASED—DEFENDANT—RESPONDENT.

Arbitration—Agreement to refer to arbitration

OPPENHEIM v. MAHOMED HANEEF.

in England—Award—Judgment on award in default—Suit on judgment, whether maintainable in India—Suit on award—Irregularity in procedure, whether good defence.

By a contract in writing made in London the parties agreed to refer any differences arising out of their transaction "to arbitration in London in the usual manner" and to abide by the award. Differences having arisen the dispute was referred by the plaintiff to an arbitrator in London. The defendant did not, however, take any part in the arbitration and the artitrator gave his award in favour of the plaintiffs who recovered judgment in an English Court and then brought the present suit to recover the amount:

Held, (1) that the action upon the judgment could not be maintained as the judgment had been entered in default of appearance and the action had not been tried on the merits; [p. 618, col. 2.]

(2) that the suit was, however, maintainable on the award and any defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both the parties had agreed to be bound. [p. 618, col. 2.]

Appeal from the judgment and decree of the High Court (Sir John Wallis, C. J., and Napier, J.) dated the 6th November 1918, in its Appellate Jurisdiction, reversing a decree of the Court in its Original Civil Jurisdiction.

Messrs. *DeGruyther, K. C.*, and *Harold Morris, K. C.*, for the Appellant.

JUDGMENT.—This is an appeal from a decree of the High Court of Judicature at Madras, in the exercise of its Appellate Jurisdiction, allowing an appeal from a decree made by Coutts-Trotter, J., in the exercise of the Oridinary Original Civil Jurisidction of the same Court.

The appellants are merchants carrying on business in London, and the original respondent (who has died during the pendency of this appeal and is represented by the present respondents) was a merchant carrying on business in Madras.

By a contract in writing made in London and dated 23rd October 1913, the appellants bought from the respondent 20,000 tanned Madras sheep skins of a specified quality to be shipped to the appellants in London. The contract contained the following clause:—"Any difference arising out of this contract, failing amicable adjustment to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller."

Certain skins were shipped to London, and the appellants paid to the respondent £1,495 15*s*. 4*d*. in respect of those skins: When the skins arrived in London, the appellants alleged that they were of inferior quality and refused to accept delivery. They were ultimately sold, with the consent of the respondent, at the price of £1242 15*s*, 0*d*. thus leaving a deficiency of £253 5*s*. 4*d*. which the appellants demanded from the respondent and which the respondent refused to pay. Thereupon the appellants, in pursuance of the arbitration clause contained in the contract and of the English Arbitration Act, appointed Mr. R. H. Pringle as arbitrator on their behalf in the difference which had arisen, and caused the respondent to be served at Madras with a notice dated 3rd February 1916, whereby they informed him of the appointment of Mr. Pringle and required him, within seven days from the service of the notice to name to the appellants or their agents in Madras an arbitrator to act on their behalf in London in the matter of the difference which had arisen, the notice stating that otherwise the difference would stand referred to Mr. Pringle alone as sole arbitrator. The respondent refused to appoint an arbitrator to act on his behalf or to take part in the arbitration; and thereupon Mr. Pringle, at the request of the appellants, proceeded with the arbitration. He gave no opportunity to either party to appear and give evidence before him, but, having read the contract and correspondence and inspected the skins, he made his award in writing dated 11th July 1916, and thereby awarded that the respondent should pay to the appellants the sum of £ 258 5*s*. 9*d*., with interest and costs.

On the 15th July 1916, the appellants brought an action in the King's Bench Division of the High Court of Justice in England, for the amount payable under the award, and, the writ of summons having been served by leave upon the respondent at Madras and no appearance having been entered, the appellants, on 28th November 1916, recovered judgment against the respondent for the sum of £ 286 2*s*. 9*d*., being the amount of the award with some interest and costs.

The appellants then brought the suit out of which this appeal arises against the respondent in the High Court of Judicature

OPPENHEIM *v.* MAHOMED HANEEF.

at Madras, claiming the sum of £286 2*s.* 9*d.*, due under the judgment of the King's Bench Division, or in the alternative £ 263 10*s.* 9*d.*, being the amount of the award and costs, with interest, or as a further alternative £ 253 5*s.* 4*d.*, being the loss on the contract. The respondent pleaded (among other pleas which are not now material) that the judgment of the High Court of Justice in London was not binding upon him, as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, that it was not binding upon him, as no notice was given to him by the arbitrator that he was proceeding to arbitrate.

The suit was heard by Coutts-Trotter, J., who held that, having regard to the decision of this Board in *Keymer* v. *Viswanatham Reddi* (1), the action upon the judgment could not be maintained, as the judgment had been entered in default of appearance and the action had not been tried upon its merits, and that the claim under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to. With regard to the award, the learned Judge in a lucid judgment held that the plea of want of notice could not be raised by defence in the suit. After observing that the grievance of the respondent was more imaginary than real, the award having been made by a commercial man who took the commercial documents with which he was familiar and saw the goods and gave his opinion on the spot, he added that if the objection could have been raised in the proceedings he would have felt constrained to give effect to it. But he referred to *Thorburn* v. *Barnes* (2) as a complete authority for the proposition that according to the English Law any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set aside or remit the award, and if not so taken could not be raised by way of defence to an action on the award.

(1) 38 Ind. Cas. 683; 40 M. 112 (P. C.); 44 I. A. 6; 15 A. L. T. 92; 21 M. L. T. 78; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. L. T. 175.

(2) (1867) 2 C. P. 384; 36 L. J. C. P. 184; 16 L. T. 10; 15 W. R. 623.

He, therefore, held that the defence that the award was tainted with irregularity by the fact that the respondent had not had an opportunity of being present at the arbitration was not open to him in the suit. An application having been made by Counsel for the respondent to treat the written statement as an application to the Court at Madras to set aside the award, the learned Judge held that he had no jurisdiction to entertain such an application, adding "How a Judge in Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the Court which is given jurisdiction by the English Act is the English Court."

He added that even if he had had jurisdictio he would have declined to exercise it.

Against this judgment an appeal was brought and was allowed by the Appellate Division, the learned Judges of that Division holding that the rule in *Thorburn* v. *Barnes* (2) did not apply in India. Thereupon the present appeal was brought.

In their Lordships' opinion Coutts-Trotter, J., came to the right decision and this appeal should succeed. The contract of 23rd October 1913 was made and was to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English Law and procedure. Under that law, by which both parties agreed to be bound any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award and if not so taken cannot be pleaded in answer to an action on the award. In the present case no such motion was made within the time limited by O. LXIV, r. 14, of the Rules of the Supreme Court, England, or at all, and accordingly the award became as fully binding on both parties as if it had been incorporated in the contract. No doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud— could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound.

On this view of the case the Indian Law as to arbitration is irrelevant, and their Lordships accordingly express no opinion on the question whether if the arbitration had taken place in India the defence on the ground of irregularity could have been pleaded. It is plain that the Indian Court could not set aside an English award on that ground.

In order to prevent misconception, it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and accordingly their Lordships do not deal with that point.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of Coutts-Trotter, J., should be restored, the respondents to pay the costs in both Courts in India and the costs of this appeal.

K. S. D. & Z. K. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Morris, Veasey & Co.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 761 OF 1920.
November 7, 1922.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Ross.

RAMCHARAN SINGH—DEFENDANT—APPELLANT
versus
SHEO DUTTA SINGH—PLAINTIFF—RESPONDENT.

Court-Fees Act (VII of 1870), s. 7 (xi) (cc)—"Tenant," meaning of—Suit to eject—Thikadar *after expiry of lease, position of—Court-fee.*

Section 7 (*xi*) (*cc*) of the Court-Fees Act relates to suits for the recovery of immoveable property from a person who has been a tenant but whose tenancy has expired and who is holding over even against the will of his lanlord. [p. 620, col. 2.]

The clause refers to all cases where the landlord seeks to recover the property from a person who has been his tenant and whose tenancy has come to an end or where the landlord by reason of some breach of covenant is entitled to re-enter. [p. 620, col. 2.]

The word "tenant" in section 7 (*xi*) (*cc*) of the Court-Fees Act, includes a person to whom the description would apply immediately before the commencement of an ejectment suit but whose tenancy has terminated entitling the landlord to eject him. [p. 620, col. 2.]

A suit by a landlord to eject a tenant who was a *thikadar* but whose *thikadari* interest has expired and who refuses to quit, whatever the reason may be, comes within clause (*cc*) of paragraph (xi) of section 7 of the Court-Fees Act. [p. 620, col. 2; p. 621, col. 1.]

Second appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 14th June 1920, affirming a decision of the Munsif, Chatra, dated the 20th March 1920.

Mr. *Bankim Chandra De,* for the Appellant.

Mr. *Sheonandan Rai,* for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the defendants from a decision of the Judicial Commissioner of Chota Nagpur, dated the 14th June 1920, affirming a decision of the Munsif of Chatra.

The respondents are the *jagirdars* of Mauza Kedli Khurd. The appellant, Ramcharan Singh was, until just before the date of this suit, the *thikadar* of the *mauza*. The suit was instituted in 1917 to eject the defendant on the expiry of his lease. Several defences were set up by the appellant, the main one being that his interest had not terminated but was a permanent interest created by the predecessors of the plaintiffs. It is not disputed that the plaintiffs, who are the respondents before us, were the owners of the property and it is not disputed that the appellant was the *thikadar*. The only question between them with regard to that part of the case was whether the appellant had a permanent interest or merely a temporary interest which expired, as the respondents say, shortly before the institution of the suit. In addition to the main defence which was decided in favour of the respondents by both the Munsif and the Judicial Commissioner on appeal, whose decision on that point is not now questioned, the appellant raised a question which went to the jurisdiction of the Munsif to try the suit. In filing their plaint the respondents treated the case as one governed by section 7, paragraph (*xi*), clause (*cc*) of the Court-Fees Act, namely, a case for

the recovery of immoveable property from a tenant including a tenant holding over after the determination of the tenancy. The Court-fee payable in such a case is the amount of the rent of the property in suit payable for the year before the presentation of the plaint. Acting upon that they valued the suit at Rs. 300 which was one year's rent and treated it as a suit in which the Munsif had jurisdiction. The appellant questioned that course and said that the case was not governed by paragraph (*xl*) of section 7, but came under one of the earlier paragraphs of the same section, namely, paragraph (*v*), clause (*c*) or (*d*) and that it ought to be either fifteen times the net profits or the market value of the property in suit. Before us to-day it has been contended that the proper valuation for the purposes of jurisdiction ought to be the market-value of the property and that if the market-value is ascertained it will appear that the suit is one which ought to be valued at something over Rs. 1,000, the limit of the jurisdiction of the Munsif, and, therefore, the suit ought not to have been tried by the Munsif and ought to be dismissed as being without jurisdiction.

The first question to determine, and if that is decided in favour of the respondents it puts an end to this appeal, is whether the case is covered by paragraph (*xl*) of section 7 of the Court-Fees Act. That paragraph, in so far as it is material for the purposes of this case, reads as follows:

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

* * * * *

(*xl*) In the following suits between landlord and tenant:—

* * * * *

(*cc*) for the recovery of immoveable property from a tenant, including a tenant holding over after the determination of a tenancy;

according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint."

The appellant's contention is that in the present case he is not, upon the findings of the lower Court, a tenant at all, and that, his tenancy having in fact terminated before the institution of the suit, he is no more than a trespasser and the suit should have been valued for the purposes of jurisdiction as in other cases where a person seeks to recover immoveable property, namely, the market-value of the property. It is quite clear, to my mind, from reading the paragraph to which I have referred, that it relates to suits for the recovery of immoveable property from a person who has been a tenant but whose tenancy has expired and he is holding over even against the will of his landlord because, as pointed out by the learned Judicial Commissioner, it cannot be assumed that the clause only refers to cases where the tenant is holding over with the consent of his landlord. It can hardly be expected that provision would be made for cases of a suit for ejectment where the landlord really is consenting to the tenant remaining on. If he is consenting to the tenant remaining and holding over, then it is hardly likely that he would bring a suit, so that one is driven to the conclusion that this clause at all events relates to some cases in which the tenancy has in fact come to an end and the landlord is entitled to re-enter. Once one arrives at that conclusion, I cannot help thinking that the clause was intended to refer to all cases where the landlord seeks to recover the property from a person who has been his tenant and whose tenancy has come to an end or where the landlord by reason of some breach of covenant is entitled to re-enter. The word 'tenant' as there used seems to be to include a person to whom the description would apply immediately before the commencement of the suit but whose tenancy has terminated entitling the landlord to eject him. If the section applies only to cases where the defendant is still the tenant of the landlord it is difficult to conceive any case to which the section could apply except where the landlord is entitled to re-enter by reason of a breach of covenant or to cases where the landlord must necessarily fail. The majority of cases in which a suit to eject a tenant is brought are cases where the tenancy has terminated and the tenant refuses to quit and I consider that the word 'tenant' as used in the section was intended to cover such cases. In my view the circumstances of the present case, namely, a tenant who was the *ihikadar* and whose

thikadari interest has expired but who refuses to quit, whatever the reason may be, comes within the clause (*cc*) of paragraph (*xi*) of the section, and that section applies where in such circumstances the landlord brings a suit to eject him. For these reasons I think that the decisions both of the Trial Court and of the learned Judicial Commissioner on appeal were right and ought to be affirmed and the appeal dismissed with costs.

Ross, J.—I agree.

M. D. J. & Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 9, 1922.

Present:—Viscount Haldane, Lord Phillimore and Mr. Ameer Ali.

GOPALA CHETTY, SINCE DECEASED, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

VIJAYARAGHAVACHARIAR—PLAINTIFF—RESPONDENT.

Partnership—Dissolution—Settlement of accounts—Subsequent falling in of assets—Method of disposal.

If a partnership has been dissolved and accounts have been wound up and each partner has paid what he has to contribute for the debts of the partnership and received his share of the profits the mutual rights and obligations having been thus all discharged, and then some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or of any other cause, afterwards becomes of value and falls in, it ought to be divided between the parties in proportion to their shares in the original partnership. [p. 624, col. 1.]

If, on the other hand, no accounts have been taken and there is no contract that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken. [p. 624, col. 2.]

Appeal against the judgment and decree of the Madras High Court (Sir John Wallis, C. J., and Napier, J.), dated the 12th November 1918, in Original Side Appeal No. 36 of 1916, affirming the judgment and decree of the High Court in its Ordinary Original Civil Jurisdiction (Kumaraswami Sastri, J.), dated the 27th March 1916, in Original Suit No. 207 1915.

Sir *George Lowndes, K. C.*, and Mr. *A. M. Talbot*, for the Appellants.

Mr. *Parikh*, for the Respondent.

JUDGMENT.

Lord Phillimore.—About the year 1908 a partnership was formed between Narasimhachariar, the respondent Vijayaraghavachariar, the appellant Gopala, now deceased, and the appellant Ethirajulu, who for the purposes of this appeal also represents the first appellant. Narasimhachariar having died in 1911 a suit was filed on 15th November 1913 in the High Court at Madras by his adopted son against the respondent and the two appellants, praying for partnership accounts, and payment to him of his adopted father's share. The plaintiff in this suit was, in some manner not now important to consider, settled with and retired from the suit and by an order of the High Court the respondent was transposed from his position as defendant and became plaintiff, continuing the suit against the other defendants, the present appellants.

The suit came on for hearing before a Judge of the High Court on 26th February 1915, when it was found that the partnership had been dissolved before the death of Narasimhachariar, namely, in April 1910, and that, therefore, the suit was barred by Art. 106 of Schedule I of the Indian Limitation Act, 1908, which provides that a suit for accounts and a share of the profits of a dissolved partnership must be brought within three years of the date of dissolution. The respondent did not appeal. But on 30th April of the same year he launched a second suit against the present appellants, which is now in quesion before their Lordships.

In this suit, after setting out the proceedings in the previous suit and admitting that he had become disentitled to claim a general account and the payment to him of what might be found due and payable on the taking of a general account, he said that the sum of Rs. 18,842 had been received by the appellants in various payments on various dates from debtors to the old firm, and he claimed his quarter share in this total sum. The appellants put in a written statement in which they denied that they had received any assets of the firm, said that if the accounts were to be taken the respondent would be found to be indebted to the firm, pleaded the Indian Limitation Act, and that the suit was barred by *res judicata* and certain other defences. The suit was tried before Kumaraswami Sastri, J., who gave judgment on the 27th March 1916, deciding the bulk of the issues in favour of plaintiff, now respondent, and giving him a declaration that he was entitled to a quarter share of the amount claimed and ordering an account to be taken with a view to showing whether there was any set-off in respect of sums which might be due from the respondent to the appellants. By the schedule to the decree it appeared that approximately Rs. 11,000 of the sum claimed had been received before the institution of the first suit, and the whole of the balance before the decree in the first suit. The learned Judge held that though a general partnership account was barred by the Indian Limitation Act and by the decision in the first suit, there was nevertheless a right in a partner to sue his other partners for his share of the assets of the partnership, for which the period of limitation would be six years and not three; and that, therefore, the second suit had been brought in time. The learned Judge came to this conclusion on the authority of certain cases decided in the High Court of Madras following earlier decisions in the High Court of Bombay.

The present appellants appealed to the High Court in its Appellate Jurisdiction. The appeal came on before Sir John Wallis, C. J., and Napier, J., and was dismissed, the learned Judges saying that they were not prepared to go behind three Madras decisions to the effect, that a cause of action arises from the receipt after dissolution, of partnership assets by a former partner.

They observed that these decisions appeared to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action. Otherwise, as they said, it would be quite impossible to distinguish the decision in *Knox* v. *Gye* (1). It is from this dismissal that the present appeal is brought.

Though in the opinion of the Appellate Judges the case of *Knox* v. *Gye* (1), unless it can be distinguished, would destroy the case of the respondent it so happens that it is upon a reading of certain passages in the speeches of the noble Lords who took part in that judgment that the series of cases in the Bombay and Madras High Courts, upon the authority of which judgment has been given for the respondent, proceed. It is, therefore, important to begin the consideration of the law with a careful analysis of that case.

Gye was lessee of the Covent Garden Theatre and for the purpose of the concern obtained in 1853 a considerable sum of money from one Thistlethwayte on terms of partnership. Thistlethwayte died in 1854 making Knox his executor. Knox in the second bill which he filed (which was the one that came under consideration in the House of Lords) contended that thereafter he and Gye continued the partnership. In 1854 negotiations were entered into with one Hughes for the temporary use of Her Majesty's Theatre, and a sum of £5,000 was paid to Hughes in advance for this purpose. Hughes did not carry out his share of the bargain. Gye sued him for the £5,000 and recovered judgment, but not succeeding in getting the money, he ultimately accepted, in 1862, the sum of £2,500 by way of compromise. In 1856, the Covent Garden Theatre was burnt down and Gye took the Lyceum Theatre. In October 1864, Knox filed the bill against Gye praying for accounts from the date of the original advance by Thistlethwayte for the winding up of the alleged partnership between Gye and Thistlethwayte,

(1) (1871) 5 H. L. 656; 42 L. J. Ch. 231.

that Knox might have his share of the sum advanced by Thistlethwayte, including a share of the money recovered or which ought to have been recovered from Hughes. and a share of the profits of the partnership. The answer set up by Gye in substance pleaded that Thistlethwayte's share was confined to the business of the old Theatre, the whole capital of which was lost by the fire: that Knox was not entitled to any accounts, that his rights ,if any, arose at law and not in equity; and that whichever way they arose, the Statute of Limitation was a good answer.

The Vice-Chancellor, Sir William Page Wood, made a decree in favour of Knox, being of opinion that the Statute of Limitation did not apply either as regards the money received from Hughes, which he treated as an equitable claim enforceable in equity, or as regards the share of Thistlethwayte in the partnership, the Statute being prevented from applying to that part of the claim because of the fiduciary relation between Thistlethwayte and Gye, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit.

On appeal the Lord Chancellor, Lord Chelmsford, reversed this decree. When the case came on for hearing before the House of Lords the House was composed of Sir William Page Wood, now become Lord Hatherley, and Lord Chancellor, Lord Chemsford and Lords Westbury and Colonsay. At the close of the appellant's case the House was of opinion that the partnership never extended to the Lyceum business, and Counsel for the respondent were directed to confine themselves to the argument upon the Statute of Limitation. It was apparently considered that if the Statute of Limitaton was to be applied, the right of Knox accrued in December 1854, upon the death of Thistlethwayte the partnership being dissolved by his death, and that the bill not being filed till 1864 was out of time, and with the possible exception of Lord Hatherley, the noble and learned Lords who composed the House held that the receipt of money from Hughes more than six years after the partnership was dissovled did not take the case out of the operation of the Statute. If, therefore, the Statute was to be applied it constituted a good defence. The matter then remaining for decision was whether this was a case where equity followed the law, and consequently the relief was barred. This was so held, Lord Hatherley dissenting, and the suit was accordingly dismissed.

Now it will be observed that the sum of £2,500 was received within the statutory period, and its receipt was the receipt by Gye of a partnership asset.

The case would seem, therefore, to be in point, and (the suit having been dismissed) adverse to the present respondent. But as the suit was one for a general account and not merely or even by way of addition to recover Knox's share of the sum received from Hughes, and as there are in the speeches of the noble and learned Lords some passages where a case like the present is put by way of hypothesis, the decision in *Knox* v. *Gye* (1) need not be taken for the pruposes of the present judgment as laying down a final determination of the law on this point.

Nevertheless, the observations in that case when carefully considered do not warrant the construction which has been put upon them by some of the Courts in India, but on the contrary warrant the conclusion to which, independently of authority, a little clear thinking leads.

Lord Hatherley, for the purposes of his observations, takes the case of a partnership dissolved by death and an account being taken "that everything which could be ascertained had been then ascertained and adjusted, that the account was complete and that releases were given"—releases which as he says "could only go to the extent of the claim that then existed against the surviving partner." He assumes that in that case an asset for which no allowance has been made falls in and is received by the surviving ex-partner and he holds that in such a case the executor of the deceased ex-partner could claim his share.

Lord Colonsay with a similar train of thought speaks of a sum of money "unexpectedly recovered."

Lord Chelmsford says:

"It was said that upon payment of the debt by Hughes a new right to sue accrued to the appellant. But the right to sue for what? The answer must be for an ac-

count. But that he was entitled to sue for all along, and the account must have included this very debt of Hughes, the receipt of which is supposed to have created a new right to an account."

It is true that there is, later on in his speech, some rather vague language which may have led to his having been supposed to take the view that even when partnership accounts cannot be taken a suit may be brought for a specific item; but the whole tenor of his reasoning shows that he is contemplating the circumstances supposed by Lords Hatherley and Colonsay. Lord Westbury's language is striking—he is not contemplating this particular case, but discussing the effect of the Statute of Limitation. He says:—

"It will be asked whether the bar by Statute can be greater than a release between the parties. In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of an executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the Statute, and will bar all right whatever to claim the benefit of any subsequent receipt by the accounting party."

The rule of law then is the following:

If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he had to contribute to the debts of the partnership and received his share of the profits the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other.

The case will not often occur. If the debt is incurred to the firm and both the ex-partners are alive the debtor can only safely pay upon the receipt of both, for the agency of each for the other has ceased with the dissolution of partnership, and both receiving and being in possession each can insist upon his proper share.

Lord Hatherley points out the most probable occasion when it would arise, namely, when one of the partners is dead and the debt has accrued at law to the surviving partner who thus becomes solely possessed of the former partnership item; and he says that in such a case the executors of the deceased ex-partner would have a right to recover their testator's share from the ex-partner who has received the whole. It is not so certain that this partcular case would arise in India by reason of the provisions of section 45 of the Indian Contract Act, upon which section apparently different decisions have been given in the several High Courts in India. (See Sir F. Pollock's work on the Indian Contract Act, Second Edition, page 235). It is, however, possible to conceive of other cases in which this principle might have to be applied. A partner might contract really for the partnership, but apparently as sole principal and in that capacity be the sole recipient of a partnership item.

At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding-up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership.

If, on the other hand, no acounts have been taken and there is no constact that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of accounts took place was that *A* owed the partnership so much money and that it was anticipated that *B* would hereafter receive a particular item

which would operate substantially to balance the claim.

The principle above set forth being reasonably clear and intelligible, it remains for their Lordships to discuss certain decisions in the Indian Courts.

The first case on this matter was *Dayal Jairaj* v. *Khatav Ladha* (2), decided in the year 1875. The judgment in that case rested upon other and incontrovertible grounds, but there were *obiter dicta* in the course of the judgment which no doubt would help the present respondent. These *obiter dicta* were relied upon by Latham, J., in *Merwanji Hormusji* v. *Rustomji Burjorji* (3), decided in the year 1882. That decision is, no doubt, in point and in favour of the respondent; but it is to be observed that it was largely based upon the *obiter dicta* in the previous case.

The third Bombay case was *Rivett-Carnac* v. *Goculdas Sobhanmull* (4). Candy, J., sitting as a Single Judge in the First Court criticized the previous Bombay decisions but said that he was bound by them. Accordingly, he held that though a claim for a general partnership account was barred by limitation a claim for a share of moneys received by the partnership within the period of limitation was not barred; that the plaintiff was entitled to recover Hemabai's and Gokuldas' shares of the said money, and that the second defendant was entitled to set-off against this his share of certain moneys received by the plaintiff as part of the assets of the said partnership. The High Court in appeal held that the respondent's claim to an account of the partnership dealings was not barred by limitation because, under section 17 of the Limitation Act (XV of 1877), when a person, who, if living, would have a right to sue, has died, the period of limitation is to be computed from the time when there is a legal representative of such person capable of instituting the necessary suit, and gave the plaintiff a decree for the assets which he claimed. The case came on appeal to Her Majesty in Council in 1898, and is reported as *Bhagwandas* v. *Rivett-Carnac* (5). This Board agreed with the decision of the High Court that the claim was not barred by the Limitation Act, but their Lordships thought that the decree given by the High Court was too wide, and directed an account to be taken of the partnership transactions. They made no observations on the particular point now under consideration, and the case may be left out of consideration except to the extent to which it embodies the criticisms of Candy, J.

Their Lordships now turn to the Madras cases. In *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (6), decided on appeal by the High Court in 1904, the decision in *Merwanji Hormusji* v. *Rustomji Burjorji* (3), was followed as an authority and reasons were superadded why, in the opinion of the learned Judges, it was right. One passage may usefully be quoted:

"Even on principle it would seem that this conclusion is the better one, for why should the fact that a suit for a general account is no longer maintainable be used to secure to some of the partners exclusively the benefit of realization of assets made under circumstances which raise no question of limitation with reference to a claim strictly confined to a share of what was thus realized. Of course, to allow such a claim to be maintained without the defendant being at liberty to go into the whole accounts and, if possible, defeat the plaintiff's claim by showing that the net balance is against the plaintiff would be quite unjust. The view we follow avoids such undesirable results while it secures to all the partners their fair and proper shares in assets with reference to which no question of lapse of time is capable of being raised under the law."

With great deference, this reasoning begs the question. How is it to be known that some of the partners would exclusively benefit by the realization of assets which come in after dissolution? To meet this objection the learned Judges assume that accounts may be taken and that they

(2) 12 B. H. C. R. 97.
(3) 6 B. 628; 3 Ind. Dec. (N. S.) 874.
(4) 20 B. 15; 10 Ind. Dec. (N. S.) 568.
(5) 23 B. 544; 26 I. A. 32; 3 C. W. N. 186; 7 Sar. P. C. J. 451; 12 Ind. Dec. (N. S.) 363 (P. C.).
(6) 28 M. 344.

have done enough for the ex-partner who is sued in saying that he may have the accounts taken. But if the policy of the law be that after the period of limitation no accounts shall be taken for the excellent reason that materials for taking such accounts may have disappeared, it is not legitimate to say to the person sued, "Either pay on the footing that accounts have been taken which we know have not been taken and on the footing that all matters have been squared up between you and your partner when we have no knowledge that there has been any such sequaring up, or submit to that taking of accounts against which the Legislature has protected you."

Thiruvengada Mudaliar v. *Sadagopa Mudaliar* (7), also referred to in the judgment of the High Court in the case now under appeal, may be taken to be to the same effect.

On the other hand, the Chief Court of the Punjab has expressed its inability to follow these cases, *Nihal Devi* v. *Kishore Chand* (8).

Their Lordships have no information as to the matter having come before the High Court of Calcutta.

These decisions having been thus analysed appear to rest upon some *obiter dicta* which do not purport to express Indian Law, but are the result of the construction which some learned Judges have put upon the decision of the House of Lords in *Knox* v. *Gye* (1), and inferences drawn from that decision, and except for the reasoning upon which their Lordships have already commented in *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (6), to have no other basis. As their Lordships have already pointed out, the *obiter dicta* in the Bombay High Court are founded upon a misapprehension of what took place in *Knox* v. *Gye* (1).

The present case is a striking illustration of the mischief which might result from following the conclusion at which the learned Judges in the Court of Appeal have arrived. The very items for which the respondent is now suing were actually items which would have come in to the account on his claim against the appellants for a partnership account in the suit in which he failed.

As their Lordships have arrived at this conclusion, it is unnecessary to consider the further point raised on behalf of the appellants that the dismissal of the previous suit constituted the bar of *res judicata*.

Their Lordships will humbly recommend His Majesty that the appeal be allowed and that the suit be dismissed and that the appellants have their costs here and below.

K. S. D. & Z. K. *Appeal allowed.*

Solicitor for the Appellants:—Mr. *Douglas Grant.*

Solicitor for the Respondent:—Mr. *John Joscelyn.*

(7) 7 Ind. Cas. 811; 34 M. 112; (1910) M. W. N. 446; 8 M. L. T. 231; 20 M. L. J. 987.

(8) 8 Ind. Cas. 999; 97 P. R. 1910; 142 P. W. R. 1910, 11 P. L. R. 1911.

PATNA HIGH COURT.

CIVIL REVISION PETITION NO. 337 OF 1922.

April 4, 1923.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

Musammat INDERBANSI KUER—PETITIONER

versus

SATNARAIN SINGH AND OTHERS—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), s. 73, scope of—Execution of decree—Rateable distribution—Some judgment-debtors common to all decrees—Enquiry—Court, duty of.

When execution is sought of several decrees and some of the judgment-debtors are common to all the decrees, rateable distribution among the several decree-holders ought to be allowed of the assets realised from the sale of properties belonging to the judgment-debtors who are common to all the decrees. [p. 629, col. 2.]

Gonesh Das v. *Shiva Lakshmin*, 30 C. 583; 7 C. W. N. 414 (F. B.), *Nilmoni Dey* v. *Hira Lal Das*, 43 Ind. Cas. 452; 27 C. L. J. 100, *Bijoy Kumar Addya* v. *Rama Nath Barman*, 43 Ind. Cas. 715. *Ram Chandra Nath Kalia* v. *Raghunath Saran Singh Deo*, 46 Ind. Cas. 101; 16 A. L. J. 530, relied on.

Balmer Lawrie & Co. v. *Jadu Nath Banerjee*, 27 Ind. Cas. 641; 42 C. 1; 19 C. W. N 1202, *Toola Ram* v. *Abdul Gafur*, 21 Ind Cas. 476; 7 Bur. L. T. 67, distinguished.

The provision contained in section 73 of the Civil Procedure Code intends to give a substantial

IDERBASI KUER v. SATNARAIN SINGH.

relief to the holders of decrees passed against the same judgment-debtor, and, therefore, even if the procedure is summary the consequences thereof are very material to the decree-holders and any enquiry that may be needed to give relief to the decree-holders should not be grudged by a Court. [p. 629, col. 2; p. 630, col. 1.]

Application against an order of the Sub Judge, Arrah, dated the 11th September 1922.

Mr. *P. C. Rai*, for the Petitioner.

Mr. *Mahabir Prasad*, for the Opposite Party.

JUDGMENT.

Jwala Prasad, J.—This is an application against an order of the Subordinate Judge of Shahabad, dated the 11th September 1922, refusing the application of the petitioner for rateable distribution of the assets of the judgment-debtors realised in execution of two other decrees. Those decrees were obtained by the opposite party Nos. 1 and 2, Satnarain Singh and Radna Prasad Singh, in Suits Nos. 84 and 85, respectively, on the 1st and 9th March 1922. Satnarain Singh and Radha Prasad Singh levied execution in respect of the aforesaid decrees in Execution Cases Nos. 68 and 69, and the properties of the judgment-debtors were sold on the 16th September 1922. The assets realised by the sale of the properties were held by the Court. The petitioner had obtained a money decree on the 7th July 1922 in Suit No. 81 of 1922 against the judgment-debtors in the decrees obtained by the opposite party, Satnarain Singh and Radha Prasad Singh, in Suits Nos. 84 and 85 as well as against one Bankeshwar Prasad Sahu. The petitioner put her decree in execution on the 22nd July 1922 and her application for execution was actually registered on the 8th August 1922, and the properties of the judgment-debtors were ordered to be attached on the 9th August 1922. On the 7th September 1922 the petitioner put in separate applications in Execution Cases Nos. 68 and 69 for rateable distribution of the assets that were likely to be realised in execution of the decrees of the opposite party. The Court, by its order of the 11th September 1922, refused the application of the petitioner upon the ground that Bankeshwar Prasad Sahu, a judgment-debtor in the decree of the petitioner, was not a judgment-debtor in the decrees of the opposite party in Suits Nos. 84 and 85. The reason given by the learned Subordinate Judge for his refusal to grant the prayer of the petitioner under section 73 of the Civil Procedure Code is that the judgment-debtors are not the same in the decrees of the petitioner and the opposite party, inasmuch as the number of judgment-debtors in the decree of the petitioner was seven whereas the number of judgment-debtors in the decrees of the opposite party was six. It is undisputed that six of the judgment-debtors are common in all the decrees in question. Bankeshwar Prasad Sahu, who does not appear as a judgment-debtor in the decrees of the opposite party, is son of Ramkishun Prasad Sahu, judgment-debtor in all the decrees. The judgment-debtors who are common in all the decrees as well as Bankeshwar Prasad Sahu who appears only in the decree of the petitioner were jointly and severally liable for the amount decreed against them in the decree of the petitioner. The assets realised were from the properties which belonged only to the judgment-debtors who were common in all the decrees. Therefore, the petitioner is entitled to a rateable distribution of the assets realised by the Court subsequent to the execution having been levied by the petitioner and held by the Court on the 16th September 1922.

The learned Vakil on behalf of the opposite party contends that section 73 of the Code has no application unless all the decrees passed are against all the judgment-debtors. In other words, he contends that all the judgment-debtors in all the decrees in question must be identical. It is, however, conceded that under the corresponding provisions in section 295 of the old Code of Civil Procedure it was not essential that the judgment-debtors must be identical in all the decrees concerned and that a decree-holder is entitled to a rateable distribution of the assets realised from the properties belonging to the judgment-debtors who are common in all the decrees though there may be other judgment-debtors in some of the decrees. Whatever doubts there might have existed were cleared up by the decision of a Full Bench of the Calcutta High Court in the case

IDERBANSI KUER v. SATNARAIN SINGH.

of *Ganesh Das* v. *Shiva Lakshman* (1). The principle of that decision seems to have been adopted by all the Courts in India. But the contention of the learned Vakil is that the addition of the word "passed" in section 73 of the present Code to the words that existed in the corresponding section 295 of the old Code has in fact overruled the decisions of the Courts in India and has restricted the application of the section to cases where the judgment-debtors are identical in all the decrees concerned. Now, a mere perusal of the words in the two sections will make it clear that there was no such intention in the mind of the Legislature. The passage in question in section 295 ran as follows:—

"For execution of decrees for money against the same judgment-debtor."

Section 73 has simply added the word "passed" between the words "money" and "against" in the aforesaid passage. Section 73 says

"for the payment of money passed against the same judgment-debtor."

It appears to me that the change in the section has not in the least altered the sense thereof in the old Code, but has, on the other hand, made it clearer than what it was under the old Code. It has virtually given effect to the decision of the Courts in India in making it explicit that the decrees in execution must have been

"for the payment of money passed against the same judgment-debtor."

My attention has been drawn to certain authorities in support of the contention that the word "passed" introduced in the old provision of the law has restricted the application of the section, but the authorities quoted do not go so far. In the case of *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (2), Mookerjee and Beachcroft, JJ., the decision was based solely upon the ground that the judgment-debtor in both the decrees in question was not the same person, and is no authority for the proposition that the section does not apply and no rateable distribution can be allowed of the assets realised from the judgment-debtors common in all the decrees concerned on the ground that in some of the decrees there are judgment-debtors other than the common judgment-debtors. This is obvious from the following passage in that judgment:—

"It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word 'passed' which did not find a place in section 295 of the Code of 1882. But, as already stated, the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi Mukherjee was a partner, and is not shown to be capable of execution against him individually."

Rateable distribution was disallowed in that case, because, in the view of the learned Judges, Dasarathi Mukherjee was not the same person as Dasarathi Mukherjee & Co. The same appears to be the *ratio decidendi* in the case of *Toola Ram* v. *Abdul Gafur* (3), where the judgment-debtors in the several decrees in question were held not to be the same. The learned Judges, however, were of opinion that, "Where there are several defendants in one decree and only some of them in another, rateable distribution has been allowed so far as the interests of those in both decrees are concerned." This observation is directly against the contention that the word "passed" introduced in the section has restricted the application of it in any way. Now, Mukerjee, J., who delivered the judgment in the case of *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (2), which is relied upon as an authority for the contention of the learned Vakil, later in the case of *Nilmoni Dey* v. *Hira Lal Das* (4), observed that the judgment-debtors in the two decrees need not necessarily be the same persons, provided

(1) 30 C. 583; 7 C. W. N. 414 (F. B.).
(2) 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N. 1202.
(3) 24 Ind. Cas. 476. 7 Bur. L. T. 67.
(4) 43 Ind. Cas. 452; 27 C. L. J. 100.

the decree is against the judgment-debtors in their representative capacity and the estate concerned is the same. He expressly rejected any suggestion to the effect that the section should be narrowly construed. He observes: "We may add that we are not disposed to put a narrow construction upon the terms of section 73, so as to defeat the ends of justice." On the other hand, the view taken under the old Code was followed in the decision passed subsequent to the introduction of the new Code. In the case of *Bijoy Kumar Addya* v. *Rama Nath Barman* (5) their Lordships observed: "Now from the language of section 73 of the Code of Civil Procedure and also from the decision of this Court in the Full Bench case reported as *Gonesh Das* v. *Shiva Lakshman* (1), the authority of which in our opinion has been in no way impaired by the insertion of the word 'passed' in section 73 of the new Code, in so far as the share due from the four judgment-debtors common to the two decrees are concerned, that application was a proper application:" *vide* also *Ram Chandra Naik Kalia* v. *Raghunath Saran Singh Deo* (6). The contention of the learned Vakil, therefore, is concluded by the recent authorities, and there is no room for any contention that section 73 is not applicable to the present case where six of the judgment-debtors are common in all the decrees and only one of them is in excess in the decree of the petitioner. To my mind, the section itself is clear and to interpret it otherwise would work as a great hardship and would defeat the object of the section which entitles the decree-holders to rateable distribution of the assets held by the Courts in execution of any of the decrees. The section is imperative. It does not need any application by the parties for rateable distribution. Only an application for execution of the decree is necessary in order to obtain the benefit of it, and once an application has been made for execution the Court is bound to distribute the assets rateably among the several decree-holders. The word in the section is "shall." The learned Subordinate Judge does not seem to have bestowed any consideration upon the point involved in the case. The authorities referred to by me could be found in any annotated edition of the Code of Civil Procedure and still the learned Subordinate Judge summarily disposed of such an important matter before him in a few lines which I quote hereunder:—

"The above petition in the presence of Pleaders considered. It appears that the name of one judgment-debtor (Bankeshwar Prasad Sahu) is in excess in the copy of the decree, hence no order in Execution Cases No. 68 and 69 of 1922. The number of judgment-debtors must tally with the number of judgment-debtors noted in the decree filed in Execution Cases Nos. 68 and 69/33."

This is the whole judgment of the learned Subordinate Judge.

It is clear from the above order that the learned Subordinate Judge was cognizant of the fact that all the judgment-debtors except one were common in all the decrees before him and, therefore, the decrees were passed against the same judgment-debtors so far as the common judgment-debtors were concerned and this brings the case within the letter of the section, and the assets held by the Court were realized by the sale of the properties of the same judgment-debtors in all the cases and there was, therefore, no difficulty in allowing rateable distribution of the assets among the holders of the several decrees. But, says the learned Vakil on behalf of the opposite party, there may be cases where an elborate enquiry might be needed in order to find out the shares of the common judgment-debtors in the assets and in a summary proceeding such an enquiry could not be intended by the Legislature to be made. The provision in section 73, however, intends to give a substantial relief to the holders of decrees passed against the same judgment-debtor inasmuch as it enables all of them to get the fruit of their decrees when money is realised in the execution of one of the decrees. Therefore, even if the procedure is summary the consequences thereof are very material

(5) 43 Ind. Cas. 715.
(6) 46 Ind. Cas 101; 16 A. L. J. 530.

to the decree-holders and any enquiry that may be needed in order to give relief to the decree-holders should not be grudged by any Court.

We, therefore, set aside the order of the Subordinate Judge and direct that he will, under section 73 of the Code, give relief to the petitioner by awarding his proportionate share in the assets held by the Court.

The application is allowed with costs.

Ross, J.—I agree.

Z. K. *Application allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 58 OF 1920.

June 2, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

CHARU CHANDRA PRAMANIK—DEFENDANT NO. 4—APPELLANT

versus

NAHUSH CHANDRA KUNDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 4, 12, 14, 15, 41—Hindu Wills Act (XXI of 1870), s. 2—Succession Act (X of 1865), s. 187—Suit by administrator to recover possession of debuttar *property transferred by executor in breach of trust created by Will—Adverse possession—Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 134, 142, 144.*

A Hindu died in 1894 after executing a Will in 1889 by which he dedicated his properties to his family idol and appointed his two widows and his adopted son executor of the Will. The executors having neglected for a long time to take out Probate of the Will, the plaintiffs made an application in June 1916 for Letters of Administration with copy of the Will annexed alleging that the persons named in the Will as executors had wasted the estate, contrary to the provisions of the Will, and were consequently not likely to apply for Probate. In July 1917 Letters of Administration with copy of the Will annexed were granted to the plaintiffs, in respect of the *debuttar* properties. In the meantime, the properties had been sold and purchased in September 1905 by the defendants in execution of decrees obtained on the basis of mortgage-bonds executed in 1901 by the son and widows of the testator in which they professed to deal with the properties as the heirs-at-law of the deceased testator without making any reference to the testamentary disposition made by him. In a suit instituted in March 1917 by the plaintiffs as *shebaits* and administrators of the *debuttar* estate of the idol, for recovery of possession of the properties from the defendants:

Held, (1) that when Letters of Administration with copy of the Will annexed were granted to the plaintiffs the Will was established from the date of the death of the testator, and with effect from that very date the disputed properties having become absolutely vested as *debuttar* in the deity, the defendants had not acquired a title which could be supported in derogation of the *debuttar* created by the testator; [p. 633, col. 2; p. 634, col. 1.]

(2) that with reference to section 187 of the Succession Act, read with section 2 of the Hindu Wills Act, the suit was not bound to fail, because no order for Letters of Administration with copy of the Will annexed was in existence at the date of its institution; for, so long as compliance with the section was prior to decree the fact that it was after the institution of the suit made no difference and the Court was fully competent to deal with the suit;

(3) that Arts. 134 and 142 of the Schedule to the Limitation Act were equally inapplicable to the suit which was governed by Art. 144, which again did not bar the suit as the *debuttar* had not been extinguished by adverse possession on the part of the defendants. [p. 638, col. 2.]

The first portion of Art. 134 of the First Schedule to the Limitation Act contemplates a suit to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration. This refers to a case where the transfer by the trustee is accompanied by delivery of possession to the transferee so as to render possible and necessary, the institution of a suit for recovery of possession. The Article cannot be interpreted to include within its scope a case where a simple mortgage is executed and the morgtgagor continues in possession as before. The second portion of the Article is intended to provide only for a case where the defendant's vendor purports to transfer full ownership when in fact he has only a mortgagee's right to transfer; it does not refer to the case of a purpchaser from a mortgagee of the interest of the mortgagee as mortgagee. The Article does not apply to forced sales in execution of decrees. [p. 636, cols. 1 & 2.]

Dispossession within the meaning of Art. 142 of Schedule I to the Limitation Act implies the coming in of a person and his driving out another from possession. Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another. [p. 636, col. 2.]

Persons nominated by a testator to take out Probate of his Will and to carry out a religious trust created by him are persons in whom the estate becomes vested in trust for a specific purpose within the meaning of section 10 of the Limitation Act. They cannot by breach of trust continued for a period of twelve years confer a statutory title on themselves in derogation or extinction of the trust.

CHARU CHANDRA PRAMANIK v. NAHUSH CHANDRA KUNDU.

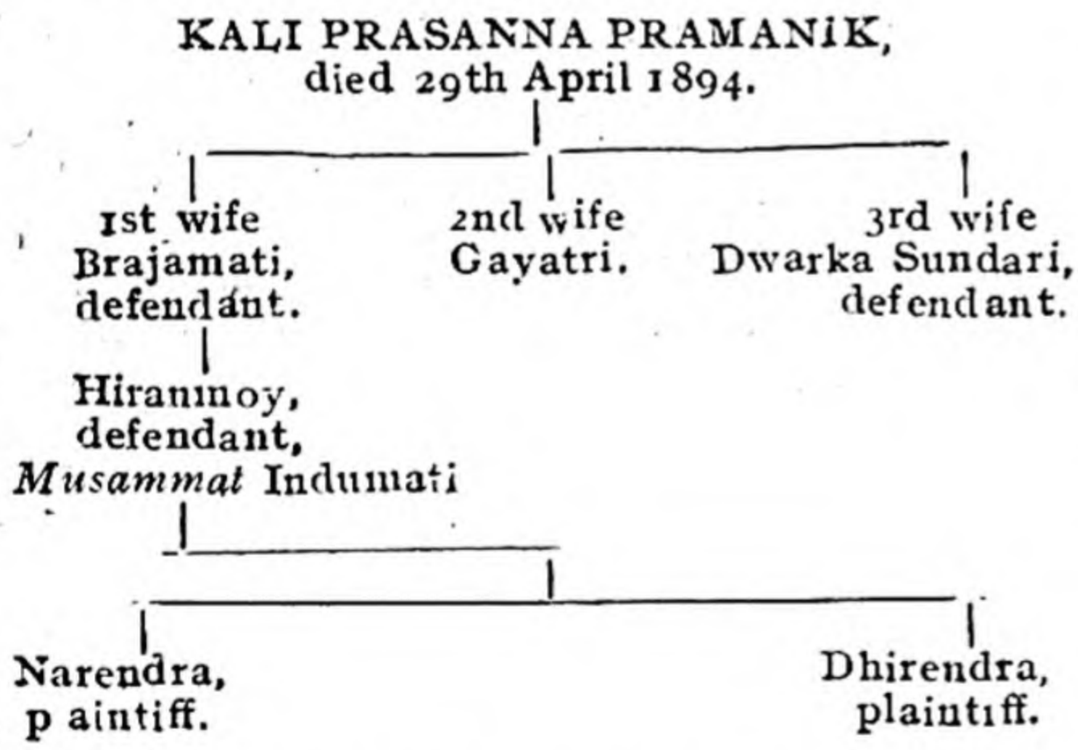
The adverse possession of a *shebait* in relation to the *debuttar* estate is fundamentally different in quality from the hostile holding of a stranger claimant, and it would be unsound on principle to tack together the possession of persons who stand in entirely different categories. [p. 638, col. 1.]

Appeal against a decree of the Subordinate Judge, Nadia, dated the 22nd December 1919.

Babu *Brojo Lal Chakraberty* (with him Babus *Santimoy Majumdar* and *Pramatha Nath Banerjee*), for the Appellant.

Babu *Ram Chandra Majumdar* (with him Babu *Tarakeswar Pal Choudhury*), for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has led up to this appeal is property comprised in a religious endowment created for the benefit of a family idol by the Will of one Kali Prasanna Pramanik. The Will was executed on the 9th March 1889, and was registered on the 7th June 1889. Pramanik died on the 29th April 1894 leaving behind him three widows, Brajamati, Gayatri and Dwarika Sundari and an adopted son, Hiranmoy. The relationship of the members of the family will be gathered from the following pedigree :—



The Will recited that the ancestral deity of the testator, Salgram named Iswar Lakshmi Narayan, had been daily worshipped in his house for a long time, and then proceeded to make the following provisions for its perpetual *sheba*:—

"My ancestral and self-acquired immoveable properties marked (*ka*) and (*kha*) mentioned in the schedule below, shall, after my death, be *debuttar* property of my above-mentioned deity Sri Sri Iswar Lakshmi Narayan Salgram. My heirs or representatives shall not have any claim, demand or right to or on all those properties; neither shall all those properties be sold for the debt of any one (of them) and no one shall be entitled to give away or sell the same and mortgage the same and none shall have any objection. Only from the income of the said properties, the *sheba* and other ceremonies on the festival occasions of the said idol shall be performed for ever, according to the rules introduced by me. If for any reason the said idol disappears, not being found out, then any one of the *shebaits* named below in the Will, in whose time the said untoward event shall take place, shall, on consecrating another Narayan Idol, perform such *sheba*, festivities and other acts. And for the performance of all those acts, I appoint Srimati Brajamati Dasi, my eldest wife, and Srimati Dwarika Sundari Dasi, my youngest wife, and Sriman Hiranmoy Pramanik, my Damusyayan adopted son, these three persons as *shebaits* executrixes and executor. Of these three persons, first my eldest wife Srimati Brajamati Dasi, and on her death my youngest wife Srimati Dwarika Sundari Dasi for her life time, and on their demise, Sriman Hiranmoy Pramanik with sons and grandsons and other heirs in succession, being managers in this manner one after another, shall carry on for ever, the *sheba*, etc., of the said idol, with the income of the said properties. The *shebaits* shall not be entitled to take loans on account of Thakur *sheba* or for any other reasons; even if they do so, the said *debuttar* properties left by me shall not be liable for such debt. Further, among the *shebaits*, if any of them, not dying in the order they have been named dies otherwise, in that case, whoever among those *shebaits* shall be living shall carry on the *sheba* and festival ceremonies of the said Thakur. And after the death of Sriman Hiranmoy Pramanik, his sons, grandsons, and others in succession, being *shebaits* of the said idol, shall perform *sheba* and all other acts. God forbid, if during the life time of my eldest wife or youngest wife or in the lifetime of any one of my wives, Hiranmoy dies without leaving sons or grandsons or a daughter

likely to have a son or daughter's sons, or without taking a son in adoption or without giving permission to his (Hiranmoy's) wife to adopt a son, in that case my eldest wife, and on her demise my youngest wife appointing a *shebait* of the said idol according to her wish, shall be entitled to make him, with sons, grandsons, and other heirs in succession, *shebaits* of the said idol; thereto no sort of objection of any of my heirs and representatives shall be tenable and admissible. God forbid, if the *shebait* of the said Thakur be altogether extinct, contrary to the above-mentioned provisions; in that case, whoever among my neighbours shall be of good lineage, experienced and of good character and shall be living at that time, shall after appropriating Rs. 50 per annum for his personal allowance etc., carry on the *sheba* (service) and festivals of the said idol, with the whole of the remaining amount of the income of the *debuttar* properties mentioned in this Will; and if the *shebaits* or executor or executrixes mentioned in the Will commit any kind of negligence in carrying on the *sheba*, etc., of the said Thakur, any one bringing this matter to the notice of the Courts established by the Sovereign shall be entitled to have all those acts to be performed in their entirety."

No application for Probate of this Will was made till the 27th June 1905 when Indumati, the wife of Hiranmoy, applied for Probate on behaalf of her infant sons, Narendra and Dhirendra. On the 14th March 1906 the District Judge held on the evidence that the Will had been executed as alleged, but he refused Probate on the ground that the original Will was not produced before the Court and the application was not made by the persons named therein as executor and executrixes. On appeal to this Court, this order was confirmed on the 27th February 1908 by Sir Francis Maclean, C. J., and Doss, J. On the 26th June 1916 an application was made for Letters of Administration with copy of the Will annexed by one Nahus Chandra Kundu and the two sons of Hiranmoy, namely, Narendra and Dhirandra. The application recited that the persons named as executor and executrixes had wasted the estate, contrary to the provisions of the Will, and were consequently not likely to apply for Probate. The applicants accordingly sought to establish the Will so that the religious trust might be carried out, and they prayed that Letters of Administration with copy of the Will annexed might be issued to them, limited under section 41 of the Probate and Administration Act, to the *debuttar* properties. On the 30th July 1917 the District Judge granted Letters of Administration with copy of the Will annexed to the first petitioner, Nahus Chandra Kundu, alone, in respect of the *debuttar* properties. On appeal to this Court, the order was confirmed on the 14th December 1917 by Fletcher and, Huda, JJ. Meanwhile, on the 6th March 1917, Nahus Chandra Kundu, Narendra Kumar Pramanik and Dhirandra Kumar Pramanik had instituted the present suit as *shebaits* and administrators to the *debuttar* estate of the deity Lakshmi Narayan Thakur against persons in unlawful possession thereof. It is necessary at this stage to outline the history of the title of these defendants.

On the 24th August 1901 Hiranmoy mortgaged to Bhaba Kali Roy one of the properties dedicated by the testator to the deity Lakshmi Narayan Thakur. The mortgagor professed to deal with the property as the heir-at-law of his deceased father, and no reference was made to the testamentary disposition made by him. On the 18th September 1901 Hiranmoy along with his adoptive mother and step-mother, executed a mortgage of the two endowed properties in favour of Monohar Pal, and satisfied the first mortgage out of the money thus raised. Here, again, the mortgagors purported to act as the heirs-at-law of Kali Prasanna, and no reference was made to his testamentary instrument. The mortgagee instituted a suit in 1904 to enforce his security and appears to have obtained the usual mortgage-decree on the 31st May 1904. The decree was executed, and at the sale which followed, Charu Chandra Pramanik and Digbejoy Pal became the purchasers of the two properties. The sale was confirmed on the 16th September 1905 under section 316 of the Civil Procedure Code of 1882. On the 14th February 1914 Charu Chandra Pramanik is said to have mortgaged the property purchased by him to Ratneswar Sarka

in the name of his wife, Krishna Mohini. The representatives of Monoher Pal (the mortgagee of 1901) of Charu Chandra Pramanik and of Digbejoy Pal (the execution purchasers in 1905) and of Ratneswar Sarkar (the mortgagee from the execution purchaser Charu Chandra Pramanik) have all been joined as defendants. They have resisted the claim substantially on three grounds, namely, first, that the Letters of Administration cannot affect their rights; secondly, that the suit is premature, and, thirdly, that the claim is barred by limitation. The Subordinate Judge has negatived these contentions and has decreed the suit. The points urged on behalf of the defendants in the Court below have been reiterated in this Court in support of the appeal.

As regards the first point, the Subordinate Judge has held that the defendants have not acquired a title operative against the *debuttar* created by the Will. In our opinion, this position cannot be seriously cotroverted. Section 4 of the Probate and Administration Act provides that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Section 12 provides that Probate of a Will, when granted, establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such. Section 14 prescribes that Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his death. Section 15 provides that Letters of Administration do not render valid any intermediate act of the administrator tending to the diminution or damage of the intestate's estate. Section 187 of the Indian Succession Act, which is not reproduced in the Probate and Administration Act, but is made applicable to the Wills of Hindus by section 2 of the Hindu Wills Act, as amended by section 154 of the Probate and Administration Act, ordains that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction in British India shall have granted Probate of the Will under which the right is claimed, or shall have granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed. It is plain that sections 14 and 15 of the Probate and Administration Act refer to cases where Letters of Administration have been granted to the estate of an intestate, where, on the other hand, Letters of Administration have been granted, not upon intestacy but with copy of the Will annexed, the first portion of section 12 is applicable. This follows from the definition of the term "Probate" as contained in the interpretation clause. Section 3 lays down that "Probate" means the copy of a Will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the tetastor. The view we take is supported by the decision of the Judicial Committee in *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1). A similar view was adopted, without reference to the judgment of the Judicial Committee, in *Rallabhandi Venkata Ratnam* v. *Raja Ram Mohana Rao* (2), where the decision of the House of Lords in *Whicker* v. *Hume* (3), was invoked in aid of the proposition that Probate and Letters of Administration with copy of the Will annexed are conclusive evidence of the *factum* and validity of the Will, in the same way as Letters of Administration are conclusive of the intestacy of the deceased. *In re Barrance, Barrance* v. *Ellis* (4) *In re Wernher, Wernher* v. *Beit* (5) *Tourton* v. *Flower* (6). There is thus no escape from the position that when Letters of Administration with copy of the Will annexed were granted on the 30th July 1917 the Will of Pramanik was established from the 29th April 1894

(1) 9 Ind. Cas. 122; 38 I. A. 7; 38 C. 327; 15 C. W. N. 121; 9 M. L. T. 71; (1911) 2 M. W. N. 30; 13 C. L. J. 58; 8 A. L. J. 96; 13 Bom. L. R. 67; 21 M. L. J. 116; 4 Bur. L. T. 65 (P. C.).

(2) 35 Ind. Cas. 854; 31 M. L. J. 277; 4 L. W. 248.

(3) (1858) 7 H. L. C. 124; 115 R. R. 70; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933; 31 L.T. (O. S.) 319; 11 E. R. 50.

(4) (1910) 2 Ch. 419; 79 L. J. Ch. 544; 103 L. T. 104; 54 S. J. 651.

(5) (1918) 1 Ch. 339; 87 L. J. Ch. 255 affirmed on appeal (1918) 2 Ch. 82; 87 L. J. Ch. 372; 118 L. T. 388; 62 S. J. 503; 34 T. L. R. 391.

(6) (1735) 3 P. Wms. 369; 24 E. R. 1102.

when the testator dies, and with effect from that very date, the disputed properties became absolutely vested, as *debuttar*, in the deity, Iswar Lakshmi Narayan. As the Subordinate Judge has pointed out, the dedication was of the strictest character. The *debuttar* was perfect and absolute; in other words, as Sir Arthur Wilson observed in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (7), the dedication was of the completest kind known to the law. The properties were made expressly inalienable and not liable to seizure for the personal debts of the heirs of the testators. The devolution of the *shebaitship* was, at the same time, carefully prescribed. The eldest wife, Braja Sundari, the junior wife, Dwarika Sundari, the adopted son, Hiranmoy, and his lineal descendants, were successivly to act as *shebaits*. In the absence of all of them, the *shebait* was to be a neighbour of good lineage and good character, or a competent person appointed by a Court of Justice. It is thus manifest that, upon the death of the testator, the ownership in the dedicated properties vested in his ancestral deity, and neither his widows nor his adopted son, could, individually or jointly create a valid title by the mortgage executed on the 18th September 1901. In this view, the foundation of the title set up by the defendants completely disappears. Their position is thus weaker than that of the mortgagee in *Hiatu Baksh Jamadar* v. *Debendra Nath Sanyal* (8), he took a security from an heir who afterwards became an administrator and yet found himself in peril. Nor can the present suit be deemed analogous in principle to the well-known class of cases where it has been ruled that the revocation of Letters of Administration, granted on the erroneous assumption that a man has died intestate, does not entitle the executors, who obtain Probate of a Will subsequently discovered, to impeach the title of a purchaser of a portion of the estate from the administrator. A grant of administration so made is now regarded not as void *ab initio* but as voidable only and it follows as a corollary, that when administrator has been clothed in this manner with authority by the Court his dealings with the effects of the deceased should stand good, notwithstanding a subsequent revocation of the grant. But it is worthy of note that even upon this question, the contrary opinion, namely, that the purchaser was not protected; although he might have taken in absolute good faith held the field for two centuries and a half from *Graysbrook* v. *Fox* (9), through *Abram* v. *Cunningham* (10), to *Ellis* v. *Ellis* (11), which were overruled by the Court of Appeal in *Hewson* v. *Shelley* (12), see also *Debendra Nath Dutt* v. *Administrator-General of Bengal* (13), *Craster* v. *Thomas* (14), *Creed* v. *Creed* (15). We may add that the observations of North, J., in *John* v. *John* (16), relied on by the appellant, do not assist his contention, for, in cases of real estate coming within the operation of the Land Transfer Act. 1897, in the absence of and until the constitution of a personal representative of the deceased, the legal estate devolves on the heir-at-law, and upon administration being taken out the grant has the effect of vesting the land in the administrator by relation, so as to enable him to bring actions in respect of that property for matters affecting the same, subsequent to the death of the intestate: In *In the Goods of Pryse* (17). Nor can the appellant successfully invoke the aid of the familiar doctrine that if a trustee having the legal estate in fee simple, conveys trust property to a purchaser for value without notice of the trust, the beneficiary has no right in equity against such purchaser, as the

(7) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 755; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).
(8) 49 Ind. Cas. 532; 29 C. L. J. 58.
(9) (1565) 1 Plowden 275; 75 E. R. 419.
(10) (1677) 2 Lev. 182; 83 E. R. 508.
(11) (1905) 1 Ch. 613; 74 L. J. Ch. 296; 92 L. T. 727; 53 W. R. 617.
(12) (1914) 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 58 S. J. 397; 30 T. L. R. 402.
(13) 35 I. A. 109; 35 C. 955; 10 Bom. L. R. 648; 12 C. W. N. 802; 14 Bur. L. R. 197; 4 M. L. T. 21; 18 M. L. J. 367; 8 C. L. J. 94 (P. C.).
(14) (1909) 2 Ch. 348; 78 L. J. Ch. 734; 101 L. T. 66; 25 T. L. R. 659.
(15) (1913) 1 Ir. R. 48.
(16) (1898) 2 Ch. 573 at p. 576; 67 L. J. Ch. 616; 79 L. T. 362; 47 W. R. 52; 14 T. L. R. 583.
(17) (1904) P. 301; 73 L. J. P. 84; 90 L. T. 747.

right of the beneficiary to the land is lost immediately on such conveyance; *Manikkal Atmaram* v. *Manchershi Dinsha* (18). Here there was plainly no conveyance of trust property by a trustee within the meaning of this rule. In this view, it is not material to discuss in detail whether Monohar Pal, the mortgagee of the 18th September 1901, and the persons who have successively derived title through him, could be regarded as purchasers for value without notice. But we may add that we see no reason whatever to dissent from the conclusion of the Subordinate Judge that these persons were aware of the Will and of the *debuttar* created thereby. We hold accordingly that the appellant has not acquired a title which can be supported in derogation of the *debuttar* created by the testator.

As regards the second point, the appellant has urged that the suit should be dismissed as premature, because the order for Letters of Administration with copy of the Will annexed was not made by the District Judge till the 30th July 1917 and the Letters of Administration were not actually issued till the 25th February 1918, long after the suit had been instituted on the 6th March 1917. Reliance has been placed on O. VII, r. 4 of the Code of Civil Procedure, 1908, which provides that where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps, if any, necessary to enable him to institute a suit concerning it, and reference has been made to the decision in *Balakrishnudu* v. *Narayanasawmy* (19). There has been some divergence of judicial opinion upon this point, as appears from *Manuel Louis Kunha* v. *Jnana Coelho* (20) and *Creed* v. *Creed* (15). But the question must be deemed to have been settled by the decision of the Judicial Committee in *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1). There, at the time the suits were instituted, no Letters of Administration had been granted, but pending the suits the widow obtained from the District Judge a grant of Letters of Administration with the Will annexed. It was contended that the suits could not be maintained with reference to section 187 of the Indian Succession Act, which requires that, before the right of a legatee can be established, Probate of the Will shall have been granted. The Judicial Committee held that, so long as the compliance with the section was prior to decree, the fact that it was after the institution of the suits made no difference, and the Court was fully competent to deal with the suit. The same view was adopted by the Judicial Committee in *Soona Mayna Kena Roona Meyappa Chetty* v. *Soona Navena Suppramanian Chetty* (21). A similar view had been adopted before these decisions of the Judicial Committee in the cases of *Baroda Prosad Banerji* v. *Gajendra Nath Banerji* (22), *Charu Chandra* v. *Sarat Chandra Singh* (23) and *Jamsetji Nassarwanji* v. *Hirjibhai Navroji* (24). Reference may also be made in this connection to *Pattan* v. *Pattan* (25), *Easton* v. *Carter* (26), *Webb* v. *Adkins* (27), *Newton* v. *Metropolitan Ry. Co.*, (28), *Tarn* v. *Commercial Banking Co. of Sydney* (29), *Fell* v. *Lutwidge* (30), *Horner* v. *Horner* (31), *Bateman* v. *Margerison* (32); we hold accordingly that there is no substance in the contention that the present suit must fail, because no order for Letters of Administration with copy of the Will annexed was in existence at the date of its institution.

(18) 1 B. 269; 1 Ind. Dec. (N. S.) 179.
(19) 24 Ind. Cas. 852; 37 M. 175.
(20) 31 M. 187; 18 M. L. J. 158.

(21) 35 Ind. Cas. 323; 43 I. A. 113; 20 C. W. N. 833; (1916) 1 M. W. N. 455; 18 Bom. L. R. 642; (1916) 1 A. C. 603; 85 L. J. P. C. 179; 114 L. T. 1002 (P. C.).
(22) 1 Ind. Cas. 289; 9 C. L. J. 383; 13 C. W. N. 557.
(23) 8 Ind. Cas. 87; 12 C. L. J. 537.
(24) 19 Ind. Cas. 406; 37 B. 158; 15 Bom. L. R. 192.
(25) (1833) 1 Ale. & Nap. 493.
(26) (1850) 5 Ex. 8; 1 L. M. & P. 222; 19 L. J. Ex. 173; 155 E. R. 4.
(27) (1854) 14 C. B. 401; 2 Com. L. R. 202; 23 L. J. C. P. 96; 2 W. R. 225; 22 L. T. (o. s.) 266; 139 E. R. 165; 98 R. R. 674.
(28) (1861) 1 Dr. & Sm. 583; 8 Jur. (N. S.) 738; 5 L. T. (N. S.) 542; 10 W. R. 102; 127 R. R. 223; 62 E. R. 501.
(29) (1884) 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.
(30) (1740) Barn. C. 320; 27 E. R. 662.
(31) (1854) 23 L. J. Ch. 10; 2 W. R. 47.
(32) (1848) 6 Hare 496; 67 E. R. 1260.

CHARU CHANDRA PRAMANIK v. NAHUSH CHANDRA KUNDU.

As regards the third point, the Subordinate Judge has held that the suit is not barred by limitation. It is not disputed that the question of limitation must be answered with reference to one or other of three provisions, namely, Arts. 134, 142, 144 of the Schedule to the Indian Limitation Act. Article 134 provides that a suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration, must be instituted within twelve years from the date of the transfer. The second portion of this Article has plainly no application to this case, as it is intended to provide only for a case where the defendant's vendor purports to transfer full ownership when in fact he has only a mortgagee's right to transfer; it does not refer to the case of a purchaser from a mortgagee of the interest of the mortgagee as mortgagee: *Rego* v. *Abbu Beari* (33), *Chandan Singh* v. *Jhuran Singh* (34), *Kamta Prasad* v. *Bakar Ali* (35), *Ruji Rai* v. *Wali Muhammad* (36). The appellant is consequently restricted to the first portion of the Article which contemplates a suit to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration. This clearly refers to a case where the transfer by the trustee is accompanied by delivery of possession to the transferee so as to render possible and necessary the institution of a suit for recovery of possession, for instance, in cases of sale, usufructuary mortgage, lease and exchange. The Article cannot be interpreted to include within its scope a case like the present, where a simple mortgage was executed and the mortgagor continued in possession as before. We need not consequently discuss whether the mortgage of the 18th September 1901 could be treated, in the circumstances of this case, as a transfer by a trustee within the meaning of Art. 134. It is further plain that the purchase by the appellant, who bought at the execution-sale on the 9th March 1905, can in no sense by treated as a transfer by the trustee under Art. 134; for it is well settled that the Article does not apply to forced sales in execution of decrees: *Ahamed Kutti* v. *Raman Nambudri* (37), *Kalidas Mulick* v. *Kanhaya Lal* (38), *Sheo Nath Singh* v. *Mahipal Singh* (39), *Kannusami Thanjirayan* v. *Muthusami Pillai* (40). It is also worthy of note that if the purchase by the appellant at the execution-sale could be treated as a transfer governed by Art. 134, the suit would not be barred, as the execution-sale took place on the 9th March 1905 and the suit was instituted on the 6th March 1917. There is thus no escape from the conclusion that Art. 134 cannot be applied to the facts of this litigation to ensure the dismissal of the suit as barred by limitation.

It is clear that Art. 142 is equally inapplicable to the events which have happened. That Article provides that a suit for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, must be instituted within 12 years from the date of the dispossession or discontinuance. Dispossession implies the coming in of a person and his driving out another from possession. Discontinuance of possession implies the going out of the person in possession and his being followed into possession by an other. The plaintiffs in the case before us were never in possession and cannot be said by any stretch of language to have been dispossessed or to have discontinued possession, while they were in possession of the disputed property. The original owner was admittedly in possession up to the time of his death. The plaintiffs derive their title from the Will of the testator and seek to recover possession on the allegation that upon establishment of the Will the *debuttar* took effect from the date of his death. Article 142 plainly cannot be made applicable in such circumstances.

(33) 21 M. 151; 7 Ind. Dec. (N. S.) 362.
(34) A. W. N. (1881) 75; 2 Ind. Dec. (N. S.) 505.
(35) A. W. N. (1881) 122; 2 Ind. Dec. (N. S.) 652.
(36) A. W. N. (1881) 169; 2 Ind. Dec. (N. S.) 767.
(37) 25 M. 99; 11 M. L. J. 323 (F. B.).
(38) 11 I. A. 218; 11 C. 121; 8 Ind. Jur 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839 (P. C.).
(39) 2 A. L. J. 234; A. W. N. (1905) 56.
(40) 38 Ind. Cas. 194; (1917) M. W. N. 515; L. W. 250.

The inference thus follows that the suit is governed by Art. 144, which provides that a suit for possession of immoveable property or any interest therein, not otherwise specially provided for in the Schedule, must be instituted within twelve years from the date when the possession of the defendant became adverse to the plaintiff; *Mahammad Amanullah Khan* v. *Badan Singh* (41). The real question for consideration is, when did the possession of the defendant become adverse to the plaintiff-respondent within the meaning of Art. 144, read with section 3, which provides, that the term "plaintiff" includes also any person from or through whom a plaintiff derives his right to sue, and the term "defendant" includes also any person from or through whom a defendant derives his liability to be sued. Now, the fourth defendant became purchaser of the disputed property at the sale in execution of the mortgage-decree on the 9th March 1905. This appears from the bid sheet in the execution case, which was adduced in evidence in the Trial Court. The sale certificate, dated the 19th September 1905 was not produced in this litigation, but was exhibited in the Probate proceeding instituted on the 27th June 1905 which ultimately came up to this Court and was heard by Maclean, C. J., and Doss, J. The sale certificate was then produced by the present appellant as his title-deed, and we have been referred to its terms from the paper-book in the appeal preferred to the High Court on that occasion. The certificate which was granted under section 316 of the Code of Civil Procedure, 1882, recites that the sale was held on the 9th March 1905, and became absolute on the 16th September 1905. Under section 316 of the Code of 1882, which differs in this particular from section 65 of the Code of 1908, title vested in the purchaser, as between parties to the suit, from the date of the certificate and not before, that is, from the 19th September 1905. The purchaser, we may assume, was put in possession by the Execution Court, on a subsequent date under section 318 of the Code of 1882. As this suit was instituted on the 6th March 1917 the possession of the appellant himself could not, on that date, have been adverse to the plaintiff for more than twelve years. The appellant is thus driven to contend that the possession of the mortgagors was adverse to the *debuttar* and should be tacked on to his own possession. We are of opinion that this contention should not prevail.

The possession of the disputed property by the mortgagors of the 18th September 1901 could not in law operate adversely to the *debuttar* in the sense that if such possession had extended over a period of twelve years, the *debuttar* would have been destroyed by virtue of section 28 of the Indian Limitation Act. The testator by his Will dedicated two of his properties to his family deity and at the same time appointed his two wives and his adopted son as *shebaits*, executrixes and executor. It was incumbent on the persons so nominated to take out Probate of the Will and to carry out the religious trust created by the testator. They were clearly persons in whom the estate became vested in trust for a specific purpose within the meaning of section 10 of the Indian Limitation Act. They could not by breach of trust continued for a period of twelve years confer a statutory title on themselves in derogation or extinction of the trust; see the decision of the Judicial Committee in *Srinivasa Moorthy* v. *Venkatavarada Iyengar* (42), *Attorney-General* v. *Munro* (43). *Newsome* v. *Flowers* (44). Time would be no bar to an action against the *shebaits* themselves, in such circumstances, for recovery of the *debuttar* properties from their hands; *Shama Charan Nandi* v. *Abhiram Goswami* (45)

(41) 17 C. 137; 16 I. A. 148; 13 Ind. Jur. 330; 5 Sar. P. C. J. 412; 23 P. R. 1890; 8 Ind. Dec. (N. S.) 629 (P. C.).

(42) 11 Ind. Cas. 447; 34 M. 257; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 10 M. L. T. 266; 38 I. A. 129 (P. C.).

(43) (1848) 2 De G. & Sm. 122 at p. 163; 12 Jur. 210; 64 E. R. 55; 79 R. R. 151.

(44) (1861) 30 Beave 461; 10 W. R. 26; 31 L. J. Ch. 29; 5 L. T. (N. S.) 570; 7 Jur. (N. S.) 1268; 54 E. R. 968; 132 R. R. 363.

(45) 33 C. 511; 3 C. L. J. 306; 10 C. W. N. 738.

reversed upon another point in *Abhiram Goswami* v. *Shyama Charan* (46). Reference may also be made to the decision of the Judicial Committee in *Peary Mohan* v. *Monohar Mukerji* (47), which affirmed the decision in *Manohar Mookerjee* v. *Peary Mohan Mookerjee* (48), and explained the nature of the relationship of the *shebait* to the idol, and his duty to ensure that the estate be safe-guarded and kept in proper custody. The adverse possession of a person so situated in relation to the *debuttar* estate is fundamentally different in quality from the hostile holding of a stranger claimant, and it would obviously be unsound on principle to tack together the possession of persons who stand in entirely different categories. From this stand point, it is not necessary to rely upon the principle enunciated in an attractive form by Abbot, C. J., in *Murray* v. *East India Co.* (49), namely, that there is no cause of action until there is a party capable of suing, so that the Statute of Limitations begins to run from the time of granting the Letters of Administration. A similar view was in essence indicated by Bosanquet, J., in *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (50). It may be difficult to fit this view into the frame work of the provisions of the Indian Limitation Act except in cases which fall within the scope of section 17, indeed, the decision of the Judicial Committee in *Soona Mayna Kena Roona Meyappa Chetty* v. *Soona Navena Suppramanian Chetty* (21) shows that in the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though Probate has not been obtained, though if there be no executor, time will run only from the actual grant of Letters of Administration; see *Knox* v. *Gye* (51) recently explained by the Judicial Committee in *Gopala Chetty* v. *Vijayaraghavachariar* (52). A similar view was adopted also in *Midnapore Zemindari Co. Limited* v. *Appayasami Naicker* (53) which has been recently affirmed by the Judicial Committee on other grounds; *Malayandi Appayasami Naicker* v. *Midnapore Zemindari Co. Limited* (54); see also *Chan Kit San* v. *Ho Fung Hang* (55). There is thus no escape from the conclusion that the suit is not barred under Art. 144, as the *debuttar* has not been extinguished by adverse possession on the part of the defendant, and this view is in harmony with the principles enunciated by the Judicial Committee in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (56). The result is, that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

B. N. & Z. K. *Appeal dismissed.*

(46) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.).

(47) 62 Ind. Cas. 76; 48 I. A. 258; 48 C. 1019; 34 C. L. J. 86; 41 M. L. J. 68; 14 L. W. 104; 23 Bom. L. R. 913; (1921) M. W. N. 554; 19 A. L. J. 773; 2 P. L. T. 725; 26 C. W. N. 133; 30 M. L. T. 24; (1922) A. I. R. (P. C.) 235 (P. C.).

(48) 54 Ind. Cas. 6; 30 C. L. J. 177; 24 C. W. N. 478.

(49) (1821) 5 B. & Ald. 204; 24 R. R. 325; 106 E. R. 1167.

(50) 2 M. I. A. 390; 6 W. R. 3 (P. C.) 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348.

(51) (1871) 5 H. L. 656; 42 L. J. Ch. 234.

(52) 74 Ind. Cas. 621; 30 M. L. T. 283; 45 M. 378; (1922) M. W. N. 386; 16 L. W. 200; 26 C. W. N. 977; 43 M. L. J. 305; 49 I. A. 181; (1922) A. I. R. (P. C.) 115; 24 Bom. L. R. 1197; 20 A. L. J 862; 36 C. L. J. 308 (P. C.).

(53) 47 Ind. Cas. 733; 41 M. 749 at p. 777; 8 L. W. 382; 34 M. L. J. 563; 24 M. L. T. 1.

(54) 60 Ind. Cas. 953; 26 C. W. N. 106; 40 M. L. J. 537; (1921) M. W. N. 352; 34 C. L. J. 6; 44 M. 575; 14 L. W. 49; 29 M. L. T. 383; 3 U. P. L. R. (P. C.) 78; 20 A. L. J. 393; (1922) A. I. R. (P. C.) 154 (P. C.).

(55) (1902) A. C. 257; 71 L. J. P. C. 49; 51 W. R. 18; 86 L. T. 245; 18 T. L. R. 420.

(56) 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629. 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

DIYAL KAUR *v.* MEHTAB KAUR.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 128 OF 1917.
April 1, 1921.

Present:—Mr. Justice Leslie Jones and Mr. Justice Broadway.

Musammat DIYAL KAUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat MEHTAB KAUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom — Widow — Alienation — Succession — Absence of agnate collaterals—Daughters and daughters' sons of collateral in 5th degree—Bandhus—*Prospective heir—Right to control enjoyment by limited owner.*

A widow who holds a life-interest in an estate under custom has the same restrictions on her power of alienation as a widow who holds a similar estate under Hindu Law and the limited nature of her life-interest in the estate can never alter even though there be a complete want of heirs. [p. 640, col. 1.]

Collector of Musulipatam v. *Cavaly Vencatta Narrainapah*, 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 479; 1 Sar. P. C. J. 82; 19 E. R. 631, followed.

In the absence of agnate collaterals the daughters and the daughters' sons of a deceasad collateral in the 5th degree are *Bandhus* and heirs, who, if they survive and succeed, succeed to an absolute estate. [p. 640, col. 1.]

Mangat Ram v. *Devi Chand*, 20 P. R. 1906; 69 P. L. R. 1906; 44 P. W. R. 1906, relied upon.

Where the owner for the time being has only a limited interest in the estate, a prospective heir entitled to succeed to an absolute estate, can restrict the enjoyment of the limited interest within proper limits. [p. 640, col. 1.]

Second appeal from a decree of the Additional Judge, Amritsar District, at Lahore, dated the 20th November 1916, reversing that of the Subordinate Judge, Second Class, at Amritsar, dated the 13th May 1915.

Pandit *Sheo Narain*, R. B., and Mr. *Muhammad Rafi*, for the Appellants.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—This judgment deals with Civil Appeals Nos. 128 and 129 of 1917.

Musammat Mehtab Kaur, widow of Bishen Singh, who had died childless, mutated the land of her deceased husband in the village of Khapar Kheri in favour of Nahr Singh, her brother's son, who, she alleged, had been adopted in accordance with the wishes of Bishen Singh, and she further gifted a *Bunga* in Amritsar City to one Hari Singh.

Two suits have been brought to set aside these alienations of *Musammat* Mehtab Kaur. There are no agnate collaterals in existence and the plaintiffs Nos. 1 and 2 are *Musammat* Dial Kaur and *Musammat* Harnam Kaur, the daughters of Jawand Singh, a deceased collateral in the 5th degree of Bishen Singh; the two sons of *Musammat* Dial Kaur and the three sons of *Mussammat* Harnam Kaur, plaintiffs Nos. 3—7.

The Subordinate Judge decreed the suit, holding that the plaintiffs were both entitled to succeed and had a *locus standi* to sue. On appeal, however, the Additional Judge set aside the decrees of the lower Court on the ground that, assuming the plaintiffs to be heirs, a point on which he arrived at no finding, the female plaintiffs were as females not competent to control the alienation made by *Musammat* Mehtab Kaur and that the male plaintiffs could in this respect be in no better position than their mothers.

A certificate was, however, granted on the question whether the sons of daughters or female collaterals are in any better position to contest alienations by a female relative than their mother. Hence the present appeals.

The relationship of the parties is not in dispute, and though there is no evidence on the question of custom as regards the right of succession, the plaintiffs are certainly *bandhus* and [*vide Mangat Ram* v. *Devi Chand* (1)] heirs in the absence of agnate collaterals. We note in this connection that it was found by the First Court that the common ancestor Karam Singh, who had originally obtained his property in *Mauza* Khapar Kheri by gift, was of a different stock from the general proprietary body and that there is no claim either by that body or by Government on the ground of escheat.

The form of the certificate is such that it precludes discussion of the question whether the female plaintiffs Nos. 1 and 2 could control the alienation of *Musammat* Mehtab Kaur, and the only further point

(1) 20 P. R. 1906; 69 P. L. R. 1906; 44 P. W. R. 1906.

MAKHAN LAL v. NATTHI.

which is to be decided by us is, whether these alienations can be controlled by their sons.

Here, again, there is no evidence regarding the right of control, either oral or in the shape of instances, but there is no ground for supposing that a widow who holds a life-interest in an estate under custom has any wider power of alienation than a widow who holds a similar estate under Hindu Law. Under that law the limited nature of her life-interest in the estate can never alter even though there be a complete want of heirs, *vide Collector of Masulipatam* v. *Cavaly Vencatta Narrainapah* (2), and the restrictions imposed on her power of alienation of her husband's estate are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. In the present case plaintiffs Nos. 3—7 are prospective heirs who, if they survive and succeed, will succeed to an absolute estate, and when, as here, the present owner has only a limited interest in the property it is, we have no doubt, their right to restrict the enjoyment of that interest within the proper limits. In this connection we may refer to the judgment in Civil Appeal No. 2163 of 1916 (unpublished) delivered on the 17th March 1921.

Accordingly, we allow the appeals of plaintiffs Nos. 3—7, holding that these plaintiffs have a *locus standi* to sue. As, however, the Additional Judge has not finally decided any other points arising in the two suits, we remand them under O. XLI, r. 23; for decision according to law. Costs will be costs in the cause.

R. N. & H. N.

Appeals allowed. Cases remanded.

(2) 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 910 OF 1921.

February 20, 1923.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Gokul Prasad.

Lala MAKHAN LAL—PLAINTIFF—APPELLANT

versus

NATTHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Subsequent mortgagee agreeing to pay off prior mortgagee—Priority—Prior mortgagee purchasing equity of redemption, position of.

A prior mortgagee who takes a further mortgage of the property and agrees, out of a portion of the consideration left in his hands, to pay off a mortgage on the property executed between his first and second mortgages and fails to do so, cannot, as against the subsequent mortgagee, claim priority in respect of the sum due to him on his prior mortgage which was incorporated in the consideration for his second mortgage. [p. 641, col. 2.]

Muhammad Sadiq v. *Ghaus Muhammad*, 7 Ind. Cas. 200; 33 A. 101; 7 A. L. J 914, followed.

Where the purchaser of an equity of redemption who is also a prior mortgagee allows his claim on the prior mortgage to become barred by time as against a subsequent mortgagee, he cannot, as against the latter, claim priority in respect of the amount of his prior mortgage. [p. 642, col. 1.]

Second appeal from a decree of the Subodinate Judge, Muttra, dated the 23rd of February 1921.

Mr. *N. P. Asthana*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal has been preferred by the plaintiff in a mortgage suit, disputing the decree of the Court below by which it awarded to the respondent, Ganga, a sum of Rs. 1,330, as payable to him in respect of certain prior mortgages alleged to have been discharged by him. The mortgage in favour of the plaintiff was executed by one Bhure on the 6th of March 1908. In 1896 a mortgage was made by Bhure's father in favour of the defendant, Ganga, for Rs. 125. In 1907 two usufructuary mortgages were executed by Bhure in favour of Jot Ram and Dan Sahai, one for Rs. 100 and the other for Rs. 280. After this the mortgage in favour of the plaintiff was executed. In 1909 Bhure executed another mortgage in favour of Jot Ram and Dan Sahai for Rs. 450. This mortgage included the amount of the mortgage for Rs. 280 executed in 1907 mentioned above. A

further sum was taken by the mortgagor, but out of the additional amount borrowed Rs. 42 was left in the hands of Jot Ram and Dan Sahai, mortgagees, for the discharge of the mortgage in favour of the plaintiff which is the mortgage now in suit. That amout was never paid. In 1910 Ganga brought a suit on the basis of his mortgage of 1896 against the mortgagor Bhure and Jot Ram and Dan Sahai. He did not make the present plaintiff, whose mortgage was subsequent in date to the mortgage on the basis of which the suit was brought, a party to the suit. The suit of Ganga was compromised, and the result of the compromise was that Ganga admitted the mortgages held by Jot Ram and Dan Sahai for Rs. 100 and Rs. 450, to have priority over his mortgage of 1896 and it was provided in the decree that the mortgaged property was to be sold subject to the two mortgages for Rs. 100 and Rs. 450 mentioned above. This decree was never executed but in 1914 the mortgagor executed a sale-deed of the mortgaged property in favour of Ganga for Rs. 1,500. This amount of consideration was composed of Rs. 950 due upon the decree obtained by Ganga in 1910, Rs. 450 the amount of the usufructuary mortgage for Rs. 450 executed in favour of Jot Ram and Dan Sahai, and Rs. 100 due to those persons under the first mortgage of 1907 executed in their favour. Ganga now claims priority over the plaintiff for the amount of the consideration for the sale in his favour on the ground that it represented the mortgages prior to the plaintiff's mortgage discharged by him. The lower Court has disallowed to him the Rs. 450 less Rs. 280 which was included in the aforesaid sum of Rs. 450 and it has held that Ganga has priority in respect of his mortgage of 1896 and in respect of the two mortgages for Rs. 100 and Rs. 280 held by Jot Ram and Dan Sahai. Thus making a total of Rs. 1,330.

Against this decree the present appeal has been preferred, and it is contended that Ganga has no priority over the plaintiff in respect of any of these amounts. Now we may take into consideration each of the mortgages which have been held to be prior to the mortgages in favour of the plaintiff. As regards the mortgage of 1907 for Rs. 100 held by Jot Ram and Dan Sahai, that mortgage is prior in date to the plaintiff's mortgage and it having been discharged by Ganga, Ganga is entitled to priority in respect of that mortgage. As regards the mortgage for Rs. 280 executed in 1907 in favour of Jot Ram and Dan Sahai, Ganga cannot, in our opinion, claim priority inasmuch as the amount of that mortgage was included in the mortgage of 1909 for Rs. 450, which was subsequent in date to the mortgage of the plaintiff. Of course, Jot Ram and Dan Sahai could have claimed priority for Rs. 280 included in the subsequent mortgage if it had been his intention to keep alive his priority in respect of this Rs. 280. But under the mortgage-deed in their favour they undertook to pay off the plaintiff's mortgage, and as they never paid off that money, they could not claim priority over the plaintiff in respect of the Rs. 280 which had been lent by them before the date of the mortgage executed in the plaintiff's favour. This was so held in the case of *Muhammad Sadiq* v. *Ghaus Muhammad* (1). Therefore, Ganga is not entitled to priority in respect of the mortgage for Rs. 280.

Now remains his own mortgage of 1896. As regards that mortgage there are two objections, the first is that under the compromise which took place between him and Jot Ram and Dan Sahai in the suit brought by him, he admitted the mortgage held by Jot Ram and Dan Sahai of the year 1909 to have priority over his own of 1896. If the mortgage of 1909 had priority over the mortgage of 1896; the mortgage of 1908 held by the plaintiff, has certainly priority over Ganga's mortgage; and on this ground Ganga cannot claim priority in respect of his mortgage of 1896. Further-more, at the time when the sale-deed in favour of Ganga was executed the claim of Ganga under his mortgage of 1896 had ceased to be enforceable against the present plaintiff by reason of lapse of time. In the suit brought by Ganga in 1910 he stated in his plaint that his cause of action for the recovery of the money due to him accrued in October 1898. Therefore, in 1914, when

(1) 7 Ind. Cas. 200; 33 A. 101; 7 A. L. J. 914.

the sale-deed in his favour was executed his right to enforce the mortgage as against the present plaintiff had become time-barred, and that mortgage, so far as the plaintiff was concerned, had become extinct. Therefore, a portion of the consideration for the sale in his favour, which represented Rs. 950, was a sum for which no remedy could be claimed as against the plaintiff and for which the plaintiff is in no sense responsible. Therefore, that portion of the consideration could not be enforced as against the plaintiff and Ganga cannot claim priority for that amount. The only sum for which he is entitled to priority is the sum of Rs. 100 to which we have already referred.

The result is, that we allow the appeal and modify the decree of the Court below in so far that out of the Rs. 1,330, declared by the Court below to be payable to Ganga, we declare that he is entitled to Rs. 100 only and that the decree in the plaintiff's favour will be subject to the plaintiff paying off the aforesaid sum of Rs. 100 to Ganga. The parties wil pay and receive costs in all Courts in proportion to failure and success, and the costs in this Court will include fees on the higher scale.

Z. K. *Decree modified.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 338 OF 1919.

June 16, 1922.

Present:—Mr. Justice Jwala Prasad.

NARSINGH THAKUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISHUN PARGASH SINGH AND OTHERS—PLAINTIFFS—AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Estates Partition Act (V (B. C.) of 1897), ss. 7, 25, 29—Partition, private, proof of—Separate shares—Acquiescence — Declaration, suit for, maintainability of.

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors-in-interest were parties to the original partition. [p. 644, col. 1.]

Where parties have held separate shares for a very long time and have acquiesced in the Survey Record of Rights recording separate possession and ownership for a number of years, it is conclusive proof that they have acquiesced in the original partition of the estate among their predecessors-in-interest and that they have been holding their lands in accordance with the original partition. [p. 644, col. 1.]

If parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings are lost in antiquity and no deed of partition is forthcoming, is not a reason for disturbing divisions which have existed for such a long period. [p. 644, col. 1.]

Manoo Chaudhry v. *Munshi Chaudhry*, 43 Ind. Cas. 393; 3 P.L.J. 188; 5 P.L.W. 97, followed.

Sections 25 and 29 of the Bengal Estates Act have no application to a suit for a declaration that there has been a partition between the parties such as is contemplated by section 7 of the Act, and that the Collector has, therefore, no jurisdiction to proceed to make a partition. [p. 644, col. 2.]

Appeal against the decision of the District Judge, Muzaffarpur, dated the 6th March 1919, affirming that of the Munsif, dated the 5th September 1917.

Messrs. *Hassan Imam, G. D. Singh, Kulwant Sahai* and *Sheonandan Roy*, for the Appellants.

Messrs. *S. Sinha, Jalgobind Prasad Singh* and *L. K. Jha*, for the Respondents.

JUDGMENT.—This is an appeal against the decision of the District Judge of Muzaffarpur, dated the 6th March 1919, affirming that of the Munsif, dated the 5th September 1917.

The defendants are the appellants. They are part-proprietors of an estate called *Mauza* Bhadai, bearing *Tauzi* No. 8146, in the Collectorate of Muzaffarpur. They instituted proceedings before the Collector for partition of their interest under the Estates Partition Act (V of 1897). The plaintiffs who are also co-proprietors in the said estate objected to the partition by the Collector under section 7 of the Act, which enacts that where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate land to be held in severality as representing his interest in the estate, no partition of the estate shall be made under this Act, except on the joint application of all the proprietors

or in pursuance of a decree or order of a Civil Court. Their objection was disallowed by the Collector on the 3rd February 1913. The order of the Collector was confirmed by the Commissioner on the 5th June.

The plaintiffs instituted the present suit out of which this appeal has arisen for a declaration that there was already a separate partition among the proprietors of the estate as required by section 7 of the Act and hence the partition by the Collector under Act V of 1897 cannot proceed.

Both the Courts below have upheld the contention of the plaintiffs and have held that on account of private partition, among the proprietors of Bhadai, of their respective inte ests there in, the Collector has no jurisdicton to proceed with the partition under Act V of 1897.

Mr. Hassan Imam on behalf of the appellants contends that the finding of the Court below does not amount to a finding of there being a formal and complete private arrangement between the proprietors, as is required by section 7 of the Act. The Munsif has recorded the following finding upon this point:—"After an anxious consideration and on weighing the evidence as a whole, I cannot but infer that there has been a *bona fide* and thorough partition between the *Maliks* privately and with the consent of all the landlords and that they have been in possession accordingly." However, it is conceded that this is a sufficient finding under section 7 of the Act.

The learned District Judge has affirmed the decision of the Munsif. He has also agreed with the reasons by which the Munsif arrived at the above conclusion. No doubt, he has not used the expressions employed by the Munsif or those that occur in section 7, but there can be no manner of doubt from the tenor of his findings throughout the judgment that the learned Judge meant to hold that there was a complete and formal private partition between the proprietors, as contemplated by section 7 of the Act. He was fully alive to the requirements of that section, which he sets out in the beginning of his judgment for the purpose of determination. He has arrived at the conclusion that these requirements of the section were satisfied by the gradual process of reasoning. He holds that there was a suggestion of private partition as early, as 1847 and, although there was no trace of any partition between 1847 and 1869, yet from 1870 up to date there have been a number of documents which mention the three *pattis* and seem to take them for granted. Upon the litigation in the Civil Court regarding the shares of the different proprietors in the year 1866, the learned Judge concludes that their shares were adjusted and that the co-sharer *Maliks* came to an arrangement and partitioned the village privately. He says that he is confirmed in this belief by a series of transactions dating from 1870 onwards in which the three *pattis* have been recognized, and he holds that, although there was no document about the private partition between the proprietors, yet the arrangement to hold their lands separately was formal. To the argument on behalf of the defendants that the arrangement was only for the purpose of convenience in order to enjoy the *ijmal* property in the most convenient way, the learned Judge has replied that the evidence on the record shows that there was some partition, and not merely a mutual arrangement.

From the rent-suits instituted by the proprietors in respect of the 16-annas rent for the land falling into their respective *pattis* and from the entries in the Survey Record of Rights showing the shares of the proprietors separately, the learned Judge has come to the conclusion that there was a complete private partition among the proprietors. Thus, the learned Judge was ultimately confirmed in his belief and came to a definite conclusion about there being a private partition of the nature contemplated by section 7 of the Act. The finding of the Court below is, therefore, not defective in law. I accept the concurrent findings of the Courts below that there was a formal and complete partition among the co-sharers.

Although there has been no document regarding the partition nor any direct evidence as to when and how the partition between the proprietors took place, yet the evidence standing over a very long period from 1870 up to date clearly shows that the parties have been holding their lands

GOBIN DA v. NANDU.

separately in accordance with their shares in the village. The documents executed by the defendants themselves (Exhibits 5, 8, 7, 9, 11 and 17) clearly use the expression *patti taksim ba khudha* (the *patti* partitioned by mutual arrangement). The entries in the Survey Record of Rights finally published some 20 years ago show by metes and bounds the lands appertaining to the different *pattis* and the proprietors thereof. These entries were based upon the possession of the parties according to the private arrangements amongst themselves and the parties have all along acquiesced in the separate entries recorded in the Survey *Khatian* and are in possession in accordance with these entries. It was pointed out in the case of *Manoo Chaudhry* v. *Munshi Chaudhry* (1), that the parties having acquiesced in the Cadastral Survey for such a length of time is a conclusive proof that they had acquiesced in the original partition of the estate among their predecessors-in-interest and that they have been holding their lands in accordance with the original partition. In circumstances similar to the present case it was observed as follows :—

"As a point of law we take it, that where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors-in-interest were parties to the original partition."

It was further pointed out in that case that if the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is not a reason for disturbing divisions which existed for such a long period. In that case, as in the present case, no deed of partition was produced and indeed from lapse of time no direct evidence of partition could be given. Yet very long possession and acquiescence in the separate holding of the lands in the estate were held sufficient to prove that there was a complete partition between the predecessors-in interest of the present proprietors. I, therefore, on a careful consideration of the evidence in the case hold that the view taken by the Courts below is correct and that the Collector had no jurisdiction to proceed with the partition under Act V of 1897.

It was faintly suggested that the suit having been brought more than four months after the order of the Collector made under section 29 declaring the estate to be under partition was barred by limitation under section 25 of the Act. This section has no application to a suit of this nature. The proceedings adopted by the Collector under Act V of 1897 being *ultra vires*, there can be no bar to the present suit for a declaration that there was such a partition as is contemplated by section 7 of the Act and that the Collector be restricted from taking further action to make the partition.

The result is, that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 43 Ind. Cas. 393; 3 P. L. J. 188; 5 P. L. W. 97.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 136 OF 1921.

February 25, 1922.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Martineau.

GOBINDA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NANDU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Succession—Daughter's son—Alienation by female—Right to challenge—Ghirths of Kangra District—Hindu Law.

Custom does not exclude a daughter's son from inheriting his maternal grandfather's property on the ground of his mother having predeceased her father or grandmother. [p. 645, col. 2.]

The estate of a widow under Customary Law is subject to the same restrictions as that of a widow under Hindu Law. [p. 646, col. 1.]

The restrictions on a widow's power of alienation are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. [p. 645, col. 2.]

Collector of Masulipatam v. *Cavaly Vencata Narrainapah*, 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631, followed.

Under Hindu Law a daughter's son is competent to challenge an alienation made by a

female holding the estate of his maternal grandfather. [p. 646, col. 2.]

Among Girths of Kangra District a daughter's son has a similar right to challenge alienations. [p. 646, col 2.]

Lahori v. *Radho*, 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906, *Kohan* v *Lakhoo*, 7 Ind. Cas. 470; 60 P. R. 1910; 92 P. W. R. 1910; 109 P. L. R. 1910, *Partapi* v. *Hazara Singh*, 31 Ind. Cas. 794; 17 P. W. R. 1916; 33 P. R. 1916, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Scott-Smith, dated the 21st March 1921, passed in Civil Appeal No. 2610 of 1920, published, as 63 Ind. Cas. 852, affirming that of the District Judge, Hoshiarpur, dated the 27th August 1920.

Pandit *Sheo Narain*, R. B., and Lala *Mehr Chand Mahajan*, for the Appellants.

Bakshi *Tek Chand*, for the Respondents.

JUDGMENT.—This is an appeal from a judgment of Mr. Justice Scott-Smith and the question for determination is whether the plaintiffs are entitled to challenge two alienations effected by their maternal grandfather's mother and his daughter (sister of the plaintiff's mother) respectively. The last male owner of the estate was one Ranu, a *Ghirth* of the Kangra District, whose relationship with the plaintiffs and the alienor is shown in the following pedigree table:—

BAHADUR—*Musammat* Gindo, died 28th February 1915.
|
Ranu, died 1905.
|
Musammat Janki-Surjan, died 1913. — *Musammat* Batholi-Nandu, died 31st December 1917.
|
Gobind, plaintiff. — Sadama, plaintiff.

We may clear the ground by stating that neither *Musammat* Gindo nor *Musammat* Batholi, who alienated the property in dispute was absolute owner of that property and that it belonged originally to Ranu and was held by the two ladies on the usual life tenure. It is further clear that on their death, the plaintiffs were entitled to succeed to the estate of their maternal grandfather Ranu. Mr. Tek Chand for the respondents, however, contend that as the plaintiff's mother had died in the lifetime of *Musammat* Gindo, they were not entitled to inherit the property of their maternal grandfather. In support of his contention the learned Advocate invites our attention to the remark in paragraph 23 of Rattigan's Digest of Customary Law which is to the following effect:—

"A daughter's son is not recognised as an heir of his maternal grandfather except in succession to his mother."

Mr. Tek Chand admits that he cannot cite a single case to support his contention, and that the aforesaid remark runs counter to the principle of the Hindu Law on the subject. Whatever the exact meaning of the remark may be, we consider that there is no reason for holding that custom excludes a daughter's son from inheritance on the ground of his mother having predeceased her father or grandmother.

There can be little doubt that the plaintiffs as the daughter's sons of the last male owner are heirs to his estate and the vital question for determination is, whether they are entitled to challenge the alienations made by the two females whose power to alienate the property was undoubtedly restricted. Now, the principle of Hindu Law is firmly established that a female takes only a life-interest in the property inherited by her from a male, and that the nature of her interest does not depend upon the existence or otherwise of persons having a right to succeed to the property after her death. As observed by their Lordships of the Privy Council in *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (1) "the restrictions on a Hindu widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorised alienation by the widow."

(1) 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

It is beyond dispute that under the Hindu Law the plaintiffs would be entitled to impeach the alienations in question. It is, however, contended that they have not succeeded in establishing a custom which would empower them to challenge the transfers, and that the two judgments relating to *Ghirths* of Kangra, namely, *Lahori* v. *Radho* (2) which authorises a widow to contest the validity of an alienation made by the widow of a collateral of her husband, and *Kokan* v. *Lakhoo* (3) which recognises the right of the sister of the last male owner to contest in the absence of his collaterals, an alienation made by his widow, have been rendered obsolete by the Full Bench decision in Civil Appeals Nos. 1013 and 1014 of 1909, *Partapi* v. *Hazara Singh* (4). Now it is true that the majority of the learned Judges constituting the Full Bench declined to enunciate any general rule regarding a female's right to challenge the alienation of an earlier female life incumbent and held that the rights of a female heir must be determined on the evidence of each particular case, but we do not think that they intended to impeach the soundness of any previous judgment on the subject. We fully recognise the proposition that the mere fact that *A* is an heir to *B* does not entitle *A* to control *B's* dealings with the property which *A* may on his death inherit. *A* may on *B's* death succeed to his estate but he may not have a right to challenge an alienation made by *B*. There can be no doubt whatsoever that the right of inheritance does not carry with it a right to contest an alienation.

In this case, however, we are dealing with alienations made by females whose power of disposition over the property was admittedly restricted, and it has been held by a Division Bench in *Diyal Kaur* v. *Mehtab Kaur* (5) that the estate of a widow under Customary Law is subject to the same restrictions as that of a widow under Hindu Law. Further, if the persons contesting the alienations are males whose right to inherit the estate is beyond dispute, there is no custom which prevents them from impugning such alienations. In these circumstances, we do not think that the mere circumstance that there are no instances one way or the other, can be regarded as a valid ground for negativing their claim. All that can be said is, that there is no custom applicable to the peculiar circumstances of this case, and, as held in Civil Appeal No. 2163 of 1916, the plaintiffs can fall back upon their personal law. It is common ground that under Hindu Law a daughter's son is competent to challenge an alienation made by a female holding the estate of his maternal grandfather. To insist upon direct evidence of a special custom in a case of this character would render the right of inheritance of a male practically nugatory.

Before concluding, we may state that we have not referred to the answer to Question No. 52 in Middleton's Customary Law of Kangra District because the learned Advocates on both sides are agreed that the answer as recorded does not appear to be quite consistent and that it does not enable them to deduce any definite rule of custom on the subject. The result of the above discussion is, that we hold that the plaintiffs are entitled to challenge the alienations made by *Musammat* Gindo and *Musammat* Batholi. We accordingly accept the appeal with costs and, setting aside the judgment of the Single Bench, remit the case for determination of the other grounds of appeal.

Z. K. *Appeal allowed.*

(2) 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906.

(3) 7 Ind. Cas. 170; 60 P. R. 1910; 92 P. W R. 1910; 109 P. L. R. 1910.

(4) 31 Ind. Cas. 794; 17 P. W. R. 1916; 33 P. R. 1916.

(5) 74 Ind. Cas. 639; 3 L. L. J. 458.

SHEO NANDAN *v.* BALGOBIND MISRA.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1803 OF 1921.

June 22, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

SHEO NANDAN AND OTHERS—DEFENDNTS — APPELLANTS

versus

BALGOBIND MISRA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 9, scope of —Entry as to fixed-rate tenancy in Revenue papers —Presumption, whether rebuttable.

The presumption about the correctness of the entry made at the time of the last revision of records before the commencement of the Agra Tenancy Act, mentioned in section 9 of the Act, is conclusive only to show that the land was a fixed-rate tenancy at the time the entry was made. There is no presumption that the nature of that land can never in future be altered. The mere fact that the land continues to be recorded as a fixed-rate tenancy cannot necessarily mean that it has ever remained such a tenancy; and evidence can be adduced to show that it has altered its nature subsequent to the date of the entry. Such an alteration may be effected by surrender, ejectment, express agreement with landlord or merger. [p. 648, cols. 1 & 2.]

Per *Sulaiman, J.*—Section 9 of the Agra Tenancy Act in terms is not confined to a dispute between landlord and tenant. It is quite general in its scope and is applicable to all cases where a dispute as to the nature of tenancy arises no matter whether that dispute arises against a landlord or not. [p. 648, col. 2.]

Jainath Pathak v. *Kalka Upadhya*, 13 Ind. Cas. 643; 34 A. 285; 9 A. L. J. 238, referred to.

Per *Lindsay, J.*—The scope of section 9 of the Agra Tenancy Act is strictly limited and the rule laid down in that section can only be applied in litigation arising between a landlord and tenant, when the matter in issue between the landlord and tenant is the nature of a tenancy. [p. 643, col. 8.]

Jainath Pathak v. *Kalka Upadhya*, 13 Ind. Cas. 643; 34 A. 285; 9 A. L. J. 238, relied on.

Second appeal from a decree of the District Judge, Benares, dated the 21st of July 1921.

Mr. *M. A. Aziz*, for the Appellants.

Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for pre-emption. The vendor, Gaya, was a *zemindar* of *patti* Subhao. He executed two sale-deeds in favour of defendants Nos. 2 and 3 and defendant No. 7, respectively. Under the first sale-deed he purported to sell his 2-annas and 8-pies share in the *patti*, and under the second a number of plots specified therein as fixed-rate holdings. The defendants Nos. 2 and 3 are the sons of Sheo Nandan, defendant No. 1, and defendant No. 7 is his wife. The plaintiffs brought this suit to pre-empt both these transfers on the allegation that they together constituted one transaction in favour of the defendants' family. There was also some dispute as to the actual sale consideration. The plaintiffs alleged that they were co-sharers in the same *patti* with the vendor and under the custom prevailing in the *mahal* they were entitled to pre-empt the sale.

On behalf of the defendants the existence of the custom of pre-emption was denied, it was pleaded that the sale considerations were truly entered in the two documents and that these were separate transactions. It was further pleaded that the plaintiffs were precluded under the provisions of section 9 of the Agra Tenancy Act from saying that the plots were not fixed-rate holdings but *zemindari* properties, and that there being no custom for pre-emption with respect to tenancy holdings the claim with respect to these plots was not maintainable.

The Court of first instance decreed the claim holding that there was a custom of pre-emption in the village, that the fixed rate tenancies had become proprietary interests and were liable to pre-emption. On appeal the learned District Judge accepted the findings of the Court of first instance and dismissed the appeal.

As there has been some dispute with regard to the constitution of this *mahal*, I think it desirable to mention the following facts.

In the Settlement of 1881 the plots mentioned in the plaint were recorded as fixed-rate holdings of Subhao's family. In the year 1893 there was a perfect partition of the entire village which was divided into three distinct *mahals*. *Mahal* Bishen Dyal consisted of 5 *pattis*, 3 of which were real (*asli*) *pattis*, the other 2 being *shamilat pattis*. The evidence of the *Patwari*, supported by the entries in the *khewat* and the *khatauni*, which are not contradicted by any other evidence makes it quite clear that all the fixed-rate holdings belonging to Subhao's family were at the partition placed in *patti* Subhao of which Subhao's family was the sole proprie-

SHEO NANDAN v. BALGOBIND MISRA.

tor. The effect of the partition, therefore, was that the fixed-rate tenants ceased to be the tenants of the other co-parceners of the *mahal*, and all their fixed-rate holdings were included in their own *patti*. The legal consequence of such a change obviously was to bring about a merger, a complete absorption of the fixed-rate tenancies into *zemindari* rights. After the partition of 1893, therefore, there can be no doubt that, in the eye of the law, the fixed-rate holdings ceased to exist. The rights and interests of the owners were only those of ordinary proprietors. It is admitted, however, that in the *khatauni* these plots continued to be recorded as fixed rate holdings.

The contention on behalf of the defendant-appellant is that it is not open to the plaintiffs to show by any evidence that these plots are other than fixed-rate holdings. Strong reliance is placed on section 9 of the Agra Tenancy Act and the argument is that, so long as the Revenue papers have not been actually corrected the presumption is absolutely conclusive that these plots are fixed-rate holdings to the present day. Section 9 in terms is not confined to a dispute between landlord and tenant. The words "as against a landlord" are not there at all. The section is quite general in its scope and is applicable to all cases where a dispute as to the nature of the tenancy arises, no matter whether that dispute arises against a landlord or not.

It is conceivable that such a dispute may arise in proceedings to which the landlord is not at all a party. Under section 20 (1) of the Tenancy Act the interest of a permanent tenure-holder or of fixed-rate tenant is heritable according to his personal law. Whereas other tenancies devolve according to the rule laid down in section 22. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is no party. Is it open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary? In my judgment the Legislature intended that this should not be allowed. The presumption under section 9 is conclusive. The only way to displace it is by producing a judicial decision in proceedings instituted before the Act, and in no other way. From this it does not, however, follow that there is a conclusive presumption under the section for all time to come that the true nature of the lands is that of a fixed-rate tenancy. The presumption can only be that the lands were fixed-rate tenancies at the time when the entry was made. There is no presumption that the nature of those lands can never in future be altered.

There are many ways in which fixed-rate tenancies may come to an end, *e. g.*, by surrender, ejectment, express agreement with the landlord, or, as in this case, by merger. I cannot, therefore, see how one can shut out evidence directed to show that a new position has risen since the Settlement. It has been suggested in argument that, so long as the entries in the Revenue papers remain uncorrected, the presumption continues. But how can a correction be ever made after the coming into force of the Act? Whenever the Courts are moved for making the correction, the presumption, according to the appellant's contention, must stand in the way.

The Full Bench, in the case of *Jainath Pathak* v. *Kalka Upadhya* (1), did not mean to lay down anything more than that "the entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy" and not as to the title to it; or, to be more exact, whether the person recorded *was* a permanent tenure-holder or a fixed-rate tenant *or not*.

I must presume conclusively that in 1881 these plots were fixed-rate holdings, but I am of opinion, that there is nothing in section 9 which precludes a Court from going into the question whether the effect of subsequent events has or has not been to alter its nature. As I have already stated, the effect of the partition of 1893, was to bring about a complete merger by which the fixed-rate holdings were destroyed and absorbed into *zemindari* rights. After that the owners became full proprietors. This is the finding of the learned District Judge, which, in my opinion, is fatal to this

(1) 13 Ind. Cas. 643; 34 A. 285; 9 A. L. J. 238.

appeal. The plaintiffs clearly had a right to pre-empt the sale, as the custom of pre-emption exists in the village, and the property sold was a proprietary interest in the *mahal*. I would, therefore, dismiss the appeal.

Lindsay, J.—I agree that this appal should be dismissed, but I wish to add a few words regarding the arguments based upon section 9 of the Tenancy Act. In my opinion that section could not be used in the present case for the purpose of defeating the claim of the plaintiff pre-emptor. It seems to me that the scope of section 9 is strictly limited and that the rule laid down in that section can only be applied in litigation arising between a landlord and tenant when the matter in issue between the landlord and tenant is the nature of a tenancy.

The Tenancy Act only professes to regulate litigation regarding agricultural tenancies and in that view it seems to me we ought to limit the scope of a section such as section 9 and ought not to assume that it was the intention of the Legislature to lay down a rule which should be of universal application so as to govern the legal relations of persons who do not stand *inter se* as landlord and tenant.

The Full Bench case of this Court reported as *Jainath Pathak v. Kalka Upadhya* (1) seems to me to be the clearest possible authority for this view. That ruling, to my mind, lays down that section 9 can only be had recourse to in cases of dispute between a *zemindar* and his tenant as to the nature of the tenancy and the section was framed for the purpose of providing a rule of evidence which should govern the decision of such cases. It is clearly laid down in the ruling in question that the entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. In the present case no question of the nature of tenancy arises between a landlord and his tenant. The plaintiff does not stand in the relation of landlord to the defendant-appellant who is the purchaser of this property. I hold, therefore, that section 9 could not be applied to the facts of the present case in order to show that the plaintiff had no right of pre-emption and that the property was still a fixed-rate tenancy and not the *zemindari* property of the person who sold it.

By the Court.—The order of the Court is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

M. A. A. & N. H. *Appeal dismissed*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NOS. 760 OF 1920, 360, 361, 364, 365, 367, 368, 369, 370, 372, 373, 374 AND 700 OF 1921.

January 30, 1923.

Present :—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

JALDHARI RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD ABDUL KABIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 21—Arbitration, private—Award, partly invalid, whether can be remitted—Award containing provisional, uncertain and contingent condition, validity of—Invalid award, whether can be set up as defence.

Where an arbitration is made without the intervention of a Court and an application is made to file the award, if the award is good in part and bad in part, the Court cannot remit it to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. [p. 652, col. 2.]

Dinabandhu Jana v. Chintamoni Jana, 26 Ind. Cas. 697; 19 C. W. N. 476, *Kunj Lal v. Banwari Lal*, 48 Ind. Cas. 711; 4 P. L. J. 394, relied on.

An award which contains a decision on a point which was not referred to the arbitrator is in excess of jurisdiction and is bad. [p. 652, col. 2.]

An award which cannot be enforced in Court cannot be set up as a defence to a suit. [p. 653, col. 1.]

An award containing a provisional, uncertain and contingent direction is bad. [p. 653, col. 1.]

An award directed that one of the parties shall execute a mortgage if legally necessary:

Held, that the direction being uncertain and contingent, the award was bad. [p. 653, col. 1.]

Appeal from the decision of the Subordinate Judge, Second Court, Gaya, dated the 30th July, setting aside the decision of the Munsif, Third Court, Gaya, dated the 23rd December 1919.

Messrs. *Rai T. N. Sahai* and *D. C. Varma*, for the Appellants.

Mr. *N. C. Sinha*, for Messrs. *Muhammad Ishfaq* and *Muhammad Hasan Jan*, for the Respondents.

JUDGMENT.

Mullick, J.—These 14 second appeals arise out of 14 suits brought by the *Mukarraridars* of the 10-annas odd-pies share of *Mauza* Chehal against their tenants for declaration of title and recovery of possession of certain holdings. It appears that the holdings were held partly on *naqdi* and partly on *bhauli* rent and on various dates in the years 1910, the tenants executed *kabuliyats* in favour of the plaintiffs commuting the *bhauli* rents into *naqdi* rents at rates of Rs. 12 and Rs. 10-8-0 per *bigha*. Shortly after the execution of these *kabuliyats* the plaintiffs obtained rent-decrees against the defendants for the arrears of part of the year 1315, the whole of the years 1316, 1317 and for part of the year 1318 *Fasli*. These decrees were obtained after contest and it seems that, at the time when judgment was given, certain suits were pending in which the tenants impeached the *validity* of the *kabuliyats* and asked, that they should be set aside. In making the decrees in the rent-suits the Court made an express reservation that the queston of the *validity* of *kubuliyats* was not decided; that question was decided about a month later when the declaratory suits were dismissed. The relevant dates of disposal were different for the different tenants but taking as an example the principal tenant Jaldhari Rai, who is concerned with Suit No. 140 of 1919, corresponding to Second Appeal No. 760 of 1920, I find, that the rent-decree in his case was passed on the 18th April 1912, and his declaratory suit was dismissed on the 30th May 1912.

Nothing further appears to have been done by either party in the Civil Court for some time, and the contest was shifted to the Criminal Courts and after various orders had been taken before the Sub-Divisional Magistrate of Nawadah we find that, on the 30th June 1913, a number of tenants, including Jaldhari, made an application to the Collector of Gaya praying that disputes between the landlords and themselves might be settled by the Executive Authority. It is to be noticed that in this application the only prayer was, that the *malik* might be induced to take his decree money in instalments. No other matter in dispute was mentioned to the Collector. The petition was sent by the Collector to the Sub-Divisional Officer of Nawadah and, after considerable difficulty, the parties were prevailed upon to resort to arbitration.

Now, the first petition for a reference to arbitration was one made by the tenants on the 1st October 1915 to the Sub-Divisional Officer of Nawadah. At that time a proceeding under section 107, Criminal Procedure Code, was pending against Abdul Aziz, the son of one of the proprietors, and he had been called upon by the Magistrate to show cause why he should not give security to keep the peace towards his tenants, and, on the 2nd October 1915, the plaintiffs replied with an application before the same Officer and agreed to an arbitration and the appointment of *Rai Sahib* Beni Madhab Prasad. It is clear that these two petitions, taken together, form the foundation and the basis of the arbitrator's jurisdiction.

There are also four other petitions which were made to the arbitrator himself and which amplify the matters in dispute but do not in any sense constitute the original reference to arbitration. They detail, on the one side or the other, the various grievances of the parties and ask the arbitrator to take them into consideration.

It will be as well at this stage to take these six petitions in their chronological order.

Exhibit X.—The tenants' petition, dated the 1st October 1915, recites that a case for executing a fresh *patta* in respect of the lands held on the *naqdi* system in the said *mauza* and for making the dues payable by instalments is pending before Sub-Divisional Magistrate of Nawadah, and that the petitioners have appointed *Rai Sahib* Beni Madhab Prasad as arbitrator "to decide of his own accord regarding the execution of fresh *patta* either *naqdi* or *bhauli* and settle the dues and make them payable by instalments and the *maliks* (*mukarraridars*) and the petitioner (the *raiyats*) will accept the same." It

is to be noted that by this time the landlords had executed their rent-decrees and had brought the holdings of all the defendants in the present suits to sale and taken delivery of possession and, I think, it is clear that this petition refers to the necessity for the execution of a fresh *patta* in order that arrangements might be made between the landlords and the tenants for the resettlements of the holdings upon a new contract. It is also to be noticed that the petition does not in any way state that there was any dispute pending between the parties as to the amount of the arrears decreed by the Civil Court. The only dispute mentioned was, whether payment was to be made in one instalment or was to be distributed over a number of years; and as for the dues to which reference is made, it is clear that these dues refer to the rents accruing between the time of the rent-decrees and the date of the award.

Exhibit B.—The landlords' petition of the 2nd October 1915 is more general in its terms and the following words in the vernacular are sufficient to explain what, in the opinion of the landlords, was the dispute submitted to arbitration. These words are:—

"*Is kisse ko jo badar mian hamlog ke pesh hai kisi panch ke supurd kiya jae. Banabir fidwian raiyan o fidwian Mukararidaran ne Rai Saheb Babu Beni Madho-Prasad Sahib, Hony. Magistrate Nawada ko bakhushi khahish apne apne panch waste infasal ammoorat tesfia talab ko mokurar kia.*"

It refers to the dispute as "*Is kisse*" that is to say, this matter or this story and by implication the reference is to the disputes mentioned by the tenants in their petition of the previous day. The landlords meant that the matters submitted to arbitration were the matter of the execution of a fresh *patta* and the settlement of the question of instalments. No other matter was within the jurisdiction of the arbitrator.

The next petition (Exhibit 16) is one by the tenants to the arbitrator on the 25th October 1915, asking him to settle the following points:—

(1) the execution of the *patta*;
(2) the settlement of dues;
(3) the question of instalments;
(4) the remission of 2 *kathas* in every *bigha* according to the practice of Survey Department;
(5) the question of expenses for Gilandazi.

To this the landlords made two replies; (1) by a petition dated the 27th October 1915 by the landlords of the 5-annas 4-pies share, and (2) by a petition (Exhibit 30) dated the 7th November 1915 by the plaintiffs who are now before us. There was nothing of much interest in the petition of the 5-annas 4-pies landlords; but in Exhibit 30 the plaintiffs asked for a determination on the following points, namely:—

(1) mesne profits;
(2) the houses erected by Jaldhari since the delivery of possession to the landlords;
(3) certain wrong entries in the Settlement Records in favour of a *thikadar* named Karu Rai;
(4) the length of the standard of measurement, and
(5) the rate of rent at which the lands should be re-settled with the *raiyats*.

Now, with regard to the last point, it is quite clear that the landlords asked for an enhanced rate and also contended that unless the tenants who asked for re-settlement paid up the whole amount of the dues, re-settlement should be refused or, at all events, re-settlement should be given only in proportion to the amount paid.

There were two further petitions, one by the tenants, dated the 12th December 1915, and the other Exhibit B1 by the plaintiffs on the same date. In the former, the tenants pleaded that the *kabuliyat* rent was too high and asked that a fair rent be fixed. They also asked for instalments; but in paragraph 4 of the petition there was an altogether new request, namely, that the dues payable should be calculated not from the date on which the tenants became liable but from the date on which terms of a fresh *patta* were fixed by the arbitrator. This is the interpretation which I give to paragraph 4 of the petition and it has at least the merit of explaining the arbitrator's decision to remit the claim for the years preceding 1318. The reply of the landlords (Exhibit B 1) asserted that the *naqdi* rent as fixed by the *kabuliyat* was fair and, in paragraph 5, it was prayed that the arbitrator may, after considering

all the facts and referring to the papers, decide the matter accordingly.

Now, on a perusal of these six petitions, it is quite clear that the arbitrator had no authority to remit any part of the money which the plaintiffs were entitled to claim by the decree of the 18th April 1912. The arbitrator submitted his award on the 29th April 1916. He remitted the claim in respect of 1315, 1316, and 1317 and for 1318 he allowed rent not at the *kabuliyat* rate (which was claimed in the plaint) but at the rate of Rs. 10 for lands assessed in the *kabuliyats* at Rs. 12-8-0 and at Rs. 7-8-0 for lands assessed at Rs. 10. From the year 1319 up to the date of his award he allowed the plaintiffs compensation at the reduced rates fixed by him but for the *naqdi* lands he accepted the rates entered in the plaintiffs' previous *jamabandis*; and with regard to the question of instalments he directed that the defendants should pay down in cash a quarter of the sum and that for the remainder they should execute a *kistbandi* for payments spread over a period of 7 years; and he also directed that the tenants should mortgage their holdings if it "was legally necessary to do so."

Although it is alleged by the defendants that the plaintiffs accepted this award and payments were made by the defendants upon the basis of this award, it has been found as a fact by the lower Appellate Court that these allegations are false; and we must now take it that the award was not accepted by the plaintiffs. It is said that the 5-annas 4 pies *maliks* have accepted the award; but with them we are not concerned. The material point is, that on the 5th April 1919 the plaintiffs filed the suits now before us impeaching the award, and praying that it should be declared null and void; and they also prayed for declaration of their title as auction-purchasers and for recovery of possession against the defendants.

The Munsif tried all the suits together and found that the award was valid.

On appeal by the landlords that decree has been set aside and the Subordinate Judge has decreed the suits and directed the Trial Court to determine the mesne profits.

Now it is a fact that since the year 1315 the tenants have not paid one penny out of the rent due to the landlord and that they have been in occupation of these lands in spite of delivery of possession given to the landlords by the Civil Court; after the rent suits there was a Cadastral Survey and Settlement of the village, and they were recorded as trespassers in occupation. Unless the award is valid they cannot resist ejectment and to me it is quite clear that the learned Subordinate Judge is right in the view that he took of the case.

There can be no doubt that upon the terms of reference as stated in Exhibit X and Exhibit B, which are the only two documents on which his jurisdiction is founded, the arbitrator had no authority whatsoever to remit any portion of the decree-money. The question was never in dispute and the tenants when they asked the Collector and the Sub-Divisional Officer to assist them in the matter of an-arbitration never dreamt of disputing their liability. The rent suits were hotly contested; no reduction was claimed at the trial and it was not till their petition of the 12th December to the arbitrator that the idea came into the heads of the defendants to ask that the dues should be paid not from the date on which they accrued but from the date on which the award was given.

That being so, the award was in excess of jurisdiction and was bad; and the question is, whether the bad part can be separated from the good part and the Court can give modified relief by affirming the good part. I think, it is not possible to do so in the present case. Whatever the law in England may be, it is now settled in India that where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part and bad in part, the Court cannot remit it to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. The High Courts in India are agreed upon this point and it is necessary only to cite *Dinabandhu Jana* v. *Chintamoni Jana* (1) and *Kunj Lal* v. *Banwari Lal* (2). In this last

(1) 26 Ind. Cas. 697; 19 C. W. N. 476.
(2) 48 Ind. Cas. 711; 4 P. L. J. 394.

mentioned case the learned Judges pointed out that it was unfortunate, perhaps, that in this country clause 21 of the 2nd Schedule of the Civil Procedure Code does not give any power to confirm an arbitration in part where it has been made without the intervention of the Court, but that the law was that, even where a portion of the award open to exception can be separated from the rest, the only course open to the Courts was to refuse permission to file the award. If, therefore, in the present case the tenants cannot enforce the award in Court, they ought not, in my opinion, to be allowed to set up the award as a defence in this suit.

The other ground upon which exception must be taken is that the arbitrator has given a direction with regard to the execution of a mortgage bond for the liquidation of the arrears which is wholly uncertain and contingent. He says, that if it is legally necessary, then the tenants will execute a mortgage as security for payment of the instalments. Now, what does this mean? Does it mean that it is contingent on legal opinion obtained by the plaintiffs or legal opinion obtained by the defendants? It may be assumed that the legal advisers of the plaintiffs will declare the necessity of a mortgage and those of the tenants will deny it. Who is to decide the point? The arbitrator has not decided it, and, therefore, the award is provisional and uncertain. There is yet another objection. The plaintiffs are co-sharer landlords and have purchased the holdings of the tenants and are entitled to retain them on payment, to the 5-annas 4-pies landlord, the proportionate share of the rent due to them. If the tenancies are occupancy holdings not capable of transfer without the consent of the landlord, then obviously a mortgage by the tenants in favour of the plaintiffs will not bind the 5-annas 4-pies landlords and will be wholly ineffectual in giving the paintiffs any security unless the latter give their consent to the transfer. There also the award is provisional, uncertain and contingent.

As for the other points argued before us, I think, the arbitrator had authority to reduce the rent as he has done. The *kabuliyat* executed by the tenants was for the period 1318 to 1326 F. S. inclusive and while holding that the rents in that contract were fair, the arbitrator made an appeal for mercy and compelled the landlord to show some generosity; his decision may not have been logical but upon the terms of the submission he was entitled to make the reduction.

The result, however, is that the plaintiffs are not bound by the award and are entitled to recover possession of the suit lands. The plea of payment which was set up by the tenants, though believed by the Munsif, has been disbelieved by the Subordinate Judge and we are bound by that finding of fact in second appeal.

In these circumstances, the learned Subordinate Judge's decree is right and the appeals must be dismissed with costs.

With regard to the question of mesne profits the Subordinate Judge has already decided that the matter is to be determined by the Trial Court and, therefore, the inquiry upon that point will take its course.

Bucknill, J.—I agree.

Z. K. *Appeals dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1656 OF 1921.
March 31, 1922.

Present:—Mr. Justice Abdul Raoof.

Musammat DURGO—DEFENDANT—APPELLANT

versus

PREM SINGH, MINOR, THROUGH HIS FATHER FATEH CHAND *alias* FATEH SINGH—PLAINTIFF—RESPONDENT.

Custom—Alienation—Widow, whether can gift non-ancestral property of husband—Construction of document—Gift or Will.

Under the Customary Law of the Punjab no female in possession of immoveable property inherited from her husband has power ordinarily to make a gift of such property; and no distinction can be made between ancestral property and self-acquired property in this respect. [p. 655, col. 1.]

In construing a document no part of it is, as far as possible, to be left out as redundant. [p. 654, col. 2.]

DURGO *v.* PREM SINGH.

In order to decide whether a document is a deed of gift or a Will it is necessary to find out the intention of the person who executed it. If he intended that the transfer should take effect immediately in his lifetime, the document must be held to be a gift. If, on the other hand, he intended that the provisions of the document should take effect upon his death, the document must be held to be a Will. [p. 654, col. 2.]

The mere use of the word "Will" in a document will not make it a Will if it was really intended that the property should vest in the donee immediately during the lifetime of the donor. [p. 655, col. 1.]

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 15th March 1921, affirming that of the Munsif, First Class, Kangra, dated the 11th August 1920.

Lala *Mehr Chand Mahajan*, for the Appellant.

Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The facts of this case are few and simple. The land in dispute belonged to one Diala, a Kotoch Rajput, of the Kangra District. On his death it came into the possession of his widow *Musammat* Bidia Devi. The *Musammat* is said to have alienated the land in favour of the plaintiff, Prem Singh, by a document dated the 5th August 1919. She died on the 15th August 1919 and on her death the land was mutated in the name of the defendant *Musammat* Durgi, widow of Devi Ditta, a cousin of Diala. Prem Singh sued for possession of this land on the strength of the above document which is marked as Exhibit P-3 on the record. The document is alleged by him to be a Will. The suit was resisted by the defendant, who is in possession, mainly upon two pleas, namely, (*i*) that the document, the basis of the suit, is a deed of gift and being unregistered is inadmissible in evidence, and (*ii*) that *Musammat* Bidia Devi being entitled to a life-estate only as a widow, she had no power to make a permanent alienation by a Will in favour of the plaintiff. The Trial Court found on both these points in favour of the plaintiff. It held the document to be a Will and on the question of the validity of the alienation it held that inasmuch as the land in suit was not ancestral and as *Musammat* Durgi had no power under the custom to contest the alienation the plaintiff acquired a valid title under the Will. It also held that it was proved that *Mussammat* Bidia Devi had the customary power of making a Will in favour of the plaintiff. On all these grounds the Trial Court granted a decree for possession to the plaintiff.

The defendant, *Musammat* Durgi, appealed, but the decree of the Trial Court was upheld by the learned District Judge.

The defendant has preferred this second appeal and two contentions have been raised on her behalf:—(*i*) relating to the nature and character of the document sued upon, and (*ii*) in respect of the power of *Musammat* Bidia Devi to make a Will. The document is, no doubt, styled as a Will, but in order to decide whether it is a deed of gift or a Will it is necessary to find out the intention of *Musammat* Bidia Devi. If she intended that the transfer should take effect immediately in her lifetime the document must be held to be a gift. If, on the other hand, the lady intended that the provisions of the document were to take effect upon the death of the lady it must be held to be a Will. Reading the document as a whole, in my opinion there can be no possible doubt that the lady intended that the property should vest in the donee immediately. In spite of the fact that the transfer is styled as a *wasiat*, I find the following clause which leaves no manner of doubt what the *Musammat* intended :—

"*Aur agar zindgi muzhar reh gai to bhi ainda guzara ki mustahaq hungi.*"

If the document was intended to take effect after the death of the lady there was no necessity for his clause. In my opinion the lady was quite conscious that she had parted with the property in favour of the plaintiff and that was why she made a provision for her maintenance in case of her continuing to live. According to the general rule of construction, no part of a document as far as possible is to be left out as redundant. Both the Courts below have ignored the effect of this clause above mentioned. The learned Judge of the Appellate Court has referred to this clause in his judgment and to the contention put forward on behalf of the plaintiff on the basis of that clause, but he has not tried to meet the argument. All that he has said in his judgment on this point is: "But I consider that the tone and meaning of the document taken as a whole is that it is

in fact a Will and not a deed of gift." This finding entirely ignores the contention based upon the clause. It is not necessary to refer to the various authorities cited before me to support the proposition that the mere use of the word '*wasiat*' cannot make a transaction a Will if it was really intended that the property should vest in the donee immediately during the lifetime of the donor. I am, therefore, clearly of opinion that the document is a gift and as such required registration under clause (*a*) of section 17 of the Registration Act, and that being unregistered was inadmissible in evidence. On this finding alone the suit of the plaintiff must fail.

On the second point Mr. Mehr Chand Mahajan has argued that no female in possession of immoveable property inherited from her husband can permanently alienate such property and that no distinction can be made between an ancestral property and self-acquired property in this respect. In support of this argument he has relied on paragraph 64 of Rattigan's Digest of Customary Law in which the rule is thus stated : " Except as provided in paragraph 39 or paragraph 62, no female in possession of immoveable property acquired from her husband, father, grandfather, son or grandson otherwise than as a free and absolute gift can permanently alienate such property."

In the case of *Dalipa* v. *Dallu* Civil Appeal No. 2163 of 1916 a Division Bench, of which the learned Chief Justice was a member, described that under Hindu Law a widow takes only a limited life-interest in the estate and the nature of her interest can never alter even though there be a complete want of heirs. The learned Judges went on to observe that, "so far as we are aware, it has never been suggested that the life-interest in an estate which custom grants to a widow is in any way wider than the interest which she takes under the Hindu Law."

So far as the parties to the present case are concerned, the *riwaj-i-am* of the Kangra District prepared by Mr. Middleton also supports the proposition. At page 70 of Volume XXVIII is to be found the question and answer on the subject. Question No 45 embracing almost all the questions arising in connection with this matter was put in the following words :—

"Question No. 45. What is the nature of the widow's interest where she succeeds? What rights of alienation has she?

"(i) Under what special circumstances or for what special purposes can she alienate?

"(ii) Is any distinction made in this matter between moveable and immoveable ancestral and acquired property, or in respect of alienations to the kindred of the deceased? Supposing alienations to be permissible, whose consent is necessary to make it valid?"

The custom was thus stated in the answer :

Answer.—The widow succeeds to a limited life-interest in the estate only. There is no restriction on her power to alienate moveable property. She can, however, only alienate ancestral immoveable property or immoveable property acquired by her husband, temporarily and for legal necessity, *i.e.*, for payment of her husband's just debts, or Government Revenue to defray the expenses of her daughter's marriage or family or for any other special and sufficient reason. She has, however, no power to effect a permanent alienation. No distinction is drawn between ancestral property and property acquired by her deceased husband. The widow making an alienation should first offer to do so to the collaterals and only on their refusal should she alienate to a stranger."

In the case of *Gobinda* v. *Nandu* (1), Letters Patent Appeal No. 136 of 1921, the learned Chief Justice, sitting with Mr. Justice Martineau, made the following observation :—

" In this case, however, we are dealing with alienations made by females whose power of disposition over the property was admittedly restricted, and it has been held by a Division Bench in Civil Appeal No. 128 of 1917 [*Diyal Kuar* v. *Mehtab Kaur* (2)] that the estate of a widow under Customary Law is subject to the same restrictions as that of a widow under Hindu Law."

(1) 74 Ind. Cas. 644; (1922) A. I. R. (L.) 217.
(2) 74 Ind. Cas. 639 3 L. L. J. 458.

REKHAB DAS *v.* SHEOBAI.

These are two recent decisions of this High Court which have a direct bearing on the question to be decided in this case. In accordance with the rule laid down in these cases I must hold, that *Musammat* Bidia Devi had no power to make the alienation relied upon by the plaintiff. The plaintiff, therefore, has acquired no title under the document sued upon. On this ground also the suit of the plaintiff must fail. In view of the above findings this appeal must succeed.

I accordingly accept the appeal and, setting aside the judgments and decrees of the Courts below, dismiss the suit of the plaintiff with costs in all Courts.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 223 OF 1920.
March 20, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

REKHAB DAS—DEFENDANT—APPELLANT

versus

Musammat SHEOBAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 108—Presumption as to death, extent of—Date of death, whether can be presumed—Res judicata.

What the Court may presume under section 108 of the Evidence Act is confined to the *factum* of death. It cannot presume that, because a person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause. [p. 657, col. 1.]

Muhammad Sharif v. *Bande Ali*, 11 Ind. Cas. 474; 34 A. 36; 8 A. L. J. 1052 (F. B.), followed.

Section 108 of the Evidence Act enables a Court to shift the burden of proof, that a person who was alive at a given date is still alive, on to the party who asserts it, if he has not been heard of for seven years by people who presumably would have heard of his being still alive; and if the Court is satisfied, in the circumstances of the case, that he is dead, having regard to the definition of "proof" in section 3 of the Evidence Act, it may presume and find as a fact that he is dead. But it does not follow that merely because a person has not been heard of for seven years, where there is no positive or reliable evidence that he is in fact alive, the Court must find that he was dead at the date of suit, much less that he was dead at any given particular date. [p. 659, col. 1.]

A person belonging to a Hindu joint family disappeared. More than seven years after his disappearance, his widow adopted a son. The missing husband's co-parceners sued for a declaration that the adoption was invalid as made during the lifetime of the husband. The widow relied on the presumption raised by section 108 of the Evidence Act. The Court decided that the husband was dead but decreed the suit on the ground that no presumption under the section in question could be raised about the death of the husband before the date of the suit, and consequently before the date of the adoption. The widow made a second adoption after the suit. The co-parceners of the missing husband again disputed the adoption but the widow urged that the question of the death of her husband at the date of the previous suit was *res judicata*:

Held, that the point was not *res judicata* as the only question material for the decision of the previous suit was whether the husband had died before the date of the adoption and as the point about his death at the date of that suit was not "substantially or directly in issue," the finding on that point was not binding. [p. 657, cols. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Aligarh.

Messrs. *Peare Lal Banerji, Lalit Mohan Banerji* and *Shambu Nath Chaube*, for the Appellant.

Mr. *Kailas Nath Katju*, for the Respondents.

JUDGMENT.

Walsh, J.—We have come to the conclusion that this appeal must be allowed and the suit dismissed. The point is a short one, but an interesting one and not so technical and artificial as it appeared at first sight. We are much indebted to Mr. Peare Lal Banerji for his able argument on behalf of the appellant. The point may be stated in a very small compass. There is an undoubted myestry about the fate of one Kedar Nath, who was engaged in commercial pursuits. He was a *Bania* who lived in Calcutta and who, for adequate reasons, namely, that he was accused of embezzelment, disappeared. This happened in December 1907, that is to say, just a little more than 13 years before this suit. He was only 23. He had no children. He had a young wife, and although feeble efforts have been made to prove his subsequent existence, nothing definite is known about it. If one had merely, on questions of fact, to draw inferences permitted by section 114 of the Evidence Act, many considerations would have to be taken into account, including what has been pressed upon us on behalf of the

respondent, that in the case of one who was not shown to have left the country, it is almost certain by now that he is dead. On the other hand, one can not leave out of account the fact that, for many years, he had paramount reasons for remaining concealed, that a childless wife is not much esteemed in this country, and that the War which followed seven years afterwards has altered, one may say, the comparative values of inferences as to the whereabouts of persons whose addresses are unknown. Many Indians have joined, or followed the troops, and have remained abroad. The Post is far from perfect, as yet. The widow, alleging permission from her husabnd, a fact which has been rejected by the Court below, went through the form of adopting a son in 1916 and the present defendant-appellant being then plaintiff, brought a suit seeking a declaration that the adoption was void. The respondent to this appeal setting up the adoption naturally relied on the presumption, or shifting of the onus, defined by section 108 of the Evidence Act. Now, if there is one thing more certain than another it is that it is clearly established in India, as in England, particularly expressed in a Full Bench decision reported as *Muhammad Sharif* v. *Bande Ali* (1), that what the Court may presume under section 108 is confined to the factum of death. It cannot presume that, because the person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause and, that being so, the defence in the former suit was bound to fail because the presumption being the sole thing which was relied on, the Court was prohibited by law from finding that Kedar Nath had died before 1915, the date of adoption. It might express an opinion as strongly as it pleased that he was dead at the date of the suit but, in my judgment, that would be a mere dictum, and even although it framed an issue, and went to the length of holding that he was dead at the date of suit, it would not be an issue as defined by section 11 of the Civil Procedure Code, "substantially or directly in issue" between the parties to that suit. It would be irrelevant, because he might be presumed dead at the date of the suit, and yet not dead at the date of the adoption which was the only material question to be decided. Encouraged by the observations of the learned Subordinate Judge, who dealt with the former suit, the widow made a second attempt to adopt, namely, on the 18th June 1919, and having in her favour, or her advisers thinking that they had in their favour, an expression of opinion that the man was dead in 1918 and that, therefore, he must be still dead in 1919, this suit was brought for partition, based upon the adoption which itself was based upon the alleged decease before June 1919. The learned Judge in disposing of this second suit, in a very clear judgment, without disposing of the question of fact, has held himself compelled to adopt the theory on which the suit was based, namely, that the issue of death was *res judicata*, that death in the year 1918 had been established in the previous suit, and that, therefore, he was compelled by law to hold that it was proved to have occurred before June 1919. In this respect we find ourselves unable to agree with him as a matter of law. There is no doubt as to his view. He says: "When once *inter partes* he was presumed to be dead when the question next arises, he will be presumed to have died, when it was decided *inter parties* that he is presumed to be dead." The fallacy in that statement is that there was no decision in favour of the presumption of his death *inter partes*. There was merely an expression of opinion. The question whether he could be presumed to be dead *inter partes* in that suit was not one which was "substantially or directly in issue within the meaning of section 11 of the Code." We, therefore, think that the decision on the question of *res judicata* was wrong. We feel less hesitation in dismissing the suit, which after all we are bound to do if that is our view, inasmuch as, at any rate in my opinion, this suit is premature, and really an abuse of the Court. The respondent's Counsel pressed us on the question a fact, namely, that the death was proved. But when one listened to him one realised that he was unable to pursue the argument on the question of

(1) 11 Ind. Cas. 474; 34 A. 36; 8 A. L. J. 1052 (F. B.).

fact, without continually grasping the weapon, if I may so describe the presumption which he professed as frequently to have thrown away. That is to say, while at one breath he disclaimed any desire to use the presumption, it found a frequent place in his argument, and necessarily so, because the actual evidence of this man's death is nil, and the surrounding circumstances can only be treated as giving rise to a legitimate inference of fact, greater or less according to the particular opinion of the individual who is asked to draw the inference. I feel it desirable to express my view about two aspects of this part of the respondent's argument. In the first place, I have no faith in a case which I am satisfied has been run, if I may use the expression, by some legal gentleman propounding a theory. One question is whether this woman either herself thinks, or is entitled to ask a Court to think, that her husband was dead in 1919 and her absence from the box and her failure to produce any evidence before the Court tending to show that she has latterly regarded herself, and been regarded by her friends and relations as a widow, is certainly not encouraging to any one who is asked to draw an inference which might be destroyed in one blow by the re-appearence of this comparatively young man. If she is not prepared to state her reasons for her own belief, it is rather a strong thing to ask the Tribunal to do what she appears to shrink from. Secondly, and I am very much impressed by this view of the case, if we were to hold otherwise, it seems to me that it would always be possible, in the unusual circumstances which have arisen in this case, for a plaintiff, desirous of benefiting by a presumption of death, to bring a suit, which he or she knows is bound to fail, asking the Court to find death at a particular date of the suit, which is admittedly immaterial, and having got a dictum in favour of an immaterial issue in a suit which ought never to have been brought at all, to bring another suit, and to try and force the Court to the length of following the presumption which it has already made by an irrelevant dictum in an improper suit. That would amount to an abuse of the process of the Court. Three further observations arise which seem relevant. Even if we followed the suggestion of the respondent's Counsel, and starting to examine the evidence *de novo* endeavoured to arrive at a decision on the issue of fact, we could then do no more than act on the presumption that Kedar Nath was dead at the date of this suit. The Full Bench decision prohibits us from finding that he was dead before that date. It seems to me, therefore, that a decision would not benefit the plaintiff. I do not think furthermore, that in the first suit the Judge, who is the same Judge who decided the suit and who is particularly clear in the expressions of his reasons, ever intended to say what it is alleged that he did say, namely, that he was satisfied that the man was dead at the date of suit. The sentence relied upon is merely his way, in my opinion, of interpreting section 108 in the English tongue. It should be observed, furthermore, that in the appeal from this judgment in the first suit to the District Judge, the question of the correctness or otherwise of the dictum, and its legal effect upon the position, of the parties disappeared altogether, and it ceased to possess any claim to amount to a decision *inter partes*. The Subordinate Judge in his judgment in the first suit said :—"Under section 108 of the Evidence Act the only presumption will be that Kedar Nath is now dead." This seems merely his way of interpreting the presumption which may legitimately be drawn under section 108, *viz.*, that he was dead at the date of the suit and not at any earlier date. Finally I am satisfied that no injustice can be done to the plaintiff by the dismissal of this premature suit. There are methods known to the law by which she can establish the issue of fact in her favour if the strength of her case permits. I think this suit is an indirect attempt to get a decision in favour of the adoption about which her advisers had some qualms. The appeal, therefore, must be allowed and the suit dismissed in all Courts with costs. The money deposited by the appellant by way of security will be re-paid.

This order is without prejudice to any previous order which we have made providing the conditions imposed upon the re-admission of this appeal, the defendant having been guilty of every possible neglect

before he eventually was enabled to bring the matter before this Court.

As an addendum to the foregoing judgment we are asked to state that there is a second point which the appellant, if he had failed upon the point which we have just decided in his favour, desired to raise, namely, that the widow, having no permission from her husband, could not adopt after the estate vested in the surviving member of the joint family. As all the facts are ascertained on that question and in the event of this case going further and the decision of that question becoming necessary, all the material for its decision is available upon the record. We think we should be serving no public interest by hearing arguments upon it, being of opinion that the suit ought to be dismissed in any case. We are told that the point is a troublesome one.

Ryves, J.– I agree in the order proposed and generally in the reasons stated by my learned brother.

It seems to me that section 108 of the Evidence Act enables a Court to shift the burden of proof, that a person who was alive at a given date, on to the party who asserts that he is still alive, if he has not been heard of by people who presumably would have heard of his being still alive after seven years, and if satisfied in the circumstances of the case, that he is dead, having regard to the definition of "proof" in section 3 of the Evidence Act, it may presume and find as a fact that he is dead. But it does not follow that merely because a person has not been heard of for seven years, where there is no positive or reliable evidence that he is in fact alive, the Court must find that he was dead at the date of suit, much less that he was dead at any given particular date. This, I think, is the fallacy underlying the judgment of the Court below. I doubt if even now the wife brought a suit for a declaration that her husband was now dead, whether the Court, on the evidence on the record as it stands, (particularly in the absence of any evidence given by the wife) would be justified in holding that the husband was in fact dead. In a case where a man has no ostensible or probable reason to disappear, it might be otherwise. Take a case where a man goes on a voyage in a ship which is never heard of again, or where, as happened in a case within my knowledge in this Court, a man started in a country-boat on ordinary business to cross the Ganges then swollen and turbulent in flood miles wide, in the rains, and neither he nor the boat was ever heard of again. After seven years of absence, on proper evidence, a Court might well act on section 108 and hold the man was dead when the suit was brought. On the other hand, there was another case in this Court where, in my own experience as Government Advocate, a man wanted for murder, was unheard of for over 15 years, and thereafter by accident was discovered and arrested in Rangoon, where he had been living all along and prospering. Each case must be decided on its facts, having regard to the probabilities of human life and conduct.

What are the facts here? The husband, aged 23, was in business in a *Bania's* firm in Calcutta. He embezzelled his master's money, and to avoid prosecution deliberately absconded, presumably with the money in his pocket. So far as the evidence goes, he has not been heard of since, but is it reasonably probable, from the point of view of the "prudent man," to believe that he is in fact dead? He had every reason to remain "*perdu*"; there is no limitation against criminal prosecution in India. True, he left behind a young wife. We have no evidence as to whether his relations with his wife were happy or otherwise. People of this caste are married young without previous acquaintance usually. We do know that she was childless, and as she must have been married to him for some years, having regard to the habits of the country, and had no child, he may well have despaired of getting a son. For all we know, he may now be prospering with a new family in Kenya or East Africa, or Burma, or any of the other places outside India, where it is common knowledge that Indian *Banias* and pedlars have settled. There is the additional fact that the wife was apparently not left in indigent circumstances, so that there was no stringent obligation on the husband to provide for her support. The learned Judge below has not come to a decision on the merits. As pointed out by my learned brother, he has held that

by reason of his previous judgment (which, however, did not decide that the husband was dead then) he was barred by the rule of "*res judicata*" from holding otherwise now. I feel some doubt whether we should not have remanded the case back, but, on the whole, I agree with the order proposed.

Z. K. & N. H. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 12, 1921.

Present :—Lord Atkinson, Lord Phillimore and Sir John Edge, KT.

SACHINDRA NATH ROY AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MAHARAJ BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (X V of 1877), Sch. I I, A t. 179 —Appeal dismissed in default—Execution of decree —Limitation, operation of—Decree nisi in mortgage suit—Limitation—Construction of document—Mortgage, equitable, by mortgagee—Mortgage, original, satisfied—Deed of indemnity to protect mortgagor—Payment by mortgagor of barred decree on equitable mortgage—Mortgagor's right to be indemnified.

In the case of the dismissal of an appeal against a decree for want of prosecution, the period of limitation for execution of the decree under the Limitation Act of 1877 runs from the date of the decree and not from that of the dismissal of the appeal. [p. 663, col. 2.]

Abdul Majid v. *Jawahir Lal*, 23 Ind. Cas. 649; 36 A. 350; 16 M. L. T. 44; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 1 L. W. 483 (P. C.) and *Bituk Nath* v. *Munni Dei*, 23 Ind. Cas. 644; 41 I. A. 104; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437 (P. C.), referred to.

In the case of a decree *nisi* made in a mortgage suit, the period of limitation for execution under the Limitation Act of 1877 is only three years and not three years plus the period given by the decree for redemption. [p. 663, col. 2.]

There is no provision in the Limitation Act of 1908 so retrospective in its effect as to revise and make effective a decree, which, before the date of its coming into operation, had become unenforceable by lapse of time. [p. 664, col. 1.]

A mortgagee created an equitable mortgage by depositing the mortgage deed with a third party. Subsequently the mortgagor having satisfied his mortgage, he contracted to indemnify him against "all losses, damages, actions, claims, suits, demands and accounts" in respect of the mortgage-deed or "any money owing or due thereunder or otherwise howsoever or for any act done by him, the mortgagee, with respect to the said mortgage-deed." Subsequently, the third party got a decree on his equitable mortgage against the original mortgagor but did not enforce it within limitation. The mortgagor, satisfied it after it had become unenforceable by lapse of time, and then sued his own mortgagee to recover the amount paid on the basis of the indemnity contract. It was urged in defence that the payment being voluntary, the mortgagee was not liable to make good the amount:

Held, that, although the payment made by the mortgagor was voluntary in the sense that it was made in payment of a decree that had become unenforceable by lapse of time, yet the mortgagee by depositing the mortgage-deed as security with the third party had blistered, encumbered and lessened the value of the mortgagor's equity of redemption, and that the latter was, under the very general terms of the indemnity contract, entitled to recover from the mortgagee what it had cost him to remedy the damage done to the property by paying off the encumbrance which the mortgagee had by his own act created. [p. 664, col. 2; p. 665, col. 1.]

Appeal against a judgment and decree of the Calcutta High Court, dated the 21st of July 1916.

Sir *George Lowndes, K. C.* and Mr. *J. M. Parikh*, for the Appellant.

Mr. *Kenwothy Brown*, for the Respondents.

JUDGMENT.

Lord Atkinson.—The financial dealings between the several parties concerned, out of which the appeals in this case have arisen, are somewhat complicated. It is, however, necessary to examine them in order to understand clearly the points calling for decision. On the 8th March 1886, the 12th May 1887, and the 12th May, 1892, the predecessors-in-title of the appellants in this litigation, styled the Roys, borrowed from one Dhanpat Singh three sums of Rs. 3,00,000; Rs. 20,000 and Rs. 15,000 respectively, and secured the repayment thereof with interest at the rates stipulated by three mortgages bearing the above respective dates of certain immoveable property belonging to them, the Roys. These mortgages were presumably in the ordinary form conveyances of the absolute interest in the property pledged with the usual provision for redemption, coupled with covenants by the mortgagors to pay the debt due under them. The Transfer of Property Act permits in Calcutta the creation of equitable mortgages by deposit of deeds. Accordingly, Dhanpat Singh, on the 3rd June 1893, created at Calcutta an equitable mortgage of the property of the Roys, comprised in these mortgage-deeds, by depositing these latter documents

with a firm trading at Calcutta as Shewaram-Krishal Chand, hereinafter styled "the firm," to secure the re-payment of Rs.70,000 lent by them to him, with interest till paid. It is not clear whether, at this particular date, the Roys had notice of this transaction. Early in the year 1894, Dhanpat Singh, instituted two ordinary mortgagees' suits, against the Roys to recover the amount secured by the three first-mentioned mortgages. The equitable mortgagees, the firm, were not made parties to these suits or either of them. The Roys contested these suits and ultimately a settlement was come to whereby Dhanpat Singh accepted a sum of Rs. 1,20,000 in full satisfaction and discharge of the amount due to him for principal and interest on the three legal mortgages. The Roys had not this sum of Rs. 1,20,000 available.

They were, in consequence, obliged to raise the money to pay Dhanpat Singh the arranged sum of Rs. 1,20,000. They accordingly borrowed from the Eastern Mortgage Agency Company, hereinafter styled "the Company" a sum of Rs. 2,00,000 and secured the re-payment of it with interest by executing to this Company a mortgage, dated the 23rd April 1894, of all the property comprised in the three first mentioned mortgages. By reason, apparently, of the existence of the equitable mortgage created by the deposit of the mortgage-deeds, an expedient was adopted. A deed of even date with the mortgage, namely, the 23rd April 1894, was executed by Dhanpat Singh, by which he after acknowledging the receipt of the sum stipulated for, released the lands and permises mentioned in the three mortgages from all claims, etc., under these instruments and protected the Roys by a covenant in the words following from all claims, which might be made against them in respect of any of the matters therein mentioned. The covenant ran thus:—

"2. The mortgagee both hereby for himself, his heirs, executors, administrators, representatives and assigns covenant with the mortgagors, their heirs, executors, administrators, representatives and assigns in manner following:—

"(a) That the mortgagee, his heirs, executors, administrators, representatives and assigns shall, at all times hereafter, keep the mortgagors, their heirs, executors, administrators, representatives, and assigns their and each of their estates and effects harmless and indemnified against all losses damages, actions, claims, suits, demands and accounts in respect of the said three several hereinbefore recited deeds of mortgage, or any money owing or due thereunder or otherwise howsoever or for any act done by him, the said mortgagee, with respect to the said deeds.

"(b) That the mortgagee shall forthwith cause the said two suits, respectively numbered 75 and 301 of 1894, now pending in the Court of the Subordinate Judge in the District of Murshidabad to be forthwith compromised on these terms and petitions to that effect filed accordingly."

The deed containing this covenant was duly registered on the day it bears date. The plaintiff, Dhanpat Singh, in each of the two suits instituted by him, lodged, in pursuance of the terms of the settlement, a petition praying that these suits might be disposed of according to the terms of the settlement which had been arrived at. The Court granted the prayer of this petition, and made in the first suit a decree dated 5th May 1894, and, in the second suit, a decree dated the 7th May 1894, whereby it was in each suit respectively decreed that the suit having been amicably settled, it should be disposed of, that the claim of the plaintiff should be taken to have been satisfied, and that each party should bear his own costs.

On the 17th July 1896, Dhanpat Singh paid to the firm, on foot of the *hundis* he had made to them, Rs. 42,000, and procured from the firm a release from all further liability on all these *hundis* on the terms that this compromise was to be without prejudice to the Company's rights to enforce their lien against the properties comprised in the three mortgages.

On the 11th May 1897, the firm instituted a suit against the Roys and the Company in the Court of the Subordinate Judge of Murshidabad to recover the sum due under their equitable mortgage, which latter they claimed had priority over the

legal mortgage executed to the Company on the 23rd April 1894, and further, that they were entitled to enforce their claims against the properties comprised in the three original mortgage-deeds deposited with them, and also against the Roys personally. The heirs and personal representatives of Dhanpat Singh, deceased, were, by the order of the High Court, made defendants in the suit. They are the first four respondents in the present appeals. The Roys and the Company contested this suit, and, on the 28th February 1903, the Subordinate Judge delivered judgment in favour of the plaintiff firm, holding that they, under their equitable mortgage, were, as regards the Roys, entitled to the sum of Rs. 27,223-4-9 for principal, interest and costs with interest at 6 per cent. till paid. subject to the mortgage to the Company of the 23rd April 1894, which he held had priority over the equitable mortgage of the firm. He made the decree usual in ordinary mortgage-suits that the Roys should pay the sums found to be due, with 6 per cent. interest, within six months from the date of the decree, failing which the properties covered by the three first-mentioned mortgages should be sold subject to the lien of the Company.

Against this decree, both the Roys and the firm appealed to the High Court at, Fort William. The appeal of the Roys was dismissed with costs. The Court held that the mortgage of the Company had not priority over the equitable mortgage of the firm, that the appeal of the latter should be allowed, and made a decree declaring that the firm was entitled to a valid equitable charge on the lands, covered by the three mortgages, and that in default of payment either by the Company or the Roys, of what was due upon that security, the mortgaged property or a sufficient part of it should be sold to meet the plaintiffs' claim, and that, unless the parties should agree as to the amount due to the plaintiffs, an account should be taken of what was due. No absolute order for sale in default of payment of the sum due was ever made on this decree. Against these two decrees, the Roys obtained from the High Court liberty to appeal to His Majesty in Council. The record was printed, No. 56 of 1910, and sent to the Office of the Privy Council. Meanwhile, however, the firm, by deed dated the 28th June 1907, reciting the execution of all the deeds hereinbefore mentioned, the creation of the equitable mortgage, the granting of the several decrees made in the litigation which had taken place between the parties, and, further, that the two decrees of the High Court dated the 26th August 1905, made in the Appeals Nos. 184 and 208 of 1903 respectively, were still unsatisfied that there was due thereon to the firm the sum of Rs. 45,377-5-6 with interest calculated up to date, that the firm had agreed to assign the said decrees to one Edward Hugh Bray (party thereto) at the "price or sum" of Rs. 23,000 assigned to him the two aforesaid decrees dated the 26th August 1905, and all money now or hereafter to become due thereunder respectively and all benefit and advantage under the said decrees respectively *including the charge created on the lands and premises described in the schedule thereto*, to hold the decrees and all the other premises thereby assigned or mentioned or intended so to be assigned unto the said Edward Hugh Bray, his executors, administrators and asigns, absolutely and for ever. This deed was duly registered.

This Edward Hugh Bray was a Director of a Company which acted as Agents for the Company, the mortgagees in the deed of the 23rd April 1894. The Roys desired to pay to Bray the sum of Rs. 50,000, due under the two decrees, assigned to him. They apparently had not money at their command for that purpose and, accordingly, they borrowed from the principal, the Company, to pay that Company's Agent, Bray, this Rs. 50,000. By deed bearing date the 1st February 1910, made between the Roys and the Company, reciting that the Roys had requested the Company to lend them the sum of Rs. 50,000 to enable them to pay and satisfy the amount then due to Edward Hugh Bray under the two decrees of the 26th August 1905, which the Company agreed to do on having the re-payment thereof with interest secured on the lands of the Roys therein mentioned, these lands were

therein mortgaged to the Company. The deed expressly stated that these lands were subject to the encumbrance created by the two decrees of 26th August 1905 alleged to be vested in Edward Hugh Bray of 8 Clive Street, Calcutta.

To carry out this arrangement, the parties had recourse to, probably having regard to their conflicting interests, the worst and most dangerous of all economies. The three parties, the Roys, Bray, and the Company employed the same Solicitors, Messrs. Morgan and Company, by which imprudence each party had imparted to him or them all the information dealing with the transaction which the common Solicitor had derived from both the other parties. The payment of the Rs. 50,000 was made in this way. The Company drew a cheque in fvour of Morgan and Company for Rs. 50,000. Morgan and Company endorsed this cheque : "To Babus Shyama Charan Roy, Parbati Charan Roy and Sachindra Nath Roy, or order" and these three endorsees, in their turn, endorsed it to " E. H. Bray, Esquire, or order ." The cheque was paid to Bray and he, having thus been paid, the Roys ceased further to prosecute the appeal to His Majesty in Council.

On the 16th April 1910, the appeal was, by an order made in the usual course in the Office of the Privy Council, dismissed for want of prosecution.

On the 15th November 1910, Bray filed an application in the Court of the Subordinate Judge certifying that these two decrees had been fully paid and praying for an order that they were fully satisfied. The first four respondents got notice of this application and did not object. On the 24th May 1911 the Subordinate Judge made an order to the following effect that " the decree be noted as finally disposed of in full satisfaction."

Sir George Lowndes for the appellants contended that no absolute order on the decrees for sale having been obtained, the equitable mortgage was, under the 88th and 89th sections of the Transfer of Property Act, 1882, still alive and did not merge in the decrees. He also assured the Board that, at this period, it was considered in Calcutta that the period of limitation under the Statute of Limitation of 1877, ran when a decree was dismissed for want of prosecution, not from the date of the decision of the decree appealed against ; but from that of the dismissal. Of course, the Board accepts with the utmost confidence that assurance, but it is not the law. Two cases decided in the year 1914 establish this. The first is the case of *Abdul Majid* v. *Jawahir Lal* (1) and the second, *Baluk Nath* v. *Munni Dei* (2). In the first, the judgment of the Board was delivered by Lord Moulton. It was decided that, under the Statute of Limitation of 1877, Schedule II, Art. 179, the period of three years named therein ran in such a case from the date of the decree appealed against and not from the date of the order to dismiss the appeal for want of prosecution. The ground on which the decision was based was thus stated by Lord Moulton: " The order (*i.e.*, the formal order) dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit, and could, in no sense, be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that, therefore, he was in the same position as if he had not appealed at all." The period of limitation ran from the date of the decree. The decision in the second of the last mentioned cases is to the same effect.

The next question to be considered is, which of the two Limitation Acts, that of 1877 or that of 1908, applies to this case. That must, it appears to the Board, be determined by the condition in which the decree stood when the latter Statute came into force on the 1st January 1909.

Sir George Lowndes contended that, where a decree *nisi* for sale is made in a mortgage suit, the period of limitation mentioned in the Act of 1877 is in effect three years plus six months, the period given by the decree for redemption. Their Lordships cannot accept that view. The sale is merely something to be done under the decree. A certain time is fixed by the

(1) 23 Ind. Cas. 649; 36 A. 350; 16 M. L. T. 44; 12 A. L. J. 624; 16 Bom. L. R. 895; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 1 L. W. 483 (P. C.).

(2) 23 Ind. Cas. 644; 41 I. A. 104; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437 (P. C.).

decree within which it is to be done, but the decree is operative from its date and it is the length of time during which it is operative that the Statute of Limitation looks to. The date of the decrees being the 26th August 1905, they became unenforceable by proceedings commenced after the 26th August 1908. Bray was paid the amount due on the 2nd February 1910, one year and three months after the statutory period had elapsed, and over thirteen months after the 1st January 1909, when the latter Act had come into operation. There is no provision in this latter Statute so retrospective in its effect as to revive and make effective a judgment or decree which, before that date, had become unenforceable by lapse of time. The payment of these decrees, by the Roys on the 2nd February 1910 was voluntary in the sense that they could not, by any legal proceedings founded upon the decree in which these facts had been elicited, and relied upon, have been compelled to make them.

The suit out of which this appeal has arisen was, on the 9th September 1912, instituted by the Roys in the Court of the Subordinate Judge, as above mentioned against the representatives of Dhanpat Singh and others, claiming to recover under the deed of indemnity of the 23rd April 1894, the amount paid by the Roys to Bray, with interest thereon till paid, and other sums amounting in all to Rs. 27,000. The plaint is long and involved. It states fully, however, the creation by Dhanpat Singh of the equitable mortgage by the deposit with the firm of the three mortgage-deeds and the transfer of the two decrees of the 26th August 1905 to Bray on the 23rd June 1907, and then avers that Bray was about to execute those decrees, and that, "considering it was more advisable to amicably pay off the decretal debt, than bear the cost of execution," the Roys borrowed a sum of Rs. 50,000 from the Company on a mortgage and paid the same to Bray for the satisfaction of the debt due upon the decrees. In paragraph 11 of the plaint it is submitted that, under the deed of indemnity, the Roys were entitled to recover the whole of the debt due to the firm and the costs of the suit relating to it, which the Roys were obliged to pay.

Maharaj Bahadur Singh, one of the defendants, filed in reply to this plaint, a written statement, raising many quite untenable defences to which it is unnecessary to refer. In its third paragraph, he, however, avers that the suit of the plaintiffs is barred by limitation in respect of the different sums of money sought to be recovered and, in its fifteenth paragraph, further avers that, even if the Roys had paid to Bray the sum alleged it was a mere voluntary payment, and that the plaintiffs were, therefore, not entitled to recover it from the defendants, the representatives of Dhanpat Singh, deceased. The defendant No. 2 also filed a written statement raising the same defences.

The Subordinate Judge held (1) that the claim of the Roys under the indemnity deed was not barred by limitation, that, under the 83rd section of the Limitation Act, the right to sue ran from the time they, the plaintiffs, were indemnified which was the 2nd February 1910 when they paid Bray the Rs. 50,000; and (2) that it was too late for the defendants to raise the defence that the payment was a mere voluntary payment and that, therefore, the plaintiffs were entitled to recover the sums claimed. On both these points the High Court came to a different conclusion. They held that, as the decrees of the 26th August 1905 had not been kept alive by obtaining an absolute order for sale, the remedies upon them were barred by limitation, that the decrees were not enforceable and that the defendants were not precluded from raising this point. They, therefore, allowed the appeal.

Their Lordships concur with the High Court in the two conclusions above mentioned, but they differ from them as to the consequences which the High Court apparently thought necessarily followed from these conclusions.

The words of the indemnity are very wide and far reaching. They provide that the Roys are to be indemnified from and against all losses, damages, actions, and claims, and/or for any act done by Dhanpat Singh with respect to the three mortgage-deeds. It was perfectly open to the plaintiffs to have replied to this plea that, thobgh the decrees could not have been enforced against them by Bray, Dhanpat Singh

had by his own actin depositing the deeds as a security with the firm, blistered, encumbered and lessened in value their equity of redemption in the property mortgaged by these deeds, and that they were, under the words of this indemnity, entitled to recover from his representatives what it had cost them, the Roys, to remedy the damage he had done to their property by paying off the encumbrance upon it which he had, by his own acts, created.

The difficulty, however, is not in discovering a principle of law entititling the plaintiffs to recover, it is in finding evidence in the case to show that the principle is applicable. This is possibly due to the fact that the whole litigation was based on the two decrees and on those alone. If the task of those conducting the case for the plaintiffs had been to elicit the irrelevant and leave the relevant hidden and obscure, they could not well have succeeded better. It seems incredible, but it is, that there is not a particle of evidence, written or parol, as to what was done with the three mortgage-deeds, by the deposit of which the encumbrance on which the two decrees of 26th August 1905 were based was created. It is not shown whether the firm delivered them to Bray when the decrees were assigned to him, or whether Bray delivered them to the Roys when the decrees were paid, as whether they were delivered by Bray or by the Roys to the Company when the mortgage of the 1st February 1910 was executed and the Company's cheque endorsed over to the Roys. On these important points, the Board is left to conjecture what would be the natural and probable course for prudent men in their own interest to take. But that is not all. Not a particle of evidence is elicited to prove the important statement in the plaint that Bray was about to execute the two decrees, and that the Roys thought it wiser to settle the decrees amicably than to incur the costs of a sale. If this were true, the fact that the Roys had to borrow money from the Company to pay these decrees, even though they might have been mistaken as to their enforceability, would not alter the position. Their expenditure would still have been incurred to cure the injury Dhanpat Singh had done them by pledging the mortgage-deeds. This point has been raised before their Lordships for the first time, and the difficulty which the Board have in dealing with it illustrates forcibly the wisdom of the rule which prohibits the raising of new points involving questions of fact after the trial is over, when evidence of fact could have been given touching those questions, had they been then raised. It was suggested that this question was raised before the High Court. That is a mistake. The passage in the judgment of the High Court on which that suggestion was founded runs as follows: —

"For the defendants-appellants, three arguments were addressed to us :—(1) That the payment by Roys to Mr. Bray was voluntary, and so they could not recover it ; (2) that the contract of indemnity was in fraud of the sub-mortgagee, Raja Gokul Das, and that the plaintiffs being parties with Rai Dhanpat Singh Bahadur to that fraud were not entitled to recover the amount from their joint wrong-doer ; and (3) that the payment was really a payment by the Eastern Mortgage and Agency Company and not by the plaintiffs.

"The third argument has not been seriously pressed. There can be no doubt whatever that the plaintiffs got credit for the amount of the decree as part of the cheque of Rs. 50,000 which undoubtedly passed through their accounts."

The point here raised was that it was the Company who really paid Bray, and it was supposed to be answered by the fact that the Company's cheque was endorsed to the Roys.

To send the case back to the Court of the Subordinate Judge to ascertain what has been done with these mortgage-deeds, what was the arrangement made in respect to them, and who has got possession of them, would involve considerable expense, and might afford an almost too tempting opportunity for the concoction of evidence. Their Lordships are driven, in order to deal with the case, to assume that matters were conducted in a business way, and that what would have occurred had they been so conducted did, in fact, occur. In the ordinary course of business, the mortgage-deeds would have been delivered by the firm to Bray when

the decrees were assigned they would have been delivered by Bray to the Roys or more probably to the Company to fortify their legal mortgages when Bray was paid off. Their Lordships will, therefore, assume that they were so delivered. It would be the natural consequence of the proved acts of the parties. As has been already pointed out, the fact that the Roys were obliged to borrow money on mortgage to get rid of the encumbrance placed upon their property by the act of Dhanpat Singh does not prejudice, in any way, their rights under the covenants to indemnify. The expenditure to get rid of the encumbrance was equally incurred at their expense, but the amount of that expenditure must be measured by the sum paid to Bray on the 2nd February 1907, with interest, as it apparently has been measured by the decree of the Subordinate Judge dated the 12th August 1914. Their Lordships are, for these reasons, of opinion that this appeal should be allowed, the judgment of the High Court reversed and the aforesaid decree of the 12th August 1914 affirmed, and they will humbly advise His Majesty accordingly. But as the grounds upon which they base their judgment were not put forward in the High Court at all and for the first time mentioned before this Board, the respective parties must each bear their own costs in the Courts in India and of the appeal to His Majesty in Council.

N. H. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Chapman, Walker* and *Shephard.*

Solicitor for the Respondant:—Mr. *G. C. Farr.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1686 OF 1921.

March 3, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

PRAG NARAIN AND ANOTHER—DEFENANTS—APPELLANTS

versus

JWALA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bundhelkhand Alienation of Land Act (II of 1903), ss. 6, 17, 22—Execution of decree—Reference to Collector—Collector, powers of—Civil Court, whether can question Collector's act—Third parties, whether bound by Collector's order—Co-sharer in undivided patti, *decree against—Mortgage, usufructuary, of specific plots, whether can be granted.*

Section 6 of the Bundhelkhand Alienation of Land Act provides various ways in which the Collector can exercise the powers given to him by the Act. It is entirely within his discretion which of those ways he shall adopt, and no Civil Court can question the exercise of his discretion in this matter. [p. 667, col. 2.]

Section 22 of the Bundhelkhand Alienation of Land Act, does not cover any act which is done by the Collector in excess of the powers conferred on him by the Act. [p. 667, col. 2.]

Where the Collector acts in excess of his powers under the Act, or where his order affects the rights of third parties, the Civil Court has jurisdiction to scrutinise it and to grant the necessary relief in respect of it. [p. 667, col. 2.]

A decree against a co-sharer in an undivided *patti* was transferred to the Collector under section 17 of the Bundhelkhand Alienation of Land Act. The Collector selected certain plots out of the undivided *patti*, the area of which he considered corresponded to the share of the judgment-debtor, and granted a usufructuary mortgage of the plots to the decree-holders;

Held, (1) that the Collector had no power to transfer to the decree-holders the actual possession of plots of which the judgment-debtor himself was not in actual possession; [p. 667, col. 2.]

(2) that the only right which the Collector could transfer was the right to which the judgment-debtor himself was entitled, namely, the right to receive his share of the rents; [p. 667, col. 2.]

(3) that the mere fact that the judgment-debtor happened to be a *lambardar*, that is, the agent of the co-sharers for the purposes of collection, did not in any way increase or alter his personal rights as proprietor. [p. 668, col. 1.]

Second appeal from a decree of the District Judge, Jhansi, dated the 2nd of September 1921.

Mr. *N. C. Vaish*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—This appeal raises a point of law under the Bundhelkhand Land Alienation Act. A decree had been passed against Jwala Prasad, one of the plaintiffs, on a mortgage in favour of the defendants, Prag Narain and Beni Prasad. The decree is not before us but it appears that it was transferred to the Collector under section 17 of the Act, inasmuch as the mortgagees were not members of an agricultura tribe. The first plaintiff, Jawala Prasad, was owner of an undivided share in a 5 annas 4 pie *patti*. The rents of the entire *patti* were collected by the *Lambardar* who, as it happened, was at that time Jwala Prasad himself,

PRAG NARAIN v. JWALA PRASAD.

The share mortgaged was a 10 pie undivided share out of this *patti*. The Collector, purporting to act under the provisions of section 6 of the Act, selected certain specific plots which he considerd to be the equivalant of a 10 pie share and gave the defendants a usufructuary mortgage of these plots for a term of 20 years. The present suit was brought by Jwala Prasad and the two other co-sharers in the *patti*, Sukhnandan and Sheo Dayal, for a declaration that the mortgage executed by the Collector so far as it purported to transfer possession of specific plots and to give the mortgagees the right either to cultivate these plots or to collect the rents of them was *ultra vires*. The suit has been decreed by the Court below. The defendants appealed to this Court on two grounds:—

(1) That the mortgage was within the powers vested in the Collector by the Act.

(2) That the Civil Court is precluded by section 22 of the Act from entertaining the present suit.

Two of the plots in Suit Nos. 19 and 195 were in the actual possession of Jawala Prasad as *khudkasht*. The first Court dismissed the suit as regards these plots. We are unable to appreciate the reasons which led the learned District Judge on a corss-objection by the plaintiffs to set aside this portion of the Trial Court's decree. It seems to us that it was perfectly open to the Collector to transfer to the mortgagees the possession of lands which were in the actual possession of the mortgagor.

Section 22 of the Act lays down that no Civil Court shall take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or in him by or under this Act. The appellant treats this as meaning that the Civil Courts have no jurisdiction to question anything done by the Collector which purports to be done under the Act. The lower Courts have met the objection by holding, first, that what was done in this case was in excess of the powers conferred by the Act, and, secondly, that it is clearly open to third parties whose interests are affected, to challenge the validity of a mortgage which interferes with their rights. In this case the second and third defendants were no parties to the proceedings before the Collector in the course of which the mortgage was executed.

Section 6 of the Act provides various ways in which the Collector can exercise the powers given to him by the Act. It is entirely within his discretion which of those ways he shall adopt, and no Civil Court can question the exerciseof his discretion in this matter. It is clear, however, from the language both of sub-section (1) and of sub-section (2) of section 22 that the effect of that secton is not to cover any act which is done in excess of powers conferred by the Act. If, therefore, the Collector in granting the lease was acting illegally and in excess of his powers, section 22 will not have the effect of ousting the Civil Court's jurisdiction.

The position taken up by the parties in the first issue is this. The plaintiffs rely on the fact that the defendant was not in actual possession of any particular plots in the *patti* and that his only right was to receive his share of the profits. The Collector has, therefore, given to the mortgagees a right which the mortgagor himself did not possesss. It is true that Jwala Prasad was himself the *lambardar*, but as *lambardar* he was merely acting as agent of co-sharers and not on his own behalf, and he was liable to be oasted from the position of *lambardar* at any time. On the other hand, the respondents contend that the only right of the second and third plaintiffs was to receive their 2/3rds share of the profits of the *patti*. This right has in no way been impaired by anything that the Collector has done. The mortgagees are entitled to profits equivalant to the profits of a 10 pie share and it makes no difference to the other plaintiffs whether the mortgagees are realising these profits direct from the cultivators or whether they are paid over to them by the *lambardar*.

In our opinion the plaintiff's contention is correct. What the Collector has done is to make a partition of the *patti* behind the backs of other co-sharers for the benefit of the mortgagees. There is nothing in the Act which authorises him to do this. The Collector could only mortgage the right which the judgment-debtor has and except as regards the plots in his pos-

session as *khudkasht*, that right was a right to receive his share on a distribution of the profits of the *patti*. The fact that he happened to be a *lambardar* at the time is irrelevant. The *lambardar* is the agent of the co-sharers for purposes of collection, but the fact of his being *lambardar* in no way increases or alters his personal rights as proprietor. The argument that the other co-sharers are in no way prejudiced is fallacious. It is true that their income at the time of the execution of the mortgage might not have been decreased. The mortgage, however, is to last for 20 years. During that time they are deprived of all control over these particular tenants, of the right of ejecting them or enhancing their rents, and should there at any time be a partition, the co-sharers to whom these lands are assigned would be unable to obtain possession from them.

For these reasons we allow the appeal in part and setting aside the decree of the learned District Judge, restore the decree of the Trial Court. As the appeal has partly succeeded and partly failed the parties will bear their own costs.

Z. K. *Appeal partly allowed.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 112 OF 1920.
April 17, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Thakurain PHULBATI KUMARI—PLAINTIFF—APPELLANT

versus

MAHARAJ KUMAR RAO MAHESHWARI PRASHAD SINGH—DEFENDANT—RESPONDENT.

Ghatwali *tenure, incidents of—Birbhum and Kharagpur* Ghatwalis, *difference between—Succession to* Ghatwali *tenures, regulation of—Bengal Ghatwali Lands Regulation (XXIX of 1814), applicability of—Hindu Law*—Mitakshara *—Impartible estates, devolution of.*

One of the main distinctions between tenures of the nature of Birbhum *Ghatwalis* and those of the nature of Kharagpur *Ghatwalis* is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom the revenue is paid direct; whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. [p. 672, col. 1.]

Raja Lelanund Sing Bahadoor v. *Government of Bengal*, 6 M. I. A. 101; 4 W. R. P. C. 77; 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 E. R. 38, referred to.

Bengal Ghatwali Lands Regulation XXIX of 1814 applies to Birbhum *Ghatwalis* only and has no application to tenures of the nature of Kharagpur *Ghatwalis*. [p. 678, col. 1.]

The incidents that attach to the *Ghatwali* tenure in *Taluka* Dumri are:

(1) that it is impartible and permanent;

(2) that it descends by lineal primogeniture; and

(3) that it is alienable with the consent of the *zemindar*. [p. 672, col. 2.]

Succession to this *Ghatwali* is governed by the Mitakshara Law, subject to the incident of impartibility, that is, on the death of a *Ghatwal* the estate devolves upon his male agnates by survivorship, to the exclusion of his widows. There is no special custom in the family which entitles the widow of a deceased *Ghatwal* to succeed to the tenure in preference to his eldest agnate in the most direct line, with whom the deceased was joint. [p. 673, col. 2.]

In a Mitakshara family living in commensality the inheritance even of impartible estates is confined to male members, to the exclusion of females, unless the estate itself is separate or self-acquired property. [p. 674, col. 2.]

An impartible estate is not necessarily the separate estate of the holder for the time being. It may be held as common family property, in which case, subject to impartibility and the rule of primogeniture, it will descend according to the canons of devolution applicable to such property, that is to say, the joint male agnates will succeed to the exclusion of females, and of the agnates the eldest in the most direct line will take. [p. 675, col. 2.]

The mere fact that an estate is impartible does not, in a case governed by the Mitakshara Law, make it separate or self-acquired property. It may be self-acquired or it may be the property of a joint undivided family. In the latter case, succession will be regulated according to the rule of survivorship, but as one person alone can hold the estate at a time, the person designated is the eldest male member of the senior branch of the joint family. [p. 676, col. 2; p. 677, col. 1.]

Although the members of a joint Mitakshara family do not acquire in impartible property the same rights as in partible property belonging to the family, such as the right of joint enjoyment the right of partition or the right of restraint, on alienation, they at least retain the right of survivorship. [p. 677, col. 1.]

Case-law discussed.

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 20th February 1920.

Messrs. *N. C. Sinha* and *A. P. Upadhya*, for the Appellant.

Messrs. *S. Ahmad* and *J. Prasad*, for the Respondent.

PHULBATI KUMARI *v.* MAHARAJ KUMAR RAO MAHESHWARI PRASHAD SINGH.

JUDGMENT.—The dispute in this case concerns the title to two villages and certain lands in a third comprised in *Taluka* Dumri, *kismat* 4 annas, which it is alleged is a *Ghatwali* tenure formerly belonging to Ghanasyam Singh as *Ghatwal*, who died childless in the year 1880 (1287 F. S.) leaving two widows. The senior widow, *Thakurain* Kishori Kumari, succeeded to her husband's estate in circumstances which will be referred to later and died in the year 1916. The junior widow, *Thakurain* Phulbati Kumari, who survived her co-widow is the plaintiff in the suit and appellant in this appeal. She claims the property as the reversionary heir of her husband on the death of the senior widow. The defendant, Maharaj Kumar Maheshwari Prasad Singh, the respondent in this appeal, is the son of the late Maharaja Bahadur of Gidhaur and brother of the present holder of that title. His title to the property is based upon a conveyance from the senior widow, Kishori Kumari, under a *kabala*, dated the 13th October 1898, in which Pairu Singh, the younger brother and next male heir of Ghanasyam Singh, joined. The appellant disputes Kishori Kumari's right to alienate the property in question and contends that the estate is inalienable. The respondent, on the other hand, disputes the appellant's right to inherit contending that her sole right in the property is that of maintenance. By her plaint the appellant alleges that the 4 annas share in *Taluka* Dumri was settled upon *Thakur* Jungle Singh, the ancestor of her husband, as a *Ghatwali* service-tenure by Captain James Brown, the Sardar of the Jungles and *Taris* of Gidhaur, Kharagpur, Birbhum, and the adjacent tracts in 1776 under a *sanad* dated the 17th December that year, the other 12 annas share being settled with other *Ghatwals*, and that Rs. 142-12-0 together with cess is payable as perpetual *mukarrari* rent to the *zemindar*, the Maharaja Bahadur of Gidhaur, the entire income from the *Ghatwali* interest being appropriated by the *Ghatwal* for the time being. She pleads that by the custom of her husband's family the estate descends to the eldest son of the *Ghatwal*, the remaining sons, if any, getting maintenance and, if the *Ghatwal* dies without issue, his widow becomes proprietor and if there be more than one widow the eldest succeeds and after her the second widow takes. She alleges that, except for the properties in dispute, she came into possession of the remaining properties of the estate in 1916 on the death of Kishori Kumari. She further pleads that there was no legal necessity which would justify the transfer by Kishori Kumari to the respondent.

The respondent by his written statement denies that the estate is a *Ghatwali* tenure and pleads that it was a *mukarrari* interest held by Ghanasyam Singh and his ancestors from the Maharaja of Gidhaur at the rent named and cesses. He admits that by the custom of the family the eldest son succeeds and if there be no issue the first widow succeeds and the second gets maintenance, but he denies that the second widow succeeds on the death of the first, and alleges that the eldest son of the nearest *gotia* of the last male-holder inherits on the death of the senior widow, the second widow continuing to get maintenance and having no rights of inheritance. By this is apparently meant that the eldest member of the most direct line of descent succeeds in preference to those nearer in blood but less direct in descent from the common ancestor, that is, according to the rule of primogeniture. He further alleges that in the year 1900 by a *bazidawa* deed dated the 8th February that year, after the death of Pairu Singh (who died in 1899), Kishori Kumari relinquished the whole of her interest to Pairu's eldest son, Mukhtar Singh, the next male agnate, thereby accelerating the succession and that Mukhtar Singh got his name registered as *mukarraridar* and took possesion and has continued in possession as ostensible owner ever since. He denies that the appellant ever got possession of any portion of the property. He also pleads that the property was not inalienable and that in any case the transfer to him was justified by legal necessity.

The learned Subordinate Judge found all the issues in favour of the respondent and dismissed the suit. From that decision the plaintiff has appealed.

It will be convenient, in the first place, to consider, as far as can be gathered from the evidence, the origin and incidents of the estate of which the property in suit forms part. The earliest document relied on by the appellant is the *sanad* of the 17th December 1776 granted by Captain James Brown. Its genuineness is not questioned, nor is Captain Brown's authority. From 1774 to 1778 he was actively employed under the East India Company in quelling disturbances and establishing order in what was known as the jungle *terai* or jungle *terry* which included most of the country now comprised in the Santhal Parganas and such of the land to the north and west in the Bhagalpur, Monghyr and Hazaribagh Districts. He granted many *Ghatwali* tenures and confirmed many more to the previous *Ghatwals* for service in guarding the *ghats* and *chowkies*. The *sanad* is addressed to the *Chowdris Kanoongoes Zamindars* and *Muksaddies* of *Mauza* Dumri. It recites that Kanchan Singh, Jungle Singh (the ancestor of the appellant's husband) Ragho Singh and Manorath Singh, *Ghatwals* of the aforesaid *mouza*, have been in accordance with old standing practice enjoying *Ghatwali* fees for their services as *Ghatwals* out of *siyer* for *rahdari* of the *mauza* and declares that from 1184 F. (1777 A.D.) in conformity with the old standing practice the fees for *Ghatwali* have been granted to them. It directs the *Chowdries* and others to allow them to enjoy the fees and enjoins upon the *Ghatwals* the duty of keeping watch and going the rounds of the *ghats* and *chowkies* in their *illakas* and holds them accountable and liable to dismissal for any murders, thefts, highway robberies, night attacks or other disturbances in their *illakas*. This document is not a grant of land but an authority to the persons named to collect, as formerly, *Ghatwari* or *Ghatwali* fees or tolls from those using the roads and passes which the *Ghatwals* undertook to protect. It is relied upon in the plaint as the basis of the appellant's title but it is not and cannot be regarded as the grant upon which the title of Ghanasyam Singh and his ancestors to the land in suit is based. It does appear, however, that a tenure comprising 8 annas in *Mauza* Dumri was granted by Raja Gopal Singh of Gidhaur to Jungle Singh and Nain Singh (the son of Kanchan Singh, one of the *Ghatwals* mentioned in the *sanad* of 1777) in the year 1780 (1187 F.) with the sanction of Captain Brown. This can be gathered from certain proceedings which were tried in the year 1798 before the Dewani Adaulat of Ramgarh and which went on appeal to the Patna Provincial Court of Appeal in the following year. Copies of the judgments in both Courts have been produced in evidence by the appellant. From these it appears that in the year 1780 Jungle Singh and Nain Singh as *Ghatwals* of the *Mouza* were granted a *patta* of 8 annas share in the *mouza* by the Raja at the instance of Captain Brown and that this share formerly constituted their *Ghatwali* interest. About 1796 the Raja had attempted to raise the rent contending that the *patta* of 1780 was a grant for one year only. The grantees had refused to accept a new *patta* or grant a *kabuliyat* at an enhanced rent and the Raja had thereupon endeavoured to disposses them by letting the lands to other tenants. Jungle Singh and Nain Singh then sued the Raja claiming a *patta* at the old rent, the object being apparently to establish their title to a permanent interest at the former rent. They proved that they had been in occupation paying rent at the same rate for over 12 years. The Ramgarh Court found in favour of the plaintiffs and ordered the *patta* to be granted by the Raja at the old rent. The Court referred to section 49 of Regulation VIII of 1793 which provides that "*Istimrardars* (*mokurraridars*) of the nature of those described in section 18 who have held their lands at a fixed rent for more than 12 years are not liable to be assessed with any increase either by the officers of Government or by the *zemindar* or other actual proprietor of land should he engage for his own lands." To appreciate the effect of this section it is necessary to refer to the earlier sections of the Regulation, more particularly sections 18 and 19. The former provides that *mokurraridars* holding lands of which they are not actual proprietors and whose grants have been

obtained since the Company's succession to the Dewani and have not received the sanction of Government are to be dispossessed and a settlement is to be made with the proprietors as provided in the Regulation. Section 19 provides that *Istimrardars*, who have not got possession of their lands to the exclusion of the proprietors or without their consent, as the *mokurraridars* under section 18 are supposed to have done, but held them of the proprietors on *patta* or lease, are to be considered as a species of *patta talukdars* and the settlement is to be made with them as afterwards provided in the Regulation. Section 49 is one of the provisions relating to the new settlement by the *zemindar* in cases contemplated under sections 18 and 19. Although there is nothing to show that any Permanent Settlement had been made with the proprietors of the Gidhaur Raj at that time, some sort of settlement appears to have been made with the Raja of Gidhaur and his brother in 1775 of some villages including Dumri as appears from a *sanad* of that date (Exhibit A) signed by Captain Brown. It may be assumed that this was confirmed and made permanent in 1793 by Regulations I and VIII of that year. It appears from the judgments of the Ramgarh Court in 1798 and the Appellate Court at Patna in the following year that the Collector had confirmed the rent reserved in the grant of the half share of Dumri to the *Ghatwals* by the *zemindar* in 1780. After the Permanent Settlement of 1793 the Raja had sued Nain Singh and Jungle Singh to compel them to execute a *kabuliyat* at a higher rent but in 1796 the Court had rejected his claim and ordered him to execute a *patta* at the old rate. The *patta* was prepared and withdrawn from Court by the Raja but apparently not executed and when he again attempted to obtain a higher rent the *Ghatwals* brought the suit of 1798 with the result already mentioned. An appeal by the Raja Gopal Singh from that decision was dismissed by the Appellate Court which found that the Raja had knowingly put a false construction on the previous decree and fined him Rs. 25 for having preferred a litigious appeal. From that time to the present the interest enjoyed in the estate by the appellant's family has been described in documents sometimes as a *Ghatwali* tenure, sometimes as a *mukarrari* tenure, and more often as a *mukarrari Ghatwali* tenure. It is undoubtedly of a permanent nature and held at a fixed rent payable to the *zemindar*, and it would appear to be a settlement made by him with the tenure-holders by force of the provisions of Regulation VIII of 1793. The learned Subordinate Judge considered that the estate was a *Ghatwali mukarrari* tenure which was originally granted as *Ghatwali* and in respect of which the *Ghatwals* afterwards at about the time of the Permanent Settlement got a *mokurrari* lease from the *zemindar* thereby fixing rent in perpetuity. In the absence of the instrument under which the grant was created it is impossible to know whether it was in fact a service-tenure granted in consideration of peforming the duties of *Ghatwal*. That the grantees of the 8 annas share in question were *Ghatwals* together with others is conclusively proved by the *sanad* of 1776 but the remuneration for their services referred to in that *sanad* is not a grant of land but a right to collect certain tolls from those using the roads. In the Bengal District Gazatteer, Volume XVIII, at page 168, there is a passage which throws some light upon what happened at Dumri when Captain Brown took over charge of the operations in the jungle *terai* tracts. The passage states: "About 1774 the lawless state of this tract led the British to place it in charge of Captain James Brown, who settled the estates with the *Ghatwals* with two exceptions. These two exceptions were Dumri and Mahesri which were settled directly with the proprietors, the story being that the *Ghatwal* tenure-holders fled at the approach of Captain Brown their reputation as dacoits and brigands being too strong for them to face a Government Officer without fear of the consequences. In the case of Dumri, however the *Ghatwals* finding that in their absence a settlement had been made of their tenure, returned and obtained a *sanad* settling it with them under the Raja of Gidhaur. Of the estates settled with *Ghatwals* only two are now held by their descendants, *viz.*, Tilwa and Kewal. The others have

passed into the hands of the Maharaja of Gidhaur, Chettu Rai, Akleswar Prasad and others of Rohini." The statement that Tilwa and Kewal were the only two estates still held by the descendants of the original *Ghatwals*, although possibly accurate at the present day, was hardly quite accurate in 1909 when it was written, as at that time a part at least of the Dumri estate still remained in the hands of the descendants of Jungle Singh although the other *kismats* and part of that originally granted to Jungle Singh had then been acquired by the Maharaja. The evidence shows that *parwanas* were issued by the Collector to the *Ghatwals* appointed by Captain Brown and their descendants calling upon them to peform certain duties attaching to their office up to about the middle of the last century or even later and it may be that the grant of the tenure was regarded as a concomitant of the *Ghatwali* office. The question is not free from difficulty but, on the whole, we are not prepared to disturb the Subordinate Judge's finding upon this part of the case and propose to treat the tenure for the purposes of this decision as a *Ghatwali* tenure.

It was argued on behalf of the appellant that all *Ghatwali* tenures are inalienable and reference was made to Regulation XXIX of 1814 which regulates the Settlement of the Birbhum *Ghatwali mahals*. In our opinion the estate in the present case is in no way comparable to the Birbhum *Ghatwali* tenures, and Regulation XXIX of 1814 does not apply to it, but in its origin it is rather of the nature of the Kharagpur *Ghatwalis*. One of the main distinctions between these two classes is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom the revenue is paid direct, whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. The Regulation of 1814 applies to the former only. The grant in the present case, made with the sanction of Captain Brown, would appear to bear a close resemblance to some of those mentioned as having been made in the Kharagpur estate by Mr. Cleveland and referred to in the case of *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1). In fact, in argument before the Subordinate Judge the late Sir Rash Behari Ghose, who appeared on behalf of the appellant, admitted that the estate in this case was a Kharagpur and not a Birbhum *Ghatwali*. It is highly improbable that a lawyer of his experience and learning would make the admission without good cause and we consider his admission that it was not a Birbhum *Ghatwali* was justified. The incidents that are clearly proved or are admitted to attach to the tenure are--

(1) that it is impartible, and permanent;

(2) that it descends by lineal primogeniture, and

(3) that it is alienable at least with the consent of the *zemindar*.

Proof of the last incident is supported by the fact that considerable portions of the estate have been alienated since Jungle Singh's time by the holder for the time being and at least one, if not more, of the other three four annas interests in Dumri has passed out of the hands of the original grantee and his descendants and is now held by the Maharaja of Gidhaur. In our opinion the tenure was not inalienable but could be alienated by the *Ghatwal* for the time being at least with the consent of the *zemindar*. In the present case the *zemindar* was the brother of the respondent, the purchaser, and as he has made no attempt to question the transaction of the 13th October 1898 under which the respondent holds, it may be presumed that he is a consenting party.

The question then arises as to the course of succession of a tenure of this nature. The family of the appellant is governed by the Mitakshara Law and the devolution of immoveable property in the family must be governed by that law subject to the question of impartibility, unless either there be some special custom of the family to the contrary, or unless there be some peculiar feature inherent in *Ghatwali* tenures which prevents the operation of the Mitakshara rule of succession in the case of impartible property. It is the appellant's case that Pairu Singh, the brother of Ghansyam Singh and his son Mukhtar Singh

(1) 6 M. I. A. 101; 4 W. R. P. C. 77; 1 Sar. P. C. J. 505; 1 Suth. P. C J. 248; 19 E. R. 38.

were seperate from and not living jointly with Ghansyam Singh at the time of his death in 1880, and that, therefore, even under the Mitakshara Law the widows would be entitled to succeed to the family property in preference to the separated *gotias* but that, owing to the impartible nature of the property, only one *Ghatwal* can inherit at a time and that, therefore, the senior widow would take first and after her the junior. This is also said to be in accordance with the family custom relied upon. It is next contended that all *Ghatwali* property is the exclusive separate property of the holder for the time being and devolves according to the rules affecting separate property subject again to the question of impartibility. We propose, first, to consider whether Pairu and his son and other members of his family were living jointly with Ghansyam or not at the time of the latter's death. It appears from a petition dated the 5th March 1843 presented in the Court of the principal Sadar Amin at Bhagalpur by Lal Behari Singh, the father of Ghansyam Singh that Jungle Singh and the others who were appointed *Ghatwals* at the time of Captain Brown each held a fourth share in the *mahal*. Whether they took jointly in the first instance and afterwards separated or whether they each took a four annas share originally is not very clear, but, however that may be, the four annas *kismat* of Jungle Singh has come down from him, to his descendants in the direct male line without a break until the time of Ghansyam Singh, the husband of the appellant who died childless in 1880. During that time many of the *mouzas* comprised in the estate have been granted by way of maintenance to members of younger branches of the family and not resumed. The evidence on this point is dealt with by the learned Subordinte Judge at length and need not be repeated. These branches have separated from the main stock and are no longer connected with it in mess or estate. The family house of Ghansyam Singh and his ancestors is at Panjbhajan and some attempt was made to prove that one of the villages of the estate, *Mouza* Chauki, had been given by Ghansyam to his brother Pairu as a maintenance grant and that Pairu and his son Mukhtar and other members of his family lived there separate from Ghansyam, No document was produced in support of this story. Many documents, on the other hand, have been put in evidence by both parties in the case from the year 1881 up to 1918. Many of them are executed by members of the family and in one instance by the appellant herself. Others are plaints and decrees in suits in which the family was interested and in every case Pairu and Mukhtar, where their names are mentioned, and the instances are numerous, are described as residing at Panjbhajan. It is admitted that they had no separate residence there and some of the appellant's principal witnesses admit that Pairu and Mukhtar lived jointly with *Thakur* Ghansyam Singh during his lifetime and with his widows afterwards, although others say that they were separate. Kishori Kumari, the senior widow, during her lifetime executed one document at least, a mortgage-bond dated the 15th July 1895, in which she describes herself and Pairu as members of a joint family and joint in mess and business. The learned Subordinate Judge has dealt at length with this part of the evidence and has arrived at a clear finding that Pairu and Mukhtar were not separated from Ghansyam during his lifetime but lived jointly with him and had continued to live jointly with the appellant after his death up to the present date. In our opinion his finding was amply justified upon the evidence and should not be disturbed.

This being so, unless there is some feature peculiar to this tenure which distinguishes the course of succession from other impartible estates or unless there be some family custom controlling the inheritance, on the death of Ghansyam Singh the estate would devolve under the Mitakshara Law upon the male agnates entitled by survivorship to the exclusion of the widows, and the estate being impartible it would go to Pairu Singh, the eldest surviving brother of Ghansyam, and after him to his son, Mukhtar. Had the family been separated the widows would have taken in turn in priority to the next male collateral heirs. There are no doubt *dicta* to be found in the cases dealing with *Ghatwali* estates which go the length of saying that the succession is not governed

by the Mitakshara Law and in particular the case of *Kustoora Koomaree* v. *Monohur Deo* (2) was relied on. In that case the question of succession to a *Ghatwali* tenure arose. The claimants were *Musammat* Kustoora Koomaree, the mother of the last male holder, a posthumous son, who died about a year after his birth, and the plaintiff Monohur Deo, a distant cousin of the deceased holder. It does not appear from the report whether these cousins were joint or separate in estate but their common ancestor was the great-great-grand-father of the plaintiff. Incidentally, it may be mentioned that the *Ghatwali* in that case was situated in Birbhum and a distinction is drawn in the judgment between Birbhum *Ghatwalis*, in which the evidence showed that females succeeded, and those in Ramgarh, where the evidence showed they did not. The plaintiff relied on family custom but this was decided against him on the evidence. The Trial Court had decided in favour of the plaintiff. The High Court reversed this decision and pronounced in favour of Kustoora Kumari, the mother of the last male holder. The High Court appears to have approached the question for decision upon the assumption that the mother would succeed unless the contrary could be proved. There are two passages in the judgment which are relied on. In the first the Court expresses the view that succession to "these *Ghatwalis*," by which I gather Birbhum *Ghatwalis* are referred to, was regulated by no rule of Koolachar nor by Mitakshara Law but solely by the nature of the *Ghatwali* tenure. The latter passage reads thus: "Even, under the Mitakshara Law, the widow and mother would be entitled to succeed, if the property left by the deceased were not held in common, and we have stated above that we do not think the *Ghatwali* tenure could ever be said in the sense used in the Mitakshara, to be held in common." This passage, whilst no doubt true in the sense that the property is impartible and the sons and other members of the family take no immediate interest at birth entitling them to claim partition, does not satisfactorily dispose of the real question for determination which arises in the present case, namely, whether in a joint Mitakshara family the course of succession to *Ghatwali* property is any different from that which regulates the succession of other impartible property. For there is abundant authority for the proposition that in a Mitakshara family living in commensality the inheritance even of impartible estates is confined to male members to the exclusion of females unless the estate itself is separate or self-acquired property. We shall consider some of these cases presently; but, before doing so, it will be convenient to refer here to the case of *Chhatradhari Singh* v. *Saraswati Kumari* (3) upon which special reliance was placed. It is a decision of the Calcutta High Court and although not binding upon this Court is entitled to the greatest respect. The subject of that suit was one of the *Ghatwali* tenures of Birbhum to which Regulation XXIX of 1814 applies. One of the main questions for decision was whether the word "descendants" in the Regulation meant heirs of the body or heirs generally including widows. The latter construction was preferred and the learned Judges, Ghose and Gordon, JJ., held that as between the widow and the separated brother of the last *Ghatwal* the widow's right to inherit should prevail. It may be pointed out that it was found on the evidence that the brothers had separated and that the estate was the exclusive property of the late *Ghatwal*. Upon this finding the right of the widows was established but although the Court considered it unnecessary to determine what was the original character of the Birbhum tenures as described in Regulation XXIX of 1814 they expressed the view that they were the exclusive property of the *Ghatwal* for the time being and not the joint family property in the proper sense of the term. It is unnecessary, for present purposes, to express an opinion either of concurrence or dissent upon this proposition as stated in the judgment as it was a *dictum* based upon the costruction of a Regulation which is not applicable to the present case. But if it means that the members of the family acquire by birth no immediate rights in the property entitling them to partition or creating a restraint upon the holder's powers

(2) W. R. (1864) 39.

(3) 22 C. 1861 11 Ind. Dec. (N. S.) 105.

of alienation, such as they may be, it appears to us to do no more than to define the tenure as impartible. The case of *Rajah Leelanund Singh* v. *Doorgabutty* (4), also a decision of the Calcutta High Court, was referred to, where it was held that a *Ghatwali* tenure in Kharagpur was not alienable without the consent of the landlord. In the present case, however, we have, already held that the transfer to the respondent was with the landlord's consent.

We may now refer to some of the more important cases which deal with the question of the course of succession in impartible estates. In *Tekaet Doorga Pershad Singh* v. *Tekaetnee Doorga Kooeree* (5) it was decided that an impartible *Ghatwali* estate might descend to the widow or mother of the deceased *Ghatwal* in preference to a collateral male agnate but in that case reliance was placed on the fact that the plaintiff was separated from and not joint with the last male holder. In *Katama Natchier* v. *Rajah of Shivagunga* (6) the dispute was between the late holder's wiow and daughters on the one hand and his brother's son and grandsons on the other. The last male holder was found to have been joint in estate with his brother. His son and after his death his grandson claimed the *zemindari* which was in the nature of an impartible principality. It was found that the *zemindari* in dispute was the separate property of the late *zemindar* in which his brother has no interest as a member of the joint family and it was upon this finding that the decision of the Privy Council ultimately turned. It was held that the property being separate or self-acquired, devolve upon the widows and daughters in preference to the brother's son and grandson in the same manner as other self-acquired property under the Mitakshara Law which prevailed in that part of Madras where the parties resided. It is important, however, to bear in mind that if their Lordships had found that the *zemindari* was not separate property they would have decided in favour of the brother's descendants in preference to the daughter as the following passage from the judgment at page 589 of the report shows: "Hence if the *zemindar*, at the time of his death, and his nephews were members of an undivided Hindu family, and the *zemindari*, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *zemindar*, at the time of his death, was separate in estate from his brother's family, the *zemindari* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews: following the course of succession which the law prescribes for separate estate. These propositions are incontestable." It will be observed from the passage quoted from the judgment of the Judicial Committee in 1863 that an impartible *zeminda i* was not necessarily the separate estate of the holder for the time being. It may be held as common family property in which case, subject to impartibility and the rule of primogeniture, it will descend according to the canons of devolution applicable to such property, that is to say, the joint male agnates will succeed to the exclusion of females, and of the agnates the eldest in the most direct line will take.

Again, in 1875, in the case of *Chintamun Singh* v. *Nowlukho Konwari* (7), their Lordships held that the fact that an estate is impartible does not imply that it is separate and in a Mitakshara family whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate, will follow another course of succession. The judgment refers to the earlier decision of the Board in 1870 in the case of *Sree Rajah Yanumula Venkayamah* v. *Sree Rajah Yanumula Boochia Venkondora* (8), where the *Shivagunga's case* (6) had been quoted in argument for the proposition that impartible property was always separate, but without success, and their Lordships had observed on that occasion as follows:—"The

(4) W. R. (1864) 249.
(5) 20 W. R. 154.
(6) 9 M. I. A. 539 at p. 543; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.
(7) 1 C. 153; 24 W. R. 255; 2 I. A. 263; 3 Sar. P. C. J. 537; 3 Suth. P. C. J. 204; 1 Ind. Dec. (N. S.) 98 (P. C.).
(8) 13 M. I. A. 333; 2 Suth. P. C. J. 303; 2 Sar. P. C. J. 546; 20 E. R. 576.

authority invoked, however, affords no ground for this argument. The decision in the *Shivagunga's case* (6) will be found to proceed solely and expressly on the finding of the Court that the *zemindari* in question was proved to be the self-acquired and separate property of Gowary Vallaba Taver. It assumes that if this had not been so the decision would have been the other way." The case of *Kali Pershad* v. *Anand Roy* (9) may here be referred to as it was relied on by the appellant partly for the proposition that a *Ghatwali* tenue is inalienable and partly for the proposition that it is not governed by the Mitakshara Law. The suit was by the son of a former *Ghatwal* to recover the estate which had been sold in execution of a decree obtained against his father on a bond. The arguments advanced on behalf of the plaintiff, the appellant, before their Lordships, were first, that the estate was inalienable except to the extent of the incumbent's life-interest, and, secondly, that by the Mitakshara Law the son acquired a right at birth which could not without his consent be defeated by the act of his father. Their Lordships held that a Kharagpur *Ghatwali*, which the property in suit was, could be alienated with the *zemindar's* consent and, secondly, that such a tenure was in some particulars distinct from and could not be governed by either the general objects of Hindu inheritance or the rule of the Mitakshara. The general objects of Hindu inheritance referred to are explained as the selection of heirs capable of exercising certain religious rites for the benefit of the deceased, and the Mitakshara rule as the right of the son immediately on his birth to share equally with his father in the ancestral immoveable estate. But their Lordships were particular to limit their decision to this, that the Mitakshara Law and the general Hindu Law of Inheritance were not to their full extent applicable to a *Ghatwali* tenure. There is nothing in this decision which necessarily implies that a *Ghatwali* tenure may not be held as common property of the joint family for some purposes as in the case of other impartible estates.

In *Durga Prashad Singh* v. *Trebini Singh* (10) the Privy Council again had to consider the nature of a *Ghatwali* tenure in Kharagpur, and expressed the view that it is ordinarily hereditary, the estate descending to such male members of the family as the *zemindar* approves as competent, and that it is the right of the family as long as they have male members competent to perform the duties to have one or more of them appointed *Ghatwals*. Their Lordships also agreed with the view of the Courts in India that the incidents of a *Ghatwali* tenure were not such as to give the family any rights over the property while it is in the hands of the *Ghatwal*. This decision proceeds upon the view that a *Ghatwali* tenure in Kharagpur ordinarily descends to the male members of the family as long as there is any one competent to perform the duties. We are unable to interpret this decision as any authority for the proposition that, in the event of the *Ghatwal* dying without issue, the succession should be regulated according to the rules affecting the devolution of separate property in a Mitakshara family which prefers the widow to the collateral male relations. The view expressed in that case as to the rights of the family over the property while in the hands of the *Ghatwal*, applies, as it seems to us, with equal force to all impartible estates. The only other case that need be referred to upon this point is that of *Baijnath Prasad Singh* v. *Tej Bali Singh* (11) decided by the Judicial Committee in 1921. It was the case of an impartible Raj held by a Mitakshara family. Most of the earlier authorities were there reviewed and it is unnecessary to refer to them here. The conclusions arrived at were that the fact that a Raj is impartible does not, in a case governed by the Mitakshara Law, make it separate or self-acquired property. It may be self-acquired or it may be the property of a joint undivided family. In the latter

(9) 15 I. A. 18; 15 C. 471; 12 Ind. Jur. 172; 5 Sar. P. C. J. 121; 7 Ind. Dec. (N. S.) 898 (P. C.).

(10) 48 Ind. Cas. 527; 46 C. 362; 24 M. L. T. 407; 28 C. L. J. 508; 9 L. W. 60; 21 Bom. L. R. 569; 46 I. A. 251 (P. C.).

(11) 60 Ind. Cas. 534; 25 C. W. N. 564; 19 A. L. J. 317; 33 C. L. J. 388; 40 M. L. J. 387; (1921) M. W. N. 300; 2 P. L. T. 257; 23 Bom. L. R. 654; 43 A. 228; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358 (P. C.).

case succession will be regulated according to the rule of survivorship, but as one person alone can hold the estate at a time the person designated is the eldest male member of the senior branch of the joint family. We can see no reason for applying a different rule of succession in the present case from that which governs other impartible estates. The history of the estate, so far as we know it, does not appear to afford any ground for treating the property as the separate or self-acquired property of the holder. The incidents of the tenure before Jungle Singh's period are unknown. The earliest documents show that it was claimed to have been the property of Jungle Singh's ancestors before the advent of British Rule in Bihar. At about the time of the Permanent Settlement a fresh grant was made to Jungle Singh by the Raja of Gidhuar at a fixed rent in perpetuity. It then descended in the direct male line for about 100 years. The junior branches of the family have from time to time acquired interests in certain *mouzas* of the estate by way of maintenance grants and have separated from the main branch retaining the estates so acquired in their own families. Ghansyam is found living jointly with his brother and nephew at the time of his death and the family is admittedly a Mitakshara family. Assuming, as one must, that the members of a joint Mitakshara family do not acquire in impartible property the same rights as in partible property belonging to the family such as the right of joint enjoyment, the right of partition or the right of restraint on alienation, they at least retain the right of survivorship and we consider that the burden of proving that the property is separate or self-acquired in the present case rests upon the plaintiff who asserts it. That burden, in our opinion, she has failed to dicharge.

The only question remaining to be determined is, whether the custom relied upon by the appellant is made out. Were it not for the admission in the written statement that Kishori Kumari succeeded to the estate by some family custom we should have been inclined to find that no custom of the family had been proved whereby even the senior widow was entitled to succeed in preference to the brother or nephew; but, assuming this matter to be concluded on the pleadings, we consider that no custom has been proved in favour of the junior widow. Since 1780 the succession has been from father to son without a break. No case has arisen in which the widows' claim could ever have been considered. Some of the appellant's own witnesses even admit that no other *Thakur*, by which term the holder of the title is designated, left two widows before Ghansyam, and it would be difficult to find in favour of a special custom applicable to a case which has never arisen so far as can be ascertained, unless there were some very strong evidence of tradition. After more than 20 witnesses had been called for the appellant, most of whom alleged the custom to exist without being able to refer to any instances, a witness, Sadho Singh, was called who mentioned an instance in which before the time of Jungle Singh one Pratap Singh had died childless leaving two widows who succeeded one after the other. This, he says, he heard from his grandfather but he is unable to mention the names of the widows. It is significant that none of the earlier witnesses many of them *gotias* of Ghansyam, had ever heard of it. On the other hand, they admitted, when asked, that they knew of no case of even one widow succeeding. Some 60 witnesses altogether were called for the appellant and of these two later ones also mentioned the case of Pratap Singh. There is no document to support it and the pedigree of the family produced in evidence does not go back further than Maniyar Singh, the father of Jungle Singh. It is, perhaps, significant that Pratap Singh's widows are said to have been the immediate predecessors of Maniyar so that it is impossible to check this statement from the pedigree produced which goes no further back than Maniyar, the father of Jungle Singh. Had the case been true it seems difficult to suppose that those responsible for presenting the plaintiff's case to the Court would not have been able to verify it and produce some more convincing evidence and further particulars with the names of the widows in question who succeeded in their family. Daleep Singh, an old man of 70, called by the appellant, whose name appears in the

pedigree and who is the grandson of one of Jungle Singh's brothers, says positively that in the family of the appellant no *Thakur* ever had two wives and, apart from Kishori Kumari, no *Thukrain* got the *gaddi* at any time. The next witness, Taran Singh, also a *gotia* of Ghnasyam says no female had succeeded to the *gaddi* in the family except Kishori Kumari and the appellant, and no other *Thakur* left two widows nor did he ever see a junior widow succeed after the senior widow at any other place. It may also be assumed that he never heard of it either. Evidence that such a custom exists is easily given but it is difficult to refute when the witnesses themselves can give no instances; and, when it is admitted that no such case has occurred, evidence of this nature should be treated with the greatest reserve. The respondent's witnesses who live at Dumri and the neighbourhood deny the custom whereby the junior widow succeeds, and, in our opinion, the learned Subordinate Judge who refused to accept the evidence of the appellant's witnesses on this point and who described them as having given their evidence as if by rote arrived at a proper appreciation of that evidence when he refused to believe it. It is also not without significance that no later than the year 1914 the appellant herself instituted a suit against her co-widow, Kishori Kumari, and Mukhtar Singh in whose favour Kishori had relinquished the estate, to recover a half share alleging not, as now, that she was entitled to succeed on the death of Kishori but that she succeeded jointly with her upon her husband's death and was entitled to a half share in the estate which she claimed to recover back and, at the same time, sought to set aside a number of mortgages and transfers of portions of the estate effected by Kishori Kumari, Pairu and Mukhtar. The basis of the title which she asserted at that time is entirely inconsistent with the custom which she now sets up. The truth appears to be, as found by the learned Subordinate Judge, and as would appear from the evidence of Daleep Singh and others of the appellant's witnesses, that when Ghnasyam died his brother Pairu claimed the *gaddi* and as the result of a family Council, in which a number of the *gotias* took part, the respective claims of Pairu and Kishori were mooted and an arrangement was come to that Kishori should be the *gadinishin* for the time being and after her death it would be seen whether Pairu would succeed. As a matter of fact Pairu had *de facto* control of the estate and was given a general power-of-attorney by the widow in 1881 and he took no active steps to assert his legal right in the circumstances. The learned Judge considered that this *am-mukhtarnama*, or general power-of-attorney, was a device by which Pairu was made to acquiesce in the position assigned him by the family council, the title remaining with Kishori but the estate being under the control of Pairu. As the family of Pairu and Mukhtar increased the expenses rose in proportion and the family got into debt. A great number of alienations and mortgages in order to raise money were executed. In Pairu's time they could be executed by himself under the general power-of-attorney, but after his death, in 1899, Kishori Kumari no doubt found it inconvenient to manage the estate and execute documents in her own name, and accordingly in 1900 relinquished in favour of Mukhtar Singh. There is evidence to show that everything she did was done in consultation with the appellant and no exception was taken. In 1914 judgments were obtained in mortgage suits for considerable amounts against Kishori, Mukhtar and the other members of the family. Seeing the property pass from their possession the present appellant was put forward in 1914 to endeavour to recover half the property by alleging that she and Kishori were jointly interested on the death of Ghansyam Singh. The suit, although in form against Kishori and Mukhtar, was in substance an endeavour to annul the alienations made by them and it was admitted by the appellant that Kishori paid the expenses of that suit. That suit failed and Kishori Kumari herself in 1915 brought another suit challenging all the acts of Pairu and Mukhtar as fraudulent. She died before it came to trial. The appellant attempted to get herself substituted in Kishori's place to carry on the suit but this came to nothing

and the suit subsequently abated. In the opinion of the learned Subordinate Judge the present suit was merely a third attempt on behalf of Mukhtar to save something out of the family property. Unfortunately, for the appellant, the plea she now sets up is entirely at variance with the case previously pleaded that she and Kishori Kumari succeeded jointly on the death of her husband. This part of the case was dealt with by the learned Judge in considering the question whether the appellant ever got possession of any part of the property after the death of Kishori Kumari. He found that she did not in fact do so, but that Mukhtar Singh was always in possession after the *bazidawa* deed was executed in his favour in 1900. This aspect of the case, however, also has a bearing in considering the plea now put forward by the appellant as to custom.

In our opinion, the learned Subordinate Judge was right in the conclusions at which he arrived and we consider that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 173 OF 1920.
April 25, 1922.
Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.
Kumar BASANTA KUMAR ROY AND OTHERS—DEFENDANTS—APPELLANTS
versus
MANJURI DASSI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (2)—Execution of decree—Appellate Court dismissing appeal on ground of deficient payment of Court-fees—Limitation, operation of.

The word "appeal" in Art. 182 (2) of the Schedule to the Limitation Act should not be restricted to mean *bona fide* appeal. The fact that there was an appeal of which the Appellate Court had seizen and which was determined by a judgment of that Court, is sufficient to bring the provisions of Art. 182 (2) of Sch. I to the Limitation Act into operation and the period of limitation for execution of the decree would run from the date of the final decree or order of the Appellate Court. [p. 680, col. 2; p. 681, col. 1.]

Where an appeal is admitted, heard and an order passed dismissing it on the ground that proper Court-fees had not been paid on the memorandum of appeal, the order is equivalent to a decree and limitation would run with regard to execution from the date of that order. [p. 680, col. 2.]

Dianatullah Beg v. *Wajid Ali Shah*, 6 A. 438; A. W. N. (1884) 153; 4 Ind. Dec. (N. S.) 99, distinguished.

Rupsingh v. *Mukhraj Singh*, 7 A. 887; A. W. N. (1885) 260; 4 Ind. Dec. (N. S.) 969, referred to.

Appeal against the order of the Subordinate Judge, Nadia, dated the 20th of April 1920.

Babu *Mahendranath Roy* (with him Babu *Surendra Mohan Ghosh*), for the Appellants.—The defendants judgment-debtors are the appellants. The appeal arises out of an application for execution of a rent decree which was equivalent to a money-decree. The objection as to limitation was disallowed. Hence this appeal. The decree for money was passed on 29th July 1915. There was an appeal by the decree-holder to the High Court which was dismissed on 5th May 1919, as no Court-fees were paid. The present application was made on 5th December 1919. I submit there was no appeal within the meaning of Art. 182 (2) of the Indian Limitation Act. That was not a *bona fide* appeal by the decree-holder. The authorities on the point are rather conflicting. In the case of an appeal which is not *bona fide* and is wholly incompetent, it cannot be said to be an appeal as contemplated by Art. 182 (2) of the Indian Limitation Act. A suit for rent was brought in 1908 by the plaintiff for the years 1311-14 B. S. In that suit rent was claimed at the rate of Rs. 173-10-0 per annum. The Subordinate Judge decreed the suit at Rs. 929-9-0 per annum on 3rd July 1913. There was an appeal. The District Judge reduced the rate of rent to Rs. 521 per annum on 11th August 1914. The plaintiff appealed to the High Court on 17th November 1914. That appeal was valued on the basis of the difference between Rs. 929-9-0 and Rs. 521. The appeal was disposed of on 23rd January 1918 affirming the decision of the District Judge. Then, on 9th April 1914, the plaintiff brought a suit for rent for the period subsequent to 1314 B. S. and rent was claimed at Rs. 929-9-0 and the suit was decreed on

29th July 1915 at the rate of Rs. 521 per annum. The plaintiff, therefore, preferred a first appeal to the High Court. They did not value the appeal, on the ground that the previous second appeal was still pending. I submit there was absolutely nothing to prevent them from valuing the appeal as they could have valued it precisely as they valued the previous second appeal. These facts clearly show that the appeal was not *bona fide* at all. Refers to *Gour Chunder Shaha* v. *Gour Mohun Ghosh* (1); *Dianatullah Beg* v. *Wajid Ali Shah* (2); *Rupsingh* v. *Mukhraj Singh* (3). The case in *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (4) is clearly against me. Refers to *Mir Waziruddin* v. *Lala Deoki Nandan* (5); *Krishna Dayal Gir* v. *Syed Abdul Gaffur* (6); *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (7) and *Mahomed Abdul Kadir* v. *Sami Pandia Tevar* (8).

Babu *Ram Chandra Mazumdar* (with him Babus *Rupendra Coomar Mitter* and *Biraj Mohan Mazumdar*), for the Respondents, was not called upon to reply.

JUDGMENT.—In this case, the judgment-debtors are the appellants and their plea is that the execution of the decree is barred by limitation. The decree in this case was passed by the Court of first instance on the 29th of July 1915. There was an appeal by the plaintiffs, who are the decree-holders, to the High Court and the appeal was dismissed on the 5th of May 1919. The application for execution of the decree was presented on the 5th of December 1919: under paragraph 2 of the third column of Art. 182 of the Indian Limitation Act, there is no doubt that the application for execution would be within time. But the judgment-debtors contend that there was no *bona fide* appeal so as to bring the case under the provisions of the second paragraph of column 3 of Art. 182, and the reason for stating that the appeal was not *bona fide* is that *ad valorem* Court-fee was not paid on the memorandum of appeal and that the appeal was dismissed by this Court upon the ground that it was incompetent as the appeal was not valued and proper Court-fees had not been paid. The appellants rely upon the case of *Dianatullah Beg* v. *Wajid Ali Shah* (2) in support of their proposition that the period of limitation should not be reckoned from the date of the decree of the High Court dismissing the appeal on the 5th of May 1919. In that case, it appears that the appeal was not admitted on the ground of the deficiency of the Court-fees and it was held by that Court that there was no appeal or a final decree or order of an Appellate Court within the meaning of Art. 179 (2) of the Limitation Act of 1877. That is not the case here. There is no doubt that the appeal was admitted in this case. It was heard by the Court and a decree was pronounced dismissing the appeal; and it cannot, therefore, be said that there was no appeal within the provisions of Art. 182 (2) of the Limitation Act. It is argued on behalf of the appellants that the word "appeal" must be read to mean *bona fide* appeal. But we are unable to accept this contention because, if this were accepted, the result would be that, in every case, the Court of execution would have to decide the question whether any appeal preferred from the decree was a proper and *bona fide* appeal or not. In our opinion, that cannot be the meaning of the provisions of Art. 182 (2) of the Limitation Act. On the other hand, there is the case of *Rupsingh* v. *Mukhraj Singh* (3). In that case, it was held that, where a Judge of the Court exercising jurisdiction in respect of the registering of appeals made an order dismissing an appeal on the ground of deficient payment of Court-fee, the order was equivalent to a decree and that limitation would run with regard to execution from the date of that order. The real question in this case, therefore, is whether there was an appeal of which this Court had seizen and which was determined by a judgment of this Court. If that was so, it would bring

(1) 5 W. R. Mis. 11.
(2) 6 A. 438; A. W. N. (1884) 153; 4 Ind. Dec. (N. S.) 99.
(3) 7 A. 887; A. W. N. (1885) 260; 4 Ind. Dec. (N. S.) 969.
(4) 16 C. 250; 8 Ind. Dec. (N. S.) 165.
(5) 6 C. L. J. 472.
(6) 40 Ind. Cas. 13; 2 P. L. J. 402; 2 P. L. W. 229.
(7) 74 Ind. Cas. 660; 48 I. A. 335 at p. 344; 30 M. L. T. 96; 24 Bom. L. R. 659; (1922) M. W. N. 338; 26 C. W. N. 858; 49 C. 203; 4 U. P. L. R. (P. C.) 57; (1922) A. I. R. (P. C.) 187 (P. C.).
(8) 60 Ind. Cas. 267; 39 M. L. J. 431; 12 L. W. 304; (1920) M. W. N. 587; 43 M. 835.

the provisions of Art. 182 (2) of the Limitation Act into operation and the period of limitation for execution of the decree would run from the date of the final decree or order of the Appellate Court. The appellants cited some other cases in support of their contention; but, in our opinion, these cases do not really touch the present question. We think that the decision appealed against is right and the appeal should be dismissed with costs. We assess the hearing fee at five gold *mohurs*.

B. N. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 200 OF 1922.
May 9, 1923.
Present:—Mr. Justice Gokul Prasad.
CHHAJJU AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JHABBA AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy (II of 1901), s. 34—Squatter in possession without consent of landlord—Occupancy rights, when accrue—Zemindar, *whether can sue for ejectment.*

Where a squatter has been in possession of land without the consent of the landlord his occupation for any number of years would not vest him with the rights of an occupancy tenant; but occupancy rights would commence to accrue from the date the squatter commences to pay rent.

The question as to when a presumption arises that the possession of a tenant is without the consent of the landlord depends upon the facts of each case.

It is open to the *Zemindar* to treat a squatter as a tenant by bringing a suit for ejectment against him.

Babu Sat Narain Prasad v. *Ram Kumar*, Sel. Dec. No. 3 of 1910, followed.

Second appeal against a decree of the Additional Judge, Moradabad, dated the 8th November 1921.

Mr. *Kailas Chandar Mital*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for ejectment. The plaintiffs who are *muafidars* sued under section 63 for the ejectment of the defendants as their tenants. The first written statement filed by the defendants was to the effect that the defendants had been in possession for more than twelve years and as the plaintiffs were *muafidars* the defendants had acquired occupancy rights and were occupancy tenants. This was on the 6th of January 1921. A supplementary written statement was filed on the 1st of April 1921, in which the defendants pleaded that they were *Zemindars* and as the plaintiffs were *muafidars* they ought to have proceeded under section 79 of Act II of 1901, and having failed to take any such steps for 14 years the suit was liable to dismissal. They further contended that the relationship of landlord and tenant did not subsist between the parties and that the suit was not barred by limitation. The suit was brought in the Revenue Court and the Assistant Collector found that the relationship of landlord and tenant subsisted between the parties. He also came to the conclusion that the defendants were sub-tenants of the plaintiffs and as they had never paid rent they could be only non-occupancy tenants and had not acquired any right of occupancy. On these findings the Assistant Collector decreed the claim. The defendants went up in appeal and the learned District Judge has found that the plaintiffs are *muafidars khairati*, and could not be tenants-in-chief and, therefore, the defendants are not sub-tenants. The learned Judge has further found that the defendants having been in possession for more than 12 years without payment of rent had become occupancy tenants. On this finding, he has dismissed the suit. The plaintiffs come here in second appeal and their first contention is, that the defendants having been in possession without the consent of the plaintiffs, the plaintiffs were entitled to treat them as tenants under section 34 and sue for their ejectment. So far as the plaint itself goes the suit has not been brought on these allegations. The learned Vakil for the appellants has referred me to a large number of rulings to show that the Board of Revenue has held that where a squatter has been in possession of a plot of land without the consent of the landlord his occupation for any number of 12 years

would not vest him with the rights of an occupancy tenant, but that occupancy rights would commence to accrue only from the date the squatter commences to pay rent. This is evident from the last portion of section 34 itself and does not require any ruling in support. The question, however, about which the Board itself is not consistent is, when does the presumption arise that the possession of the tenant is without the consent of the landlord. In my opinion, the decision of this question would depend upon the particular facts of each case and it is not a question capable of a uniform answer. It is obvious that section 79 of the Tenancy Act has no application to the facts of this case, because the plaintiffs are *muafidars khairati* and not tenants. It is also evident that the defendants, *zemindars*, could not have put in 12 years necessary for the acquisition of a right of occupancy because they have admittedly not paid rent. The defendants, *zemindars*, could not have acquired proprietary rights because there is nothing to show, that they ever asserted a title adverse to the plaintiffs, the *muafidars*, to their knowledge. The plaintiffs have treated them as tenants by bringing this suit for their ejectment [see in this connection the case of *Babu Sat Narain Prasad* v. *Ram Kumar* (1)]. The defendants being neither proprietors nor occupancy tenants ought to have been ejected and the decree of the first Court should not have been interfered with. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

M. A. A. *Appeal allowed.*

(1) Sel. Dec. No. 3 of 1910.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1080 OF 1915.

March 7, 1923.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

DEBI PARSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BHAGO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of defendant during pendency of suit—Legal representatives not substituted—Decree against deceased defendant, legality of.

It is illegal for a Court to continue to hear a suit against a dead person whose death has been brought to its notice and to pass a decree against such person in the absence of his legal representative being brought on the record. [p 683, col. 2; p. 684, col. 1.]

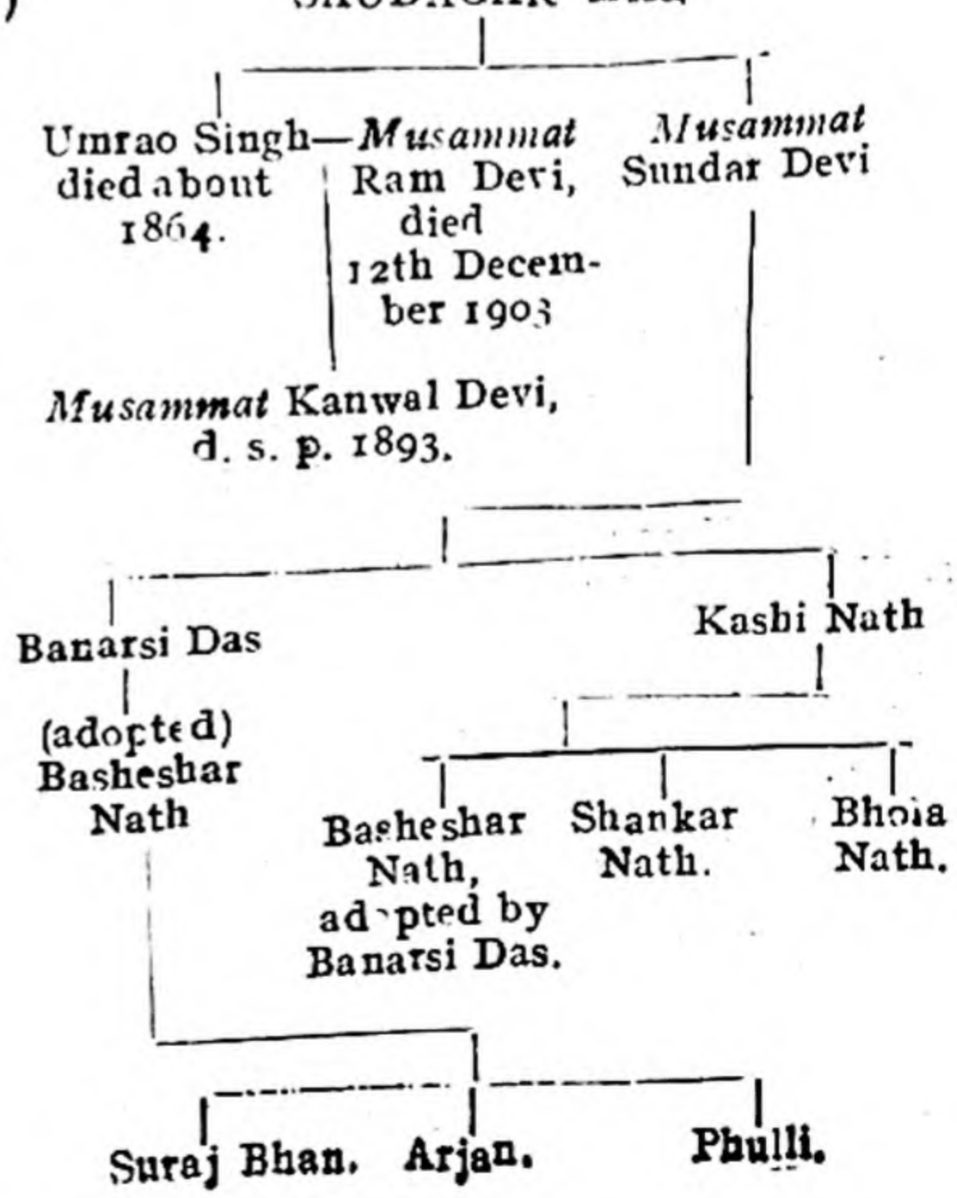
First appeal from a decree of the Subordinate Judge, First Class, Delhi, dated the 6th January 1915.

Mr. *M. S. Bhagat* and Lala *Jagan Nath*, for the Appellants.

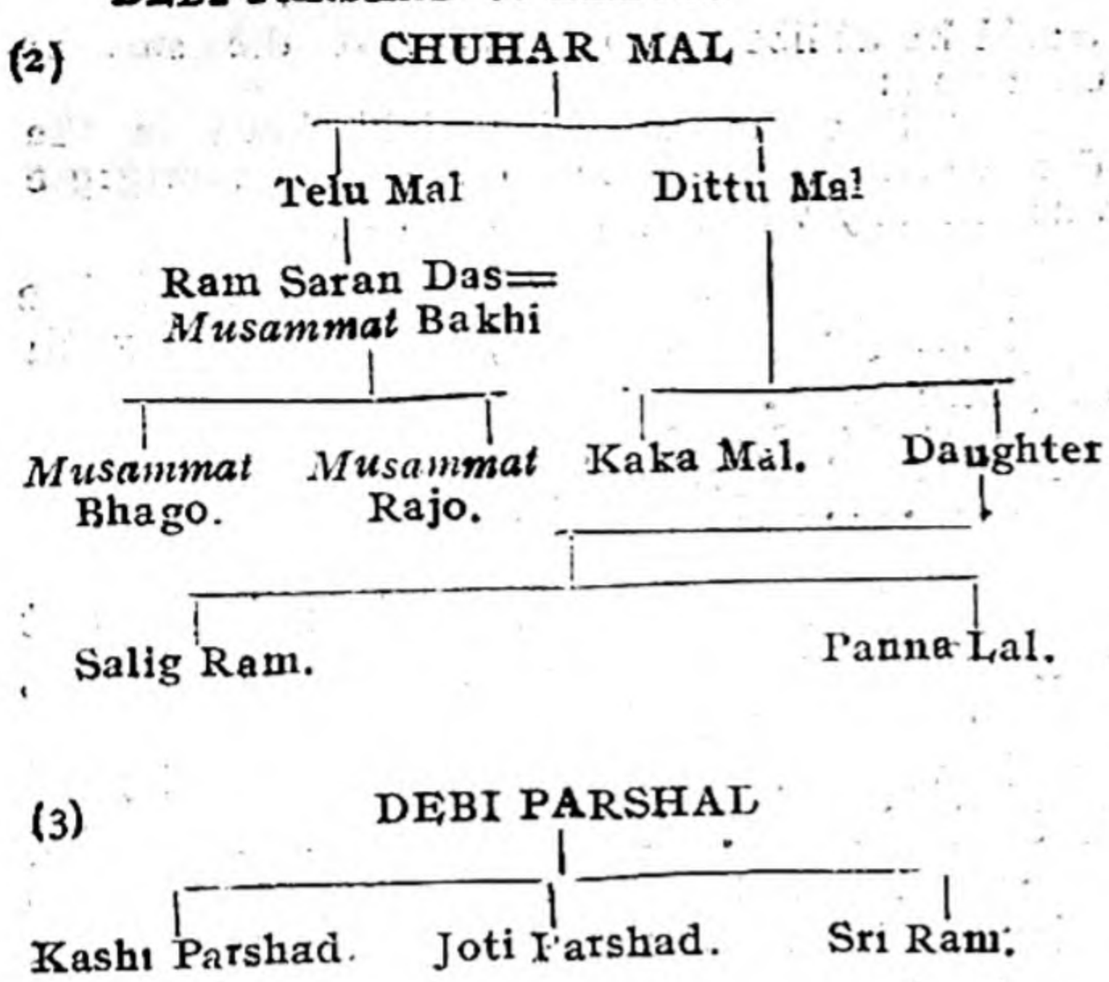
Lala *Sardha Ram*, (with him Mr. *Manohar Lal*, Lala *Balwant Rai* and Lala *Mehr Chand Mahajan*), for the Respondents.

JUDGMENT.—The following three pedigree-tables are necessary for the understanding of the matter in controversy in this appeal:—

(1)



DEBI PARSHAD *v.* BHAGO.



Umrao Singh (Pedigree No. 1) was the owner of considerable property which was held by his widow *Musammat* Ram Devi until her death in December 1903. Three sets of claimants to the succession then appeared, (1) the descendants of Umrao Singh's sister *Musammat* Uttam Devi, (2) Ram Saran Das and Kaka Mal, who alleged that Saudagar Mal's great-grand-father and Telu Mal's great-great-grand-father had been brothers, and (3) Debi Parshad and his sons who also claimed to be descended from a brother of Saudagar Mal's great-great-grand-father. On the 19th January 1904 these rivals entered into an agreement which was signed (1) by Bisheshar Nath for himself and as the guardian of his three sons and by Shankar Nath for himself and as guardian of Bhola Nath, (2) by Ram Saran Das and Kaka Mal, (3) by Debi Parshad for himself and as guardian of Sri Ram, and by Kashi Parshad and Joti Parshad. The parties agreed that each set of claimants should be owner of one-third of Umrao Singh's property, that a Succession Certificate or Letters of Administration should be taken out jointly or by one of the three parties and that all should combine to resist any other claimant.

Four years of litigation about Letters of Administration ensued, and Letters of Administration eventually were granted to Basheshar Nath alone on the 11th January 1908, the order being upheld by the Chief Court on 12th February 1909.

On the 8th March 1909 Debi Parshad and his sons sued for possession of one-third of the property by partition on the basis of the agreement of 19th January 1904. They obtained a preliminary decree on 21st March 1910 against which Basheshar Nath, and other defendants appealed unsuccessfully. A final decree was passed on 6th January 1915 dividing the property, and the present appeal is by the plaintiffs Debi Parshad and his sons against that final decree.

There is a cross-appeal by Basheshar Nath, Shankar Nath and Bhola Nath, No. 1323 of 1915, which will also be disposed of by this judgment as well as cross-objections filed (*a*) by *Musammat* Bhago, the sole surviving representative of Ram Saran Das, and Panna Lal, and Salig Ram, claiming to be representatives of Kaka Mal, and (*b*) by Phulli, son of Basheshar Nath.

It is necessary to set aisde the decree of the lower Court on a preliminary point and to send the case back for re-decision. The appeal against the preliminary decree was dismissed on 6th June 1912. Kaka Mal, defendant, died on 27th April 1914. Debi Parshad, plaintiff, applied to the Trial Court on 16th June 1914 for an order that he himself was the legal representative of Kaka Mal on that date and on 16th August 1914 the Court recorded directions that the defendants should reply to this application but no written replies are on the record and no order was passed on it. Kaka Mal continued to be shown as a defendant and the final decree was passed against him and the other defendants.

In Civil Appeal No. 1323 Mr. Manohar Lal, Advocate, applied on 7th June 1921, on behalf of Kaka Mal's sister's sons, Panna Lal and Salig Ram, that they should be made respondents as Kaka Mal's legal representatives. The application was granted subject to all just exceptions and objection is now taken in *Musammat* Bhago's cross-objections to which Panna Lal and Salig Ram have also subscribed, to the lower Court's failure to implead the legal representatives of Kaka Mal. This objection must be sustained, for it was obviously illegal for the Court below to continue to hear the suit against a dead person whose death had been brought to its

notice and to pass a decree against that person.

Accordingly, we set aside the decree of the lower Court and remand the case for re-decision after disposal of the application of 16th June 1916 and after the impleading as defendants of those persons whom the Court finds to be the legal representatives of Kaka Mal. The lower Court must be taken to have disposed of the case on a preliminary point and the remand, therefore, will be under O. XLI, r. 23. The stamps on both appeals will be refunded and costs will be costs in the cause.

Z. K. & N. H. *Decree set aside; Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1605 OF 1921.

March 7, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

PHUL CHAND AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat SURJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Equity of redemption, purchase of, by prior mortgagee, effect of—Priority—Usufructuary mortgage—Possession not delivered—Interest, whether can be claimed—Decree for sale on subsequent mortgage, form of.

A prior mortgagee who has purchased the equity of redemption is entitled to hold up the earlier mortgages which are satisfied out of the sale consideration as a shield against any attempt to deprive him of the property. [p. 684, col. 2.]

When a usufructuary mortgagee is unable to obtain possession of the mortgaged property and there is a definite covenant in the mortgage-deed that, in the event of his being unable to obtain possession, the mortgagee would be entitled to interest, he can claim interest on the mortgage amount. [p. 684, col. 2; p. 685, col. 1.]

A prior charge-holder in possession of the mortgaged property is not liable to have his possession disturbed until his charge is paid off. [p. 685, col. 1.]

A decree for sale on a subsequent mortgage provided that if the decree-holder failed to pay off the prior mortgagee by the date fixed the latter would be at liberty to apply that the suit be dismissed:

Held, that the condition laid down in the decree giving the option to the prior mortgagee was perfectly valid. [p. 685, col. 1.]

Second appeal against a decree of the District Judge, Meerut, dated the 13th of June 1921.

Dr. *S. N. Sen*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants, Phul Chand and Kanchu Mal, for sale on the basis of a mortgage of 7th April 1916 in their favour. The defendants Nos. 2-4 who are the answering respondents held two prior mortgages on the same property, one executed on 7th December 1907 and the other on 13th October 1915. After the date of the plaintiff's mortgage, namely in the year 1919, these defendants purchased the property for a sum of Rs. 5,000. Out of this sum, Rs. 3,800 was taken in satisfaction of the mortgage of 1907 including interest, Rs. 43-12-0 was credited on account of the mortgage of 1915 and the remainder went in satisfaction of an earlier mortgage of the year 1887 in favour of the plaintiffs. It is now settled law that, under such circumstances, the defendants are entitled to hold up the earlier mortgages which were satisfied out of the sale consideration as a shield against any attempt to deprive them of the property. The Courts below have accordingly passed a decree requiring the plaintiffs, as a condition of getting the property sold, to re-pay to the defendants the amounts of the mortgages of 1907 and 1915. Against this decree the plaintiffs appeal. Of the eight grounds of appeal the only ones that have been pressed are those contained in the 1st, 7th and 8th paragraphs. The first plea was, that as the mortgage of 1907 purported to be a usufructuary mortgage the defendants were not entitled to claim any interest under it. It has been found and cannot be disputed that, although this mortgage purported to be a usufructuary mortgage the defendants were unable to obtain possession. There was also a definite covenant in the mortgage-deed of 1907 that the defendants should be entitled to interest in the event of their

being unable to obtain possession. The Courts below have rightly allowed interest under this covenant. The 7th plea is to the effect that only a sum of Rs. 43-12 on account of the mortgage of 1915 was allowed as part of the sale price on the purchase of the property by defendants, they are only entitled to claim this amount as a charge on the property. There is nothing on the record to show why the whole amount of the decree under this mortgage was not included in the sale consideration, but it has been found by the Court below, as a fact that the whole amount of the mortgage was due on the property. As the amount was decreed to the defendants themselves they are entitled to claim it. The last point has reference to the form of the decree passed by the Court below. The decree directs that, unless the plaintiffs pay the amount by the date fixed in the decree under the earlier mortgages the defendants Nos. 2—4 shall be at liberty to apply that the suit be dismissed. The appellants' contention is that the decree should have directed the property to be sold leaving the prior mortgagees to get what they could from the sale-proceeds. This is not the law. The defendants are prior charge-holders in possession of the property and are not liable to have their possession disturbed until their charge is paid off. The form of the decree in some cases, given as form No. 8 Appendix D of the Code of Civil Procedure, provides that in case the plaintiff fails to make the necessary payment to prior mortgagee the latter shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property. The option lies with the prior mortgagee, and as the prior mortgagees in this case are perfectly satisfied with the decree as it stands, the plaintiffs have no cause of complaint.

The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale subject to this that the time for the plaintiffs to pay the money due to the defendants Nos. 2—4 is extended to three months from this date.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1878 OF 1918.

January 5, 1923.

Present:— Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

KARTAR SINGH—DEFENDANT—APPELLANT

versus

LABH SINGH AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Ancestral property—Common ancestor mentioned in pedigree-table, effect of—First appeal—Printing documents—Practice—Adjournment for printing, whether can be granted.

The mere mention of the common ancestor in a pedigree-table is not of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor. [p. 686, col. 1.]

Jiwan Singh v. *Har Kaur*, 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914, dissented from.

A finding as to the ancestral nature of property must be based on positive evidence. Conjecture cannot, in such a case, be allowed to take the place of proof. [p. 686, col. 2.]

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.), followed.

The practice of the Lahore High Court with regard to the printing of records in first Appeals is, that the oral evidence is printed at the expense of the appellant, whereas documents are printed at the expenses of the party desiring it. [p. 686, col. 1.]

It is not the duty of an appellant to get those documents printed on which the respondent relied in the Court below. [p. 686, col. 2.]

In the absence of a reasonable excuse for the failure of a party to get the necessary documents printed the Court will not adjourn the hearing of a case to enable it to get them printed. [p. 686, col. 2.]

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 20th May 1918.

Dr. *Nand Lal*, for the Appellant.

Lala *Badri Das*, R. B., and Dewan *Mehr Chand*, for the Respondents.

JUDGMENT.—The property in suit in the case out of which this appeal and the cross-appeal arise belonged to Buta Singh, deceased, a Dhillu Jat, of village Sur Singh in the Kasur Tahsil. Plaintiffs claimed to succeed to it as being his collaterals in the fifth degree against his daughter's son Kartar Singh, alleged to have been adopted by Buta Singh. The property consists of land and a house. The Court below

held that the land was the ancestral property of the plaintiffs, whereas the house was not. It found the factum of adoption proved but held that it was not valid by custom. It, therefore, gave the plaintiffs a decree declaring that they were entitled to the land in suit, but dismissed their suit as regards the house. The defendant has appealed against the decree in regard to the land and the plaintiffs have filed a cross-appeal asking for a decree for the house claimed by them as well as for costs.

The documents produced by the parties in the lower Court, some of which have been referred in the judgment, and upon which parties relied, have not been printed. Letters in the usual form were sent by the office to the appellants' Counsel, but, in spite of this, they did not apply to have any of the documents printed. According to the practice of this Court the oral evidence in the case is printed at the expense of the appellant whereas the documents are printed at the expense of the party desiring it. Dr. Nand Lal in support of his appeal contended that there was no evidence on the printed record that the land was ancestral *qua* the plaintiffs. The only evidence relied upon by the lower Court in support of its finding that the land is ancestral is that the common ancestor of the deceased and the plaintiffs by name Kora, son of Parja, is mentioned in the pedigree-table of the Settlement of 1868. It refers to *Jiwan Singh* v. *Har Kaur* (1) in which it was stated that the express mention of the common ancestor in the pedigree-table in that case was presumptive proof that the land descended from him. Now, with all due respect to the Judges who were parties to that decision we are unable to hold that the mere mention of a common ancestor in a pedigree-table is of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor. Mr. Badri Das on behalf of the plaintiffs referred to *Lal Shah* v. *Hira Lal* (2) in which it was held that when a person has obtained a decree in his favour the *onus* is on the appellant in a Court of Appeal to show that the decision is wrong. He urges that his clients having obtained a finding that the land is ancestral, the *onus* is now on Kartar Singh, defendant, to show that the land is not ancestral. This proposition, no doubt, is generally correct, but Mr. Nand Lal replies to it by saying that there is no evidence on the printed record in support of the finding and, that, therefore, it should not be maintained. We cannot agree with Mr. Badri Das that it was the duty of the defendant to get these documents printed upon which the plaintiffs relied in the Court below. According to the practice of this Court it was the duty of the plaintiffs to get any documents upon which they relied printed. No excuse is offered for their neglect to do this, and we, therefore, refuse to adjourn the case in order that the necessary documents may be printed.

We are quite unable to hold on the evidence upon the record before us that it is proved that the land in dispute is the ancestral property of the plaintiffs. It was laid down by the Privy Council in the case reported as *Atar Singh* v. *Thakar Singh* (3) that in a case of this sort conjecture cannot take the place of proof. We, therefore, hold that the plaintiffs upon whom the burden lay to prove that the land was ancestral have not discharged it.

This being our finding in regard to the land for which a decree has been passed, it is obvious that there is no proof that the site in the village upon which the house in dispute stands is ancestral. We, therefore, accept the defendant's appeal and dismiss that of plaintiffs and setting aside the order of the lower Court dismiss the plaintiffs' suit.

As the defendant also omitted to get the documents upon which he relied in regard to the question of custom printed we think it will be equitable to order that parties should bear their own costs in both the Courts, and we make this order accordingly.

Z. K. *Defendants' appeal accepted.*
Plaintiffs' appeal dismissed.

(1) 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914.

(2) 41 Ind. Cas. 163; 106 P. R. 1917, 119 P. W. R. 1917.

(3) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.).

UMRAO BEG *v.* MUKHTAR BEG.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 314 OF 1919.

February 16, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Mirza UMRAO BEG—JUDGMENT-DEBTOR—APPELLANT

versus

Mirza MUKHTAR BEG AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Execution of decree—Decree for costs in favour of several plaintiffs—Satisfaction by some decree-holders, validity of—Execution—Procedure—Court, discretion of.

A decree for costs in favour of several plaintiffs operates as a simple money-decree jointly in favour of all the plaintiffs, and can only be executed by all the decree-holders jointly, or by some only of the decree-holders subject to the provisions of O. XXI, r. 15 of the Civil Procedure Code. No one of the decree-holders is entitled to grant full discharge of the decree out of Court, or to certify to the Court complete satisfaction of the decree, without the concurrence of all the decree-holders. [p. 687, col 2.]

A wide discretion is conferred upon the Execution Court by O. XXI, r. 15 of the Civil Procedure Code and so long as it insists upon payment of the entire amount of the decree by the judgment-debtor, it has authority to make such adjustment of the rights of the decree-holders *inter se* as it may think equitable and proper; and for this purpose, without going behind the decree, or entering into any question, which if it was to be litigated at all between the plaintiffs should have been adjudicated upon prior to the passing of the decree and not after, it is entitled to examine the pleading and to inform itself as to the precise position of the plaintiffs as they came into Court. [p. 688, col. 1.]

Execution First Appeal from a decree of the Subordinate Judge, Agra, dated the 26th of July 1919.

Messrs. *Iqbal Ahmad* and *S. Raza Ali*, for the Appellant.

Drs. *S. M. Sulaiman* and *S. N. Sen*, for the Respondents.

JUDGMENT.—This is an execution first appeal arising out of an unfortunate litigation which has already occupied our attention in connection with Regular First Appeal No. 39 of 1920. The point which we are now called upon to decide is, however, distinct from any of the questions raised in the connected appeal above referred to. The suit was one for partition. There were fifteen plaintiffs in the case, and in the preliminary decree as drawn up these plaintiffs were awarded their costs against the defendant. There was an appeal to this Court and also a petition of cross-objections on the part of the plaintiffs, with the result that the preliminary decree passed by the Trial Court was further modified in favour of the plaintiffs and the defendant was made liable to a further sum on account of costs. The application with which we have to deal is an application by fourteen of the plaintiffs, Nos. 2-15, asking that the entire decree for costs may be executed, subject to such orders as the Court may see fit to pass for the preservation of the rights of the first plaintiff, *Musammat* Faiyazi Begam, who had declined to join in the application for execution. The attention of the Execution Court was, therefore, distinctly drawn to the provisions of O. XXI, r. 15 of the Civil Procedure Code, but it is by no means clear from the order passed whether that Court applied its mind to these provisions. The point of the matter is, that the first plaintiff, *Musammat* Faiyazi Begam, is the own sister of the judment-debtor defendant, Mirza Umrao Beg and it has been made evident enough, not only from the proceedings in this execution matter, but from proceedings which have taken place in the Court below in connection with the preparation of the final decree for partition, that the brother and sister have come to some sort of arrangement amongst themselves. In connection with that arrangement, no doubt, the first plaintiff, *Musammat* Faiyazi Begam, has certified to the Court below that she has realised the full amount of the costs awarded under the decree, which the remaining plaintiffs are now seeking to execute. The Court below has rightly held that the decree for costs as drawn up operates, independently of the rest of the decree, as a simple money-decree, jointly in favour of all the plaintiffs. It follows as a natural consequence that it can only be executed by all the decree-holders jointly, or by some only of the decree-holders subject to the provisions of O. XXI, r. 15 of the Civil Procedure Code above referred to. It also follows that no one of the decree-holders is competent to grant full discharge of the decree out of Court, or to certify to the Court complete satisfaction of the decree, without the

UTTAM SINGH v. RUTAN DEVI.

concurrence of all the decree-holders. So far, the decision of the Court below is correct. If the judgment-debtor has really paid the entire amount of the decree to his sister, but has done so with the obvious intention of evading the provisions of O. XXI, r. 15 of the Civil Procedure Code, he must take the consequences if the result is in fact to compel him to pay the whole amount of the decree, or any part thereof, twice over. The real difficulty in the case turns on the proper application of the discretion allowed to the Court by O. XXI, r. 15 of the Civil Procedure Code. We have no doubt, that this is a wide discretion and that the Court, so long as it insists upon payment of the entire amount of the decree by the judgment-debtor, has authority to make such adjustment of the rights of the decree-holders *inter se* as it may think equitable and proper. Those rights, however, are the rights under the decree. In the present instance, the Court below seems to have assumed that if there be a decree in favour of a large number of plaintiffs it must be understood that they are entitled to divide the money amongst themselves *per capita*. Even on this basis we find it a little difficult to understand why the Court below has given the applicants for execution ⅞ths of the decretal amount, seeing that they represent 14 out of 15 plaintiffs. We think, however, that the Court, without going behind the terms of the decree, or entering into any question which, if it was to be litigated at all as between the plaintiffs, should have been adjudicated upon prior to the passing of the decree and not after, is nevertheless entitled for the purposes of O. XXI, r. 15 of the Civil of Procedure Code to examine the pleadings and to inform itself as to the precise position of the plaintiffs as they come into Court. Once this is done, it becomes obvious that the two sets of plaintiffs, namely, *Musamma* Faiyazi Begam as the plaintiff of the first party and the remaining plaintiffs as plaintiffs of the second party, were equally interested in the result of the litigation. The logical way, therefore, of adjusting the accounts between them would be to see that they each got half of the money due under the decree for costs. Now *Musammat* Faiyazi Begam has committed herself to certifying to the Court, that she has been paid in full. Her interests, therefore, are sufficiently protected under the terms of the rule in question by taking note of the fact certified by her. The result we thus arrive at is, that execution of this decree should have been permitted in favour of the remaining decree-holders to the extent of a half share in the costs. We modify the order of the Court below accordingly. Parties will pay and receive costs of this appeal in proportion to failure and success. The costs will include fees on the higher scale.

Z. K. *Decree modified.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3003 OF 1918.
December 21, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

UTTAM SINGH—DEFENDANT—APPELLANT

versus

Musammat RUTAN DEVI, AND OTHERS LEGAL REPRESENTATIVES OF ANANT RAM, DECEASED—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 36, 71, 72, 73, 77—Refusal to register—Application to Registrar headed as appeal, dismissal of—Suit to enforce registration, maintainability of.

In a suit under section 77 of the Registration Act to enforce registration of a document the Court is only concerned with the genuineness and execution of the document; questions relating to the validity of the document are not legitimately within the scope of such a suit. [p. 690, col. 1.]

Plaintiff lodged a sale-deed for registration with the Sub-Registrar and took out a summons directing the defendant to appear and admit execution. Defendant failed to appear and the Sub-Registrar refused to register the deed. Plaintiff thereupon made an application to the Registrar which was headed as an appeal and was described as an application under sections 72 and 73 of the Registration Act. The application was not verified as a plaint as required by section 73. The Registrar rejected the application on the ground that it was an appeal under section 72, which did not, under the circumstances, lie. Plaintiff then filed a suit under section 77 of the Registration Act:

UTTAM SINGH *v.* RUTAN DEVI.

Held, (1) that the application to the Registrar was in substance one under section 73 of the Registration Act and the defects were merely formal; [p. 691, col. 1.]

(2) that the mere fact that the application was headed as an appeal or that an erroneous section of the Act was mentioned therein was not sufficient to take it away from the category of an application under section 73 of the Registration Act; [p. 691, col. 1.]

(3) that there had been a substantial compliance with the provisions of section 73 of the Registration Act and that the dismissal of the application by the Registrar, although technically under section 72 was one really under section 76 of the Act; [p. 692, col. 1.]

(4) that, therefore, the suit under section 77 of the Registration Act was maintainable. [p. 692, col. 1.]

Tribeni Sahu v. *Bhagwat Bux Rai*, 34 C. 1037; 11 C. W. N. 1030; 6 C. L. J. 298 (F. B.), *Bechun Sahu* v. *Syed Ali Rasul*, 16 Ind. Cas. 614, *Bisheshar Nath* v. *Emperor*, 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L. J. 865, referred to.

First appeal from the decree of the Subordinate Judge, First Class, Amritsar, dated the 28th October 1918.

Pandit *Sheo Narain*, R. B., Bakhshi *Tek Chand* and Dr. *Nand Lal*, for the Appellants.

Lala *Faqir Chand* and Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—This was a suit to enforce registration of a sale-deed under section 77 of the Indian Registration Act. The facts are briefly these. On the 21st March 1917 the defendant sold two houses in the City of Amritsar to the plaintiff for a sum of Rs. 7,000. A sale-deed was duly executed, signed and delivered to the plaintiff. Out of the sale price fixed a sum of Rs. 3,700 was paid to the defendant in advance on the day the sale-deed was completed and as to the balance of Rs. 3,300 it was stipulated that it would be paid before the Sub-Registrar on the day the deed was registered. The plaintiff's allegation is that he repeatedly called upon the defendant to get registration of the sale-deed effected, and to receive the balance of the sale price but he failed to do so. On the 23rd April 1917 the plaintiff lodged the sale-deed with the Sub-Registrar of Amritsar, and took out a summons under section 36 of the Registration Act ordering the defendant to appear and admit execution on the 30th May 1917. The summons was duly served, but he neglected to appear. Thereupon the Sub-Registrar refused to register the document and returned it to the plaintiff with an endorsement "Registration refused." The plaintiff thereupon moved the Registrar on the 7th June 1917 by an application which was couched in the following words:—

"ANANT RAM—APPELLANT

versus

UTTAM SINGH—RESPONDENT.

"Miscellaneous appeal from the order of the Sub-Registrar, Amritsar, dated the 30th May 1917, refusing registration of the sale-deed, executed by the respondent in favour of the applicant for Rs. 7,000 in respect of house situate at Amritsar.

"GROUNDS.—On the 21st March 1917, the respondent executed a deed of sale for Rs. 7,000 in respect of a house, situate at Amritsar, in favour of the appellant and completed the same. He, after signing the deed in Persian and English characters in the presence of witnesses, and after perusing the contents of the deed, made it over to the appellant vendee for getting it registered. Out of the sale money he received Rs. 3,700 and the remaining Rs. 3,300 was to be paid before the Sub-Registrar. The appellant, under section 36 of the Registration Act, filed an application in the office of the Sub-Registrar for authoritative registration. But the respondent did not put in appearance in spite of his having been personally served with summons. Therefore, the Sub-Registrar refused registration. Hence an application under sections 72 and 73 of the Registration Act is made with the prayer that the applicant's appeal may be accepted and the sale-deed ordered to be registered. The appellant is prepared to pay the remaining sale money. The sale-deed is herewith attached in original.

Dated the 7th June 1917.

Petition of—

(Sd.) Anant Ram, Appellant."

The application was in writing and was duly signed by the applicant and was accompanied by a copy of the reasons recorded under section 71 of the Registration Act. It was made within three days from the date of the refusal of the Sub-Registrar to register the document and

UTTAM SINGH *v.* RUTAN DEVI.

was presumably presented in person by the petitioner in the office of the Registrar. The only defect in the application was that it was not verified by the petitioner in the manner required by law for the verification of the plaints. Otherwise it fully complied with the requirements laid down in section 73 of the Act. The Registrar treated this application as an appeal under section 72, and after service of notice on the defendant, the executant of the deed, dismissed it on the 13th August 1917 on the ground that registration had been refused because of denial of execution and that, consequently, an appeal under section 72 of the Registration Act was not competent. The present suit was then instituted by the plaintiff on the 27th of August 1917. The main cotention of the defendant was that the suit was not maintainable inasmuch as the plaintiff had failed to perform the preliminaries of procedure and conditions essential to entitle him to the remedies and reliefs provided for in section 77. Other pleas on the merits were also raised but it is now conceded that in a suit under section 77 the Court is only concerned with the genuineness and the execution of a document, and that questions relating to its validity are not legitimately within its scope. On the question of the maintainability of the suit, the Senior Subordinate Judge found in the affirmative and decreed the plaintiff's suit. Against this judgment and decree the defendant has appealed to this Court through Pandit Sheo Narain, and we have listened to lengthy arguments by Counsel on both sides.

The contentions of the learned Counsel for the appellant are two-fold. Firstly, it is contended that the provisions of section 73 are imperative and that they must be strictly complied with before a party could sue under section 77 of the Indian Registration Act. It is urged that where the plaintiff ought to have applied under section 73, but mistaking his remedy preferred an appeal to the Registrar under section 72, it is the same as if he did not go at all before the Registrar. The second contention of the learned Counsel is that the failure on the part of the executant to appear and admit is equivalent to denial of execution and that a refusal to register under such circumstances does not entitle a party to appeal under section 72 of the Act, but his proper remedy is to move the Registrar only by a petition under section 73.

Mr. Badri Das, on the other hand, contends that the provisions of section 73 were fully complied with in this case, that the non-appearance of a party to admit execution does not necessarily lead to the inference that execution is denied, that in the present case it was doubtful if registration was refused on the ground of denial of execution and that consequently the petition-writer who drafted the petition adopted the best possible course open to him under the circumstances, *viz.*, to mention both the sections 72 and 73 in the petition and to leave it to the Registrar to decide which of the two sections was applicable. It is further cotended that the refusal to register by the Registrar was in any case under section 76, and that this refusal entitles the plaintiff to sue under section 77 of the Act.

The question whether the non-appearance of a party to admit execution is equivalent to a denial of execution is a doubtful question on which opinions may differ. The Calcutta and the Bombay High Courts have consistently held that a wilful refusal or neglect to attend and admit execution is equivalent to a denial of execution, within the meaning of the Registration Act, but, with all respect to the learned Judges who have adopted this view, we are unable to understand how a Sub-Registrar is to distinguish between cases of wilful non-appearance and cases other than those of wilful non-appearance. A Sub-Registrar is precluded from conducting any enquiry upon this point and according to these very authorities must refuse to register the document if the executant has failed to put in an appearance. We do not see any valid reason why a mere failure to appear which may be due to an accident or to any other legitimate cause should be held to be wilful, and if the registration is refused, the refusal to register be held to be due to a denial of execution. Take, for instance, the case of a person who after duly executing a document hands it over to the person in whose favour it is executed. The latter presents the document to the Sub-Registrar for regisration and takes out

a summons for the executant of the deed to attend and admit execution on a particular date. On the date fixed the executant fully intending to attend and admit execution starts from his house but happens to meet with an accident on the way and fails to appear before the Sub-Registrar, who refused to register the document. The refusal to register in this case is clearly due to the non-appearance of the executant, but, can it be said that the non-appearance in this case is wilful, and that the refusal to register proceeds on the ground of denial of execution? The executant never denied execution, was in fact always prepared to admit execution, and it was only owing to some unforeseen circumstances that he was prevented from putting in an appearance. We very much doubt if, in these circumstances, the non-appearance could be said to be equivalent to a denial of execution. At all events, the question is not free from doubt and there is force in the argument of Mr. Badri Das that if, in these circumstances, the petition-writer drew up the petition for the plaintiff made a mistake in quoting the wrong section, or even if he mistook the remedy which was open to the applicant under the law the mistake was a *bona fide* mistake and should have been condoned by allowing the petitioner to amend his petition. It is, however, unnecessary to discuss this point any further as we are clearly of opinion that the appeal must fail on the ground that the plaintiff has substantially complied with all the requirements of law as required by section 73, and that he is entitled to maintain this suit under section 77, even if the refusal to register was due to denial of execution, and even if an appeal under section 72 was not competent.

As already pointed out, the only defect in the petition was that it was not verified as required by sub-clause (2) of section 73 of the Registration Act. In all other respects it was a perfectly valid and a good application under section 73. The mere fact that it was headed as an appeal or that an erroneous section of the Statute was mentioned therein would not be sufficient to take it away from the category of an application if it was in fact and in law an application under section 73 and the Registrar could not very well refuse to entertain it merely because it purported to be under section 72 which obviously had no application. In *Tribeni Sahu* v. *Bhagwat Bux Rai* (1), Mr. Justice Woodroffe observed :—" It is not to be supposed that a Court in the administration of justice will refuse an application, which on the merits it ought to grant, and in law can grant simply because the applicant asks the Court to exercise its admitted powers under a wrong section." These remarks apply with full force to the facts of the present case, and we are clearly of opinion that the erroneous mention of the section in the application did not vitiate it in any way whatever. Pundit Sheo Narain, however, strenuously argues that the defect as to want of verification was fatal to the proceedings, and cites a large number of authorities in support of the proposition that the provisions of the Registration Act are mandatory in their nature, and must be strictly observed. We have examined all these authorities, and are of opinion that they have no application to the present case. All the authorities cited relate to cases where the question was whether a document had or had not been validly presented for registration before the Registering Officer. It was held in these cases that the provisions of sections 32 and 33 of the Act were imperative and that the Courts were not to allow the imperative provisions of the Registration Act to be defeated when it was proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed in the Act to present it. This was perfectly correct as the object of sections 32 and 33 is clearly to make it difficult for persons to commit frauds by means of registration under the Act. No such question arises in the present case. Here the defect is merely one of form and not one of substance and it has been repeatedly held that regard must be had to the substance rather than to the form of the proceedings. In *Bechan Sahu* v. *Syed Ali Rasul* (2) Mookerji and

(1) 34 C. 1037; 11 C. W. N. 1030; 6 C. L. J. 298 (F. B.).

(2) 16 Ind. Cas. 614.

Beachcroft, JJ., held in somewhat similar circumstances that "it would be strange if meaningless adherence to technicalities were allowed to impede and possibly to defeat the ends of justice, legal procedure was plainly not intended for such a purpose." In *Bisheshar Nath* v. *Emperor* (3) it was laid down by Walsh, J., that O. VI, r. 14 of the Code of Civil Procedure which requires a pleading to be signed by a party is a matter of procedure only, and that it is the business of the Court to see that the provision is carried out. The provisions as to verification of plaints given in O.VI, r. 15 of the Civil Procedure Code are almost identical in terms with sub-clause (2) of section 73 of the Registration Act. It is beyond doubt that if a plaint with defective verification or with no verification at all is filed in Court it can always be amended and the defect remedied the reason being that the efect is one merely of form and not one of substance. It is, however, argued that in the present case the defect was never remedied and the application was never verified. Even so, we do not think that the character of the application would in any way be affected by this neglect on the part of the plaintiff. At the most it could be said that the application made under section 73 was bad and refused because it was not properly verified but the application would still be an application under section 73, and the dismissal by the Registrar though apparently made under section 72 would be in substance an order under section 76. In our opinion the contention is wholly untenable and we hold that all the substantial requirements of section 73 were complied with and the dismissal by the Registrar being one under section 76, the suit under section 77 was fully competent.

As to the question of the genuineness and the due execution of the deed we entirely concur with the finding of the Court below that it was duly executed and delivered by the defendant to the plaintiff.

Lastly, it is contended that the suit was a declaratory one and that more than Rs. 80 should not have been allowed as Pleader's fees. We do not see any force in this contention. The suit was clearly not one of a declaratory nature but one in which consequential relief was prayed for and granted. In our opinion the Pleader's fees have been rightly assessed and we overrule the objection.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L. J. 865.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 60 OF 1923.

June 19, 1923.

Present:—Mr. Justice Daniels.

FIRM DWARKA DAS-AJODHIYA PRASAD—PETITIONER

versus

FIRM LACHMI NARAIN-GIRDHARI LAL—OPPOSITE PARTY.

Negotiable Instruments Act (XXVI of 1881), s. 7—Acceptance, method of—Oral acceptance, when binding.

A *hundi* can be accepted only by the drawee signing his acceptance thereon, a verbal acceptance will not be binding, except possibly by local custom, which to be effective must be specifically set up and proved by evidence.

Civil revision from an order of the Judge, Small Cause Court, Cawnpore, dated the 11th of January 1923.

Mr. *I. B. Banerjee*, for the Petitioner.

Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—This is an application for revision of a decree of the Judge of the Small Cause Court, Cawnpore, so far as it awards a sum of Rs. 59 against the applicant firm Dwarka Das-Ajodhia Prasad on the basis of a *hundi*. The *hundi* was drawn on the applicants and the whole question so far as their liability went was, whether they accepted it, or not. The learned Judge of the Court below finds that the *hundi* was not accepted as required by section 7 of the Act, namely, by the drawee signing his assent on the bill, but he finds on oral evidence, that the applicants did accept it verbally and on this basis he has decreed the suit against them. He relied on a statement in the fourth edition of Chal-

mer's Negotiable Instruments Act, page 190, that "Possibly by local custom *hundis* may be accepted verbally." The learned Judge has, however, overlooked the fact that any such local custom must be specifically set up and proved by evidence, and neither of these things was done in this case. On the findings of the Court below it appears to me, that no decree could legally be passed against the applicants and I accordingly allow the revision and set aside the decree of the Court below so far as it is against the applicants. As the Court below has found that the merits of the case are largely with the opposite party I allow no costs to the applicants either here or in the Court below.

M. A. A. *Application allowed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 108 OF 1923.

April 20, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Macpherson.

Syed SHAH MUHAMMAD MAUDOOD AND OTHERS—PETITIONERS

versus

Maharaja SIR RAMESHWAR SINGH BAHADUR AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 9; O. XVII, rr. 2, 3—Pleader instructed only to apply for adjournment—Dismissal of suit, nature of—Restoration, application for, whether maintainable.

On the date of hearing of a suit the Pleader for the plaintiff put in an application for adjournment which was rejected. The Pleader had no further instructions. The Court thereupon dismissed the suit under O. XVII, r. 3 of the Civil Procedure Code, "for want of evidence":

Held, (1) that the Pleader for the plaintiff having no instructions beyond applying for an adjournment there was no appearance on behalf of the plaintiff at the hearing and the dismissal of the suit was, therefore, under O. XVII, r. 2 of the Civil Procedure Code;

(2) that an application under O. IX, r. 9 of the Civil Procedure Code for restoration of the suit was, therefore, maintainable.

Civil revision from an order of the Subordinate Judge, First Court, Patna, dated the 18th March 1922.

Messrs. *K. B. Dutt* and *Rai G. S. Prasad*, for the Petitioners.

Mr. *N. C. Sinha*, for Mr. *P. N. Sinha*, and Messrs. *Murari Prasad*, *S. M. Nayamatullah* and *S. N. Ray*, for Opposite Parties Nos. 1, 2, 3 and 11.

JUDGMENT.

Mullick, J.—In 1918 and 1920, Shah Muhammad Maudud, Hafiz Karim, Muhammad Musa, Shujait Ali, Abdul Mali and Zafar Hussain filed three suits against a large number of defendants for a declaration, that certain properties were *wakf* properties and that they could not be sold in execution of certain mortgage-decrees obtained by the defendants (the Maharaja of Darbhanga and others). On the 29th July 1918, Hafiz Karim filed a petition through his Pleader, Babu Avadesh Kishore, stating that he would withdraw from the suit and the Subordinate Judge's order thereon was that the petition should be put up on the date of the opening of the case. A similar petition was thereafter made by the plaintiff Abdul Mali and after the case had run a leisurely course it came on for hearing on the 8th August 1921. On that date when the case was called on the plaintiffs did not respond and the order-sheet of the Court shows the following entry:—

"Defendant has put in *Hazri*. His Vakils are ready. The plaintiff does not respond to call. His Pleader, Mr. Abdur Rahman, has sent word that he has no instruction to-day. Inform plaintiff's Pleader." The signatures of *Maulvi* Abdul Rahman and Abdul Qayum, two Vakils engaged by the plaintiffs, show that the entry was duly shown to them.

A little later on the same day the Court recorded the following order:—"After the above order a petition for time is put in on behalf of the plaintiffs on the ground that some plaintiff is dead and some is at Muzaffarpore and so forth. The case has been pending for the last three years or so. It appears from the order-sheet that enough time has been allowed to the plaintiff to be ready in this suit but he was never ready. The other side is ready with his witness and I see no reason to grant any adjournment and so I reject plaintiff's petition for time."

To the right of this order under the heading "Pleaders' signatures" appear the following entries "*Sd.* S. L. Singh Pleader." "*Sd.* A. Quayum, Vakil." "I have no further instructions, *Sd.* A. Rahman, Vakil 8th August 1921."

Later, again, on the same day the Court recorded the following order:—No further steps by the plaintiffs. The plaintiffs failed to adduce evidence though time was given to them to do so in support of their case. The suit is, therefore, dismissed with costs for want of evidence under O. XVII, r. 3, Civil Procedure Code.

An application was then made, on the 18th March 1922, for the restoration of the suit under O. IX, r. 9 of the Civil Procedure Code; but the Subordinate Judge held that the suit having been disposed of under r. 3 of O. XVII and not under r. 2, the application under O. IX was not maintainable.

Thereupon, Saiyid Shah Muhammad Maudud, Muhammad Musa Sujait Ali and Zafar Hussain filed the present application to this Court on the 23rd March 1922, for the exercise of its revisional jurisdiction under section 115 of the Civil Procedure Code.

Now, it is clear, that on the 8th August 1921, the Vakils of the plaintiffs had no instructions to prosecute the case. They were apparently instructed only to apply for an adjournment and, in these circumstances, there could have been no appearance on behalf of the plaintiffs at the hearing of that day. The dismissal was, therefore, one under r. 2 of O. XVII, and the Subordinate Judge was in error in basing it upon r. 3.

The application for restoration under O. IX, r. 9 was, therefore, maintainable, and the Subordinate Judge declined to exercise jurisdiction in refusing to hear the evidence in support of it.

We accordingly set aside his order and direct that the application for restoration be disposed of according to law.

It is contended by the opposite party that a remand will only protract a litigation which has already continued for nearly five years and we have been asked to dispose of the application for restoration ourselves. We hesitate to adopt this course as it is possible that all the evidence upon which the plaintiffs rely may not be before us. The petition dated the 8th August 1921 asks for an adjournment on the following grounds:—

(1) the illness of Shah Muhammad Maudud, (2) the absence of Zafar Hussain on business at Muzaffarpore, (3) the death of Hafiz Karim, and (4) the refusal of Abdul Mali to prosecute the suit. With regard to Hafiz Karim, it is clear that as he had already applied for leave to withdraw no substitution of his heirs was necessary, as for Abdul Mali his refusal to continue to appear as plaintiff was also no ground, the only question, therefore, is whether the suit could not proceed in the absence of Shah Muhammad Maudud and Zafar Hussain and whehther, there was sufficient cause for such absence. The learned Counsel for the plaintiffs contends that the answer to this question is in the affirmative and he prays that an opportunity may be given to him to adduce evidence. We think his prayer should be allowed.

We accordingly direct that, upon the record reaching the Subordinate Judge, he do fix a date for hearing the application under O. IX, r. 9, Civil Procedure Code allowing sufficient time to both parties to produce their evidence and that if for any reason whatsoever the parties or either of them be not ready to proceed with the hearing on the date so fixed, no further adjournment be given and the case be forthwith disposed of.

It will not be necessary to issue notice of the date fixed for hearing to any of the parties other than those who have appeared before us to-day namely, Saiyed Shah Muhammad Maudud, Haji Sheikh Muhammad Musa, Sheikh Shujait Ali and Saiyid Zafar Hussain Khan, the petitioners, and Maharaja Sir Rameshwar Singh Bahadur, Chowdhury Kedar Nath Thakur, Mr. Saiyid Hassain and Ramsundar Dass Bairagi, the opposite party.

The application is allowed with costs hearing fee one gold *mohur*.

Macpherson, J.—I agree.

Z. K. *Application allowed.*

MAHADEO PRASAD *v.* BISSESSAR PRASAD.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 95 OF 1920.

February 27, 1923.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

MAHADEO PRASAD AND OTHERS—APPELLANTS

versus

BISSESSAR PRASAD AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Contract by karta *—Necessity—Interest—Creditor, duty of.*

A solemn agreement duly and freely entered into cannot be rescinded and the parties to the contract cannot be allowed to avoid the terms thereof which they agree to with their eyes open and with no restraint upon their freedom of will. [p. 701, col. 1.]

But when a contract entered into by a head member or *karta* of a joint Hindu family is sought to be enforced against the other members on the ground of necessity, it must be shown, not only that there was necessity to borrow the principal sum, but that the rate of interest agreed upon was also a necessity: in other words, that it was impossible for the *karta* or the head member to obtain the loan for family necessity except at the rate of interest agreed upon. [p. 701, cols. 1 & 2.]

The creditor has not only to show that there was a family necessity so as to bind the members of the family on behalf of the parties to the contract with respect to the loan advanced but that the rate of interest was the market or commercial rate. [p. 701, col. 2.]

Ram Bhujawan Prosad Singh v. *Nathu Ram*, 71 Ind. Cas. 933; 2 Pat. 285; 50 I. A. 14; 4 P. L. T. 29; (1923) A. I. R. (P. C.) 37; 32 M. L. T. 129; 44 M. L. J. 615; 25 Bom. L. R. 568; (1923) M. W. N. 382; 38 C. L. J. 25 (P. C.), referred to.

Appeal from a decision of the Subordinate Judge, Muzaffarpore, dated the 28th November 1920.

Messrs. *Noresh Chandra Sinha, Guru Saran Prasad* and *Raghunandan Prasad*, for the Appellants.

Messrs. *Lachmi Narain Sinha* and *Tribhuban Nath Sahay*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.– This appeal is directed against a decision of the Subordinate Judge of Muzaffarpore, dated the 28th November 1919, passed in an action to enforce a mortgage. The mortgage was executed in favour of the plaintiff No. 1. The other plaintiffs are members of a joint Mitakshara family and claim the bond in suit as belonging to the family.

Defendants Nos. 2 and 3 are the minor sons of defendant No. 1 and are joint with him, defendant No. 1 is the *Karta* of the family. The other defendants are interested in the mortgaged property and are, therefore, impleaded as such in the suit. They did not appear in the suit, only defendant No. 4 filed a written statement, but he did not appear at the trial.

The claim of the plaintiff was resisted only by defendants Nos. 1, 2 and 3. Defendant No. 1 filed a separate written statement and defendant. Nos. 2 and 3 another. The case of defendant No. 1 was that the bond was taken from him under undue influence, that he was under the pressing necessity of borrowing Rs. 2,400 to deposit the same in the Civil Court in order to have an execution sale of a valuable property of his, namely, *Mauza* Bahersi, set aside; that the creditor agreed to lend the said sum to the defendant but ultimately at the last moment refused to lend the sum of Rs. 2,400 unless the defendant borrowed from him Rs. 19,000 and paid off all the defendant's debts standing on the date of bond; that the defendant could not get loan elsewhere and as the time for depositing the amount necessary to set aside the sale of Bahersi was about to expire, the defendant was forced to borrow Rs. 19,000 and to agree to pay the high rate of interest and compound interest stated in the bond the terms of which were penal and unconscionable. He further contended that he sold *Mauza* Muhammadpur *Tauji* No. 14632, to defendant No. 4 for Rs. 8,000, who tendered this amount to the plaintiffs in part satisfaction of the mortgage-debt, but the plaintiffs refused to accept this amount and hence the plaintiffs are not entitled to interest and compound interest on Rs. 8,000 from the date of tender.

Defendants Nos. 2 and 3 contended that the defendant No. 2 was born on the 21st of June 1910 that is some 15 months before the bond in suit. They deny the execution of the bond, the passing of any consideration, the existence of family necessity to execute the bond, or the benefit of the loan to the family. They also

denied their liability to pay prior debts mentioned in the mortgage-bond in suit, to pay off which the loan from the plaintiff is said to have been taken. They also contended that the clause as to interest was extortionate and unenforcible as there was ample security for the money said to have been advanced. There was also a dispute between the parties as to the correct description of some of the mortgaged properties and as to whether some of them were really mortgaged or not.

The mortgage was executed to enforce a loan of Rs. 19,000 which with interest and compound interest swelled to Rs.50,486 the amount of claim laid in the suit.

Upon the pleadings the following issues were raised in the Court below:—

Issues Nos. 1 and 2 were not pressed either in the Court below or in this Court and, therefore, should not be stated.

"(3) Is the bond in suit genuine for consideration, was it executed for the benefit of the estate and for legal necessity?

"(4) Was the bond in suit executed by defendant No. 1 under undue influence?

"(5) Is the contract for payment of interest and compound interest penal and unconscionable?

"(6) Can the interest of defendants Nos. 2 and 3 in the joint property be made liable?

"(7) Which of the mortgaged properties are liable for plaintiff's claim?

"(8) Did plaintiff refuse to accept Rs. 8,000 offered in part satisfaction of the debt by Anrudh Chaudhury? If so what is its effect?

"(9) To what amount and relief, if any, are the plaintiffs entitled?

"(10) Was defendant No. 2 born before the execution of the bond?

The Court below has decided all these issues against the defendants and has given a full decree to the plaintiffs. Defendants Nos. 1 to 3 have, therefore, come to this Court in appeal.

The learned Vakil on behalf of the appellants has not seriously disputed the findings of the Court below as to the genuineness of the bond in question or as to its being for consideration. He, however, contends that the bond in question was executed in such circumstances as made the defendant No. 1 altogether helpless and placed him at the mercy of the creditor so as to agree to the terms of the bond in question. He says that the plaintiff No. 1 took advantage of the situation in which the defendant No. 1 was placed at the time and contrived to put off the advance of the loan to a time when the defendant was unable to go out of his clutches in order to seek relief somewhere else and to secure an advance which at that moment he so urgently wanted. In this way the learned Vakil for the appellants contends that the borrower, defendant No 1, was under the influence of the creditor who dominated over his will and made the defendant to agree to the terms that he proposed and consequently the bond in question is affected by the rule of undue influence described in section 16 of the Contract Act.

The above contention requires some statement of facts in order to elucidate and comprehend the direct necessity that impelled the defendant No. 1 to place himself at the mercy of the creditor the necessity being to raise a loan of Rs. 2,400 in order to deposit the same in the Civil Court to have the sale of his village Bahersi set aside. The sale had taken place on the 15th of August 1911 in Execution Case No. 98 of 1911 at the instance of one Paramahans Narain, decree-holder. In that case the defendant No. 1 and others were judgment-debtors. The deposit had to be made by the 15th of September, that is, within thirty days of the sale. At that time there was another decree pending against the defendant. That decree was passed on the 13th of December 1909, in Suit No. 54/81 of 1909 in favour of one Gur Prasad Sahu, decree-holder. It was executed (Execution Case No. 41 of 1910) and some of the properties of the defendant were attached and a notice under O. XXI, r. 66 of the Civil Procedure Code, for setting the valuation of the properties to be sold was issued. The defendant had objected to the valuation of the properties stated by the decree-holder and that objection was disallowed. He filed an appeal against the decision of the Subordinate Judge and that appeal was pending in the High Court at Calcutta. There was also a dispute with the decree-holder

with respect to a sum of about Rs. 3,400 which the defendant claimed out of Court. The appeal in the High Court was pending at the time when the bond in suit was executed. The defendant was also indebted to Babu Jogendra Chandra Mukerji, a Pleader of Muzaffarpore, under a hand-note dated the 28th November 1909, to the extent of Rs. 2,431 which was taken by him to meet the expenses of his cases, and to plaintiff Babu Bissessar Prasad Marwari in respect of Rs. 1,034-3-6 payable under a hand-note, dated the 20th June 1911. The defendant says that he expected to deposit the sum required to set aside the sale of *Mauza* Bahersi from the fund of the *Ijmali kothi* belonging to himself and others and in respect of which a Receiver was appointed by the District Judge of Muzaffarpore. He states that the District Judge sanctioned the payment of the said sum and the Receiver gave an order for the payment of a sum of Rs. 2,400 on a debtor of the joint *kothi*, the *Mahant* of Pattepur. But, unfortunately, on the 6th of September 1911, the debt of Pattepur was allotted to the share of one Babu Gajadhar by the Commissioner appointed to effect partition, and not to the defendant; and Gajadhar Babu objected to the payment of this sum and, consequently, the *Mahant's* manager refused to pay the said sum to the defendant. When the defendant's *amla* was returning from the *Mahant's* manager, thus disappointed, he met the plaintiff Bissessar on the way and proposed to take loan of the aforesaid sum from him. Bissessar then is said to have come to the defendant at Mahadeo Babu's place that very day when it was settled that he would advance this loan and that Mahadeo should have to execute a hand-note for Rs. 3,500. Rs. 2,400 being the aforesaid sum and Rs. 1,100 being due with interest on a previous hand-note executed by the defendant in favour of Bissessar. On the 8th of September the plaintiff again came and stated that the defendant should have to execute a hand-note for Rs. 6,000 as the debt due from the defendant to Jogendra Babu must also be paid. Then, it is said, the plaintiff came again on the 9th September and on that day said that the debt of Gur Prasad Sahu, who had a decree of Rs. 11,000 against the defendant should also be paid, and that the defendant should have to execute a mortgage-bond of Rs. 17,000 so that the aforesaid debts of Jogendra Babu, Gur Prasad's decretal amount and the plaintiff's debt under a previous hand-note might be paid off and Rs. 2,400 be given to the defendant to deposit in Court in order to have the sale of Bahersi set aside.

The defendant says that the interest payable under the decree of Gur Prasad Sahu was at the rate of 6 per cent. per annum, that payable to Jogendra Babu was at the rate of 12 per cent. per annum and that payable to the plaintiff under the previous hand-note was at the rate of Re. 1-4-0 per mensem, *i.e.*, 15 per cent. per annum, but on the 10th of September the plaintiff proposed that he should take interest at the rate of 24 per cent. per annum. To this the defendant objected and said that he would pay only at the rate of 6 per cent. per annum which was the rate mentioned in Gur Prasad's decree; but the plaintiff said that he would not advance at a lesser rate than Re. 1-4-0 per cent. per annum, *i.e.*, 15 per cent. per annum and compound interest at that rate and then he would agree to pay Rs. 2,400 to the defendant. The plaintiff is further said to have told the defendant that he must mortgage all his properties. The defendant thus takes us to the incidents up to the 10th of September 1911. The defendant says that he was under a wrong impression that the sale of Bahersi had taken place on the 12th of August 1911, and hence the money was to be deposited on the 12th September 1911 and consequently there was no time left to him to find out any other creditor and he had to agree to the terms dictated by the plaintiff for, if he had not done that his valuable property, *Mauza* Bahersi, would have been lost to him irretrievably. On the 11th of September 1911 the defendant says that, shortly before office hours, the plaintiff brought to him the bond fair copied and when the defendant wanted to have the document read, the plaintiff said that there was not much time left and that the terms were the ordinary terms of a mortgage-bond and that if it were read, hair-splitting objections would be

raised; consequently, the document was not read over. Further, the defendant states that he insisted that a clause may be inserted in the bond that he may repay the money within four months. This clause was added in the margin of the bond.

The learned Subordinate Judge has examined the incidents related by the defendant in the light of the evidence adduced before him and has held that the defendant has failed to substantiate them. We have carefully considered the arguments advanced and the evidence in the case, and we fully agree with the view taken by the learned Subordinate Judge. We may mention here only the salient points to show that the view taken by the learned Subordinate Judge is correct.

Now, the defendant says that he was under the impression that the sale had taken place on the 12th of August and hence the money was to be deposited by the 11th of September. There is no room for such an impression, inasmuch as in the letter (Exhibit H), dated the 23rd of August 1911, sent by the defendant and his co-sharers to the Receiver, and in Exhibit L the letter dated the 26th August 1911, sent by the Receiver to the District Judge it was stated that the sale had taken place on the 15th of August 1911. Again, his case is that the plaintiff insisted upon his taking loan in order to pay off the decree of Gur Prasad Sahu and that there was no necessity for the defendant at that time to pay off that decree inasmuch as it carried only interest at 6 per cent. per annum and that the dispute with him was then pending in the High Court of Calcutta and involved a sum of Rs. 3,400 which the defendant had claimed as having been paid out of Court. In other words, the defendant wants to make out that there was no urgency to pay off the decree of Gur Prasad Sahu and that he could wait to pay it at his convenience. This is entirely wrong, inasmuch as there was no dispute as to the liability of the defendant to pay the decree of Gur Prasad Sahu. His properties were already attached and valuation for sale proclamation was ascertained by the Subordinate Judge. The dispute in the High Court related only to the valuation and the defendant further claimed a remission of Rs. 3,400 out of a large sum of over Rs. 11,000 as having been paid out of Court. After the disposal of the matter in the High Court which would not have taken long the properties attached would inevitably have been sold unless the full decretal amount was paid. It appears that the dispute was settled out of Court about the time the mortgage-bond in question was executed and the claim of Rs. 11,749 was reduced to Rs. 10,632 odd allowing a remission of Rs. 999 odd to the defendant. After this settlement the defendant was bound to pay up otherwise his properties would have been sold after service of sale proclamation, which would not have taken long for the law prescribes sale to take place after thirty days of the service of sale proclamation, *vide* O. XXI, r. 68. That the settlement of the dispute with Gur Prasad Sahu was already arrived at when the bond in question was executed is clear from the recital in the bond itself, wherein the exact sum of Rs. 10,850 is stated to be the sum settled "in satisfaction of the entire decree" which was "calculated to be beneficial" to the defendant (the quotations are from the bond Exhibit 2). This sum was left with the plaintiff to be paid to Gur Prasad Sahu as settled which he did pay and had a certificate of satisfaction recorded in Court on 14th September 1911, *vide* Exhibit 5, which sets forth in detail the terms of settlement with Gur Prasad Sahu and the defendant the amount of the claim and the amount remitted, *vide* also Exhibit J.

Thus, it is clear that the defendant's village Bahersi was already sold off and his other properties also were in danger of being sold in execution of Gur Prasad Sahu's decree. When he was raising a loan to deposit the sum of Rs. 2,400 to save his village Bahersi it is natural that he would take a further loan to save his other properties in danger of being sold by Gur Prasad Sahu. It is immaterial that the sum decreed in Gur Prasad Sahu's case carried interest at 6 per cent. per annum. The defendant could only raise loan at the market-rate of interest and the amount decreed was arrived at after calculating interest at 12 per cent. per annum, *vide* Exhibit Q. The plaintiff's own debt,

under a previous hand-note executed by the defendant was naturally to be included in the loan so also the debt due to Jogendra Babu. Thus, the defendant must have been himself anxious to raise the sum of Rs. 19,000 from the plaintiff to pay up all his outstanding debts, and not that he was pressed by the plaintiff to take the said loan of Rs. 19,000 instead of Rs. 2,400 only to deposit it in the Civil Court to have the sale of Bahersi set aside. The defendant's case is improbable and not borne out by the evidence or the circumstances in the record.

Now, as to the incidents related by the defendant which brought him under the clutches of the creditor. His case is that he came to know on the 7th of September 1911, that the *Mahant* of Pattepur had refused to pay to him the sum of Rs. 2,400 ordered by the District Judge in order to have the sale of Bahersi set aside and thus he became in need of raising money elsewhere and his agent mentioned it to the plaintiff who thereafter became anxious and began to come to the defendant day after day in order to ensnare him and induce him to take a loan of much larger sum of money and to execute the mortgage-bond in dispute. He wants us to believe that he did not settle the terms either on the 7th and 8th September or on the 9th and did not know what interest was going to be charged by Bissessar until at the eleventh hour. This is an unnatural story. On the other hand, the plaintiff states that the negotiation took place and was settled on the 9th of September. The stamp purchased on the 9th corroborates the statement of the plaintiff, inasmuch as unless the amount, the rate of interest and other terms were fully settled no stamp would be purchased. At any rate, the defendant came to know on the 11th according to his own showing that the terms demanded by the plaintiff were unconscionable. Why not then from that date up to the 15th did he try to obtain a loan from elsewhere. He is a man of substance and his properties were worth at least Rs. 50,000. If the terms demanded by the plaintiff were hard and unconscionable it was not difficult for him to secure a small loan of Rs. 2,400 required to set aside the sale of Bahersi. That he did not do so is an ample proof of the fact that he did not want only Rs. 2,400, but that he wanted a much larger sum, namely, Rs. 19,000, in order to discharge all the debts mentioned in the mortgage-bond in suit, the largest of which was that of Gur Prasad Sahu (Rs. 11,000) and which had to be paid in order to obtain the benefit of a remission and of saving the property from sale. It may be said that if the defendant could invent stories of negotiations being carried on by the plaintiff in an indefinite and unsettled manner so as to drive the defendant from day to day to the ultimate helpless condition stated by him, why is it that the defendant did not invent a further story bringing him nearer to the date when the money was to be deposited, that is, the 15th of September 1911. The answer is to be found in the date when the bond was executed, namely, the 11th of September. Therefore, it was impossible for him to carry his invention further than the 11th of September and hence he alleged that he was under the wrong impression that the sale had taken place on the 12th of August and the deposit had to be made on the 11th of September. It has already been shown that the defendant must have known that the sale had taken place on the 15th August 1911, inasmuch as he himself, with his co-sharers had written a letter (Exhibit H), dated the 23rd August 1911, to the Receiver that the sale of Bahersi had taken place on the 15th August. The Receiver dealing with this letter states in his letter to the District Judge (Exhibit L) that the defendant had stated that the sale had taken place on the 15th August 1911.

The defendant was in need of money to pay off his debts. He approached the plaintiff and negotiated with him for the same and agreed to the terms mentioned in the bond. The negotiation was settled on the 9th of September 1911, and stamp was purchased on that date and the bond was executed and duly registered on the 11th of September 1911. The plaintiff out of the consideration money satisfied Gur Prasad Sahu's decree by paying Rs. 10,632-12-0 (Exhibit 5 and J-1); Rs. 2,431 was paid to Jogendra Babu on the 15th September 1911, due under a hand-

note (Exhibit 4); Rs. 1,068-7-0 to the plaintiff due under a hand-note and the defendant took in cash Rs. 4,684 per receipt (Exhibit 1) out of which Rs. 2,400 was deposited to set aside the sale of Bahersi (Exhibit S) on the 12th of September 1911. Thus, the defendant received the full consideration money of the bond. The finding of the Subordinate Judge that the mortgage was executed for consideration is, therefore, unchallengeable.

We, therefore, agree with the view taken by the learned Subordinate Judge that the defendant has failed to prove that he was ensnared by the plaintiff to take a loan of Rs. 19,000 instead of Rs. 2,400, or that the bond was executed under undue influence or on account of pressure brought to bear upon him by the plaintiff. The defendant never before this suit complained that he executed the bond under the pressure exercised by the plaintiff. Five years after the execution of the bond in question, he instituted suits against his co-sharers for contribution with respect to the decree of Paramahans. In those suits he based his claim upon the bond in question and did not state that he was in any way coerced to execute it.

The defendants did not in the appeal question the passing of consideration and in fact the payment of the debts mentioned in the bond has been amply proved as already shown. The learned Subordinate Judge has held that defendants Nos. 2 and 3 the minor sons of defendant No. 1 are bound by the mortgage executed by defendant No. 1 and that the family properties were validly mortgaged. This part of the finding of the learned Subordinate Judge is not seriously disputed by the learned Vakil on behalf of the appellants and in fact the finding is not open to challenge.

The defendant No. 2 was born fifteen months before the date of the bond in suit and defendant No. 3 was admittedly born after the execution of the bond. The decree of Gur Prasad Sahu was passed on the 13th of December 1909, upon hand-notes two years before the birth of defendants Nos. 2 and 3 and some two years before the execution of the mortgage-bond in suit. The decree was based upon the hand-notes of 1907 (*vide* Exhibits O and P). It is not impeached as being an immoral debt of the father. It was a personal debt of the father incurred much prior in point of time to the mortgage-bond in suit and independent of any security in immoveable property. Therefore, it was an antecedent debt, and the father was justified to raise a loan to pay it off and his minor sons are bound by it though they were not parties to the suit. Out of the balance Rs. 4,684-12-6, Rs. 2,400 was clearly for family necessity inasmuch as it went to have the sale of the family property *Mauza* Bahersi set aside and the remainder was borrowed for family necessity and to look after an appeal against one Gouri Dutt, which has been proved as pending at that time. Therefore, the family properties in suit have been validly mortgaged to secure the loan of Rs. 19,000 mentioned in the mortgage-bond in suit and all the defendants are bound to pay the loan.

The appellants-defendants, however, contend that the rate of interest of 15 per cent. per annum and compound interest is not enorceable. It is urged that, though the borrowing by the father in order to pay off the antecedent debts as well as for other family purposes might be a valid necessity, yet the borrowing at the rate mentioned in the bond was not a family necessity and the mortgaged properties being the joint family properties of all the defendants, the father, defendant No. 1, had no specified share therein and, therefore, he was not justified in pledging the family properties to pay interest at the rate mentioned in the bond. On the other hand, on behalf of the plaintiffs-respondents it has been contended that the contract voluntarily made by defendant No. 1 for valid debt binds the defendants Nos. 2 and 3 and the family properties were validly mortgaged, that the rate of interest, howsoever exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentations such as are mentioned in the Contract Act and that the plaintiffs are entitled to recover the loan at the rate of interest and compound interest mentioned in the bond by sale of the mortgaged properties. At the Bar the following authorities were cited in support of the aforesaid respective contentions of the parties: ***Hurro Nath Rai***

Chowdhri v. *Randhir Singh* (1), *Nand Ram* v. *Bhupal Singh* (2); *Dhanipal Das* v. *Maneshar Bakhsh Singh* (3); *Nawab Nazir Begam* v. *Rao Raghu Nath* (4), *Ram Bhujawan Prosad Singh* v. *Nathu Ram* (5), *Kamla Prasad* v. *Pandey Ram Chandra Prasad Narain Singh* (6); *Manna Lal* v. *Karu Singh* (7); *Aziz Khan* v. *Duni Chand* (8) and *Balla Mal* v. *Ahad Shah* (9). We have carefully gone through those authorities. The principle seems to have been settled that a solemn agreement duly and freely entered into cannot be rescinded and the parties to the contract cannot be allowed to avoid the terms thereof which they agree to with their eyes open and with no restraint upon their freedom of will. Upon this principle, contracts for payment of exorbitant rates of interest such as 75 per cent. in some cases were upheld and were not allowed to be disturbed, but in those cases the contracts were upheld against the party to the contract on the ground that a party to the contract cannot be allowed to rip up the terms of the contract when he agreed to them voluntarily and with his eyes open. But when a contract entered into by a head member or *karta* of a joint Hindu family is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was the necessity to borrow the principal sum but that the rate of interest agreed upon was also a necessity, in other words, that it was impossible for the *karta* or the head member to obtain the loan for family necessity except at the rate of interest agreed upon. This seems to be the distinguishing feature in the authorities cited above. The creditor in such a case has not only to show that there was a family necessity so as to bind the members of the family on behalf of the parties to the contract with respect to the loan advanced but that the rate of interest was the market or commercial rate. He will not be entitled to enforce a higher rate of interest against the other members and to make the joint family properties liable for interest higher than the current market rate of interest. In the present case the family was joint and the properties mortgaged are the joint family properties of all the defendants. The mortgage, therefore, cannot be validly enforced with respect to the rate of interest beyond the current market-rate. The case seems to be governed by the recent decision of their Lordships of the Judicial Committee in the case of *Ram Bhujawan Prosad Singh* v. *Nathu Ram* (5).

Now, let us see what in this case has been proved to be the usual commercial rate of interest. The bond in question was executed amongst others to pay off the decree passed in favour of Gur Prasad Sahu in 1910 at the rate of 6 per cent. This is the rate of interest directed by the Court to be paid from the date of the decree upon the sum found due. This, of course, cannot be said to be the market-rate of interest. The rate of interest mentioned in the hand-notes, on the basis of which the decree in question was passed was 18 per cent. per annum. The Court, however, reduced it to 12 per cent. per annum (Exhibit Q) with the following observation: –"As regards the rate of interest the onus to prove it was upon the plaintiff but he did not choose to adduce any evidence, both parties agreeing that the market rate is Rs. 12 per cent. per annum and that the plaintiff may be allowed interest at that rate. I have,

(1) 18 C. 311; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar P. C. J. 642; 9 Ind. Dec. (N. S.) 207 (P. C.)
(2) 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294.
(3) 28 A. 570; 33 I. A. 118; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292 (P. C.).
(4) 50 Ind. Cas. 434; 23 C. W. N. 700; 41 A. 571; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 11 L. W. 188 (P. C.).
(5) 71 Ind. Cas. 933; 4 P. L. T. 29; 2 Pat. 285; 50 I. A. 14; (1923) A. I. R. (P. C.) 37; 32 M. L. T. 129; 44 M. L. J. 615; 25 Bom. L. R. 568; (1923) M. W. N. 382; 38 C. L. J. 25 (P. C.).
(6) 51 Ind. Cas. 496; 4 P. L. J. 565; (1919) Pat. 365.
(7) 56 Ind. Cas. 766; 1 P. L. T. 6; 13 L. W. 652 (P. C.).
(8) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).
(9) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 538 (P. C.).

therefore, no hesitation in holding that the plaintiff is entitled to get interest at the rate of Rs. 12 per cent. per annum." This then was found by the Court to be the current market-rate of interest. Another debt mentioned in the mortgage-bond is a hand-note of Jogendra Babu dated the 29th November 1909. This carried interest at Rs. 12 per cent. per annum with yearly rests. The previous hand-note in favour of the plaintiff, dated the 20th of June 1911 (Exhibit 3), carries interest at the rate of Re. 1-4-0 per mensem per cent. There is no mention of compound interest there. In the bond executed by the defendant in favour of Paltu Ram, dated the 13th of February 1909, the rate of interest was 14 annas per cent. per mensem (*vide* plaintiff's evidence). The plaintiff further says that Mahadeo executed a bond in favour of Ganga Prasad at the rate of interest of Rs. 12 per cent. per annum and that he executed a bond in favour of Jogendra Babu at the rate of Rs. 10 per cent. per annum. The plaintiff, no doubt, says that the rate of interest on loans on hand-notes as well as mortgages is the same and that he charged interest at the rate of Re. 1-4-0, Re. 1-8-0 Re. 1-12-0 and Rs. 2 before. He does not give any evidence to show that these rates were on mortgages, nor does he make any mention of compound interest.

This is all the evidence as to the rate of interest. There is no evidence on the record that the rate of interest on a mortgage security is at the rate of Re. 1-4-0 per mensem and compound interest.

Now, the properties in this case were worth Rs. 50,000 and the amount secured was only Rs. 19,000. The creditor had ample security and there is no reason why he should be allowed a higher rate of interest than the usual commercial rate that was prevalent in the market at the time. It is conceded by the learned Vakil on behalf of the respondents that there is no evidence on the record to prove that Re. 1-4-0 compound interest was the market-rate on mortgage securities. We, therefore, do not agree with the learned Subordinate Judge that the usual market-rate of interest is that mentioned in the bond, namely, Re. 1-4-0 per cent. per mensem with compound interest.

Defendant No. 1 was a young man when he executed the bond in question. He seems to have inherited a large property and he was anxious to save the same from being sold off in execution of the decrees of Gur Prasad Sahu and Paramahans. He, therefore, negotiated to take a large loan of Rs. 19,000 from the plaintiff. Although there was no fraud, misrepresentation or undue influence in the matter of borrowing the sum of Rs. 19,000 yet the plaintiff took advantage of the circumstances in which the defendant was placed and agreed to lend him the said sum at an unusual rate of interest, much higher than the commercial or market-rate.

Considering all the circumstances of the case, we hold that the plaintiff is not entitled to a mortgage-decree at the rate mentioned in the bond. We disallow the compound interest, and direct that Re. 1-4-0 per cent. per mensem simple interest be allowed.

We do not see any substance in the appellant's contention that the bond is not enforceable inasmuch as there has been an alteration in it since the execution thereof by changing the figure 12127 in the original bond into 11127 as the *Touzi* number of property No. 10 Goonipur. We have looked into the bond itself and have considered the evidence on the record and also the evidence of the Clerk of the Sub-Registration Office. I have personally examined the bond and being acquainted with the language in which the bond is written, it seems to me that the plaintiff's case is correct that the figure was written formerly as 17127 and was corrected into 11127 when it was being read out and that as it stands it is capable of being read as 12127 and 11127. Nor is there any substance in the contention that the property No. 10 mentioned in the bond is Harpur, and not Gobindpur. We agree with the learned Subordinate Judge that the plaintiff is not entitled to have *pacca* share of property No. 2, *Touzi* No. 7978 inasmuch as the *Kham* share of the *Mouza* is more than 1 anna 3 *kowries* and, therefore, the description agreed with the existing facts. The Court is also right in correcting the *Touzi* number of property No. 11 as prayed for by the plaintiff, inasmuch as the correct *Touzi*

number of that property is 14632, and not 14630 as mentioned in the bond.

There is no substance in the contention that no interest could be charged upon Rs. 8,000 inasmuch as it was tendered by defendant No. 4 when he purchased one of the mortgaged properties Mohammadpur, *Touzi* No. 14632. The learned Subordinate Judge has held that the tender was upon the condition that *Mouza* Mohammadpur would be exonerated from the mortgage lien. The evidence of Advaita Babu, Pleader, supports this finding. The tender was not valid. This also is not now seriously disputed.

I, therefore, confirm the decision of the learned Subordinate Judge with the modification indicated above. The usual mortgage-decree will be prepared by this Court calculating interest at the rate of Re. 1-4-0 per cent. per mensem simple interest from the date of the bond up to the date of grace which will be six months from now. The costs of the plaintiff will be assessed upon the sum thus arrived at in both the Courts. After the date of grace the rate of interest will be at 6 per cent. per annum.

Ross, J.—I agree.

K. S. D. *Order confirmed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 3370 OF 1922.

December 22, 1922.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Ramesam.

KACHI REDDI—PETITIONER

versus

NARAYANA REDDI AND OTHERS—RESPONDENTS.

Limitation and the Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 3—Delay in depositing security, when can be excused—High Court, power of.

The discretionary power of the High Court to excuse delay in furnishing security for costs of appeal to His Majesty in Council is not general but is explicitly restricted to a period of 60 days by section 3 (1) of Act XXVI of 1920.

Clause 9 of the Order in Council of 1920 does not enlarge such power.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to excuse the delay in making payment of the sum of Rs. 4,000 as security for costs of respondents likely to be incurred in the appeal

sought to be preferred to His Majesty in Council, in Civil Miscellaneous Petition No. 1079 of 1922, against a decree of the High Court in Appeal No. 109 (Original Suit No. 35 of 1920 on the file of the Court of the Subordinate Judge, Kurnool).

Mr. *C. S. Venkatachariar*, for the Petitioner.

Mr. *W. Kodavdarmayya*, for the Respondent.

ORDER.—A preliminary objection has been taken that we have no power to extend time or excuse delay in this case; and we think that the objection must be sustained. The delay in question is, it is not disputed, more than 150 days. To enable us to excuse it, a power more extensive than that conferred by section 3 (1) of Act XXVI of 1920 would be necessary. But we cannot hold that we have such a more extensive power or any general power, when in that section the Court's discretionary power to extend time for cause shown is recognised subject to any explicit restriction to a period of 60 days. The petitioner has relied also on the concluding words of clause 9 of the Order in Council, dated 9th February 1920, as conferring an unrestricted power. But those words can be understood as authorising the Court's use of its discretion to the extent specified in the Act and there is no necessity to read them as authorising more. The objection must be allowed. The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1652 OF 1921.

June 27, 1923.

Present:—Mr. Justice Daniels.

Chaudhri KARAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DAL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 18—Tenant, when can acquire easement against landlord—Customary easement, nature of User for 30 years, effect of.

A tenant cannot acquire by prescription an easement against his landlord, but may have a right of easement by custom. [p. 704, col. 1.]

NARÁIN SINGH *v.* DAL CHAND.

A customary easement is not limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in section 18. [p. 704, cols. 1 & 4.]

According to the custom prevailing in the United Provinces a *zemindar* has no right arbitrarily to close a way which has been used by occupancy tenants of the village for 30 years without question or opposition for access to their fields and for removing their produce. [p. 704, col. 2.]

Second appeal against a decree of the Additional District Judge, Moradabad, dated the 8th of June 1921.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *Saila Nath Mukerji*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants are *zemindars* of *Mauza* Budpur and the defendants are occupancy tenants in the same village. The present suit was brought by the plaintiffs for a perpetual injunction restraining the defendants from making use of a way through fields Nos. 131, 505 and 506. The suit was filed on the 9th August 1920, and the allegation in the plaint was that the defendants only began to make use of the way through this land from December 1919. The Court below, differing from the Munsif, finds that the way in reality is an old way which has been in use since the time of the Settlement nearly 30 years ago and has dismissed the suit. In appeal to this Court it was objected that the Subordinate Judge did not state the precise ground on which he based his judgment, and it was argued that even if the way was an old one the *zemindar* was entitled to close it. Under the Full Bench ruling in *Udit Singh* v. *Kashi Ram* (1) a tenant could not acquire by prescription an easement against his landlord and it was found by the Trial Court and not disputed in appeal that the right claimed was not an easement of necessity in the technical sense. The defendants when challenged asserted that they claimed the right as a customary right or as a customary easement under section 18 of the Easements Act. It was pointed out that the first illustration to section 18 expressly recognises that a tenant may have a customary right of easement against his landlord. I thereupon remitted an issue to the Court below on this plea. The Court below finds that a customary right of easement is established in favour of the defendants.

The appellant has challenged this finding on the ground that the Court below has mistaken the nature of customary easement. It is argued that a customary easement is limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in the illustrations. Although this is the view taken in Peacock's Easement, I know of no warrant for limiting the term in this manner. Any kind of easement recognised by the custom of the provinces would surely fall within the meaning of the term. Now it is, in my opinion, beyond doubt, that according to the customs prevailing in these provinces a *zemindar* has no right arbitrarily to close a way, which has been used by occupancy tenants of the village for 30 years without question or opposition for access to their fields and for removing their produce. The plaintiff himself never claimed any such right. He came into Court (as in all cases of this kind which have ever come up before me) on the allegation that the way was newly made. It is only in the stage of appeal through the mouth of his Counsel that he asserts his unrestricted right to close a way however old. If the right cannot be claimed as an easement, I should be prepared to assume a grant of the right as appurtenant to th tenancy from the fact of long user and long acquiescence by the plaintiff. The *zemindar* having acquiesced in the use of the disputed way by the defendants for a period of 30 years it is too late for him to turn round and deny their right to use it. On his findings of fact the learned Subordinate Judge was, in my opinion, right in dismissing the suit and I accordingly dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 14 A. 185; A. W. N. (1892) 38; 7 Ind. Dec. (N. S.) 489 (F. B.).

PATNA HIGH COURT.

CRIMINAL APPEAL No. 166 OF 1922.
December 15, 1922.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Kulwant Sahay.

RAMJIT AHIR—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal trial—Prosecution, duty of, to put forward all eye-witnesses of occurrence—Inference.

It is not for the Police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a truthful witness simply because his testimony is inconsistent with it. On the other hand, if the Police or the Public Prosecutor considers a witness to be a false witness or that his evidence is unnecessary, there would be justification for not sending up that witness as a witness for the prosecution, and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. [p 707, col. 2.]

Queen-Empress v. *Durga*, 16 A. 84 (F. B.); A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55, relied on.

Where all the eye-witnesses called for the prosecution are partisans of the complainant and hostile to the accused and the independent eye-witnesses are not called, the Court is entitled to take this fact into consideration in weighing their evidence and to draw an inference adverse to the prosecution; but if the witnesses called for the prosecution are otherwise worthy of credit the Court is not entitled to disbelieve them simply because some persons who could have thrown light upon the case, have not been put before the Court by the prosecution. [p. 707, col. 1.]

Criminal appeal from a decision of the Officiating Sessions Judge, Shahabad, dated the 16th September 1922.

Mr. *S. M. Yusuf* (with him Messrs. *S. Bashiruddin, Guru Saran Prasad, Anand Prasad* and *Sant Prasad*), for the Appellant.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—The appellant, Ramjit Ahir, has been sentenced to rigorous imprisonment for eighteen months under section 325, Penal Code, for having, on the 4th May 1922, struck Japit Ahir with a brick or a piece of a brick and thereby caused his death. The occurrence took place about an hour before sunset on the 4th May. Japit was taken to the Arrah Police Station about 4-30 P. M. on the 5th May. He complained of pain in the abdomen, but the Sub-Inspector in charge did not think it necessary to record a First Information and after making an entry in the Station Diary sent him to the hospital. On the 6th May at 6-25 P. M. in consequence of a report made by the Assistant Surgeon, Japit's dying declaration was recorded by a Deputy Magistrate. On the 7th at 1 P. M. the Sub-Inspector having come to hear of Japit's condition recorded a formal First Information, Japit died that evening in hospital and a *post mortem* report made on the following day disclosed the fact that his bowel was ruptured and that death had taken place owing to acute peritonitis. The appellant, Ramjit, was arrested on the 7th May. The record does not show on what date the remaining accused Deoraj Ahir, Ramdas Ahir, Lachmi Ahir, Sheobalak Ahir, Ramlopit Ahir, Chandrika Ramavatar and Mangal were arrested.

The learned Sessions Judge of Shahabad, agreeing with one Assessor and disagreeing with the other, has acquitted all the accused except Ramjit. The latter Assessor was of opinion that all the accused should be convicted of an offence under section 147.

The case made in the Sessions Court by the prosecution was that the appellant's party were drinking in the toddy shop of Ramlagan Passi when the complainant, Nathuni Ahir, and five other Ahirs of Badka Chanda arrived and purchased a pitcher of toddy for four annas; that when they sent Ramlagan's wife into the room, in which the appellant's party were drinking from a cup, Ramjit got angry with the woman for having sold toddy to men from Badka Chanda, who had the previous day impounded the cattle of the men of Chotka Chanda, and he came out and carried into the shop the pitcher of toddy which the complainant's party had purchased; that thereupon an altercation took place with the result that the ten men from Chotka Chanda, reinforced by Deoraj Ahir of the same village, who had been standing at his door close by, attacked the Badka Chanda men with bricks which they took from a stack near a well which was under repair. The complainant's party while retreating appear to have

RAMJIT AHIR *v.* EMPEROR.

retaliated in like manner with the result that Japit who had run up from his *kalihan*, was struck in the abdomen, as stated above, by Ramjit. On the same side were injured Jhulan, Nathuni, Sarwan and Sitaram. On the other side were injured Ramdas, Lachmi and Ramjit. The injuries of all, with the exception of Ramjit, were slight and are consistent with the allegation that they were caused by pieces of bricks. The evidence shows that Jhulan, who was Japit's cousin, ran up towards the end of the fight and struck Ramjit with a *lathi* on the head on finding Japit on the ground.

The defence at the trial was that the soccurrence had taken place not at the toddy shop but in the sugar-cane field of Jeobodhan about one hundred yards to the south-east of the shop because some cattle belonging to Nathuni and four others of Badka Chanda had been seized by the accused for trespass and were rescued by Kobari, Jhulan and other men of that village. A complaint to this effect was lodged before a Deputy Magistrate at Arrah on the 5th and there is evidence that the village *chaukidar*, Gotahul, gave certain information to the Officer in charge of the Police Station at 10-30 A.M. on the 5th. The contents of the Police Officer's memorandum are not legal evidence in this case.

The learned Sessions Judge has accepted the case put by the defence and disbelieved the whole story as to the occurrence over the pitcher of toddy. It is difficult, in the circumstances, to understand why he has, while acquitting nine of the accused, convicted Ramjit. His finding seems to be that Ramjit did strike Japit in the course of the cattle rescue. He does not find whether the blow was inflicted with a brick or with a *lathi*, nor whether there was any right of self defence. There is also no finding as to the circumstances under which Japit's death was caused, and it is difficult to understand how the sentence under section 325 can be sustained in the absence of a decision on these essential points.

But in my opinion the learned Sessions Judge is wholly worng in the view he took of the evidence. The story told by the prosecution appears, on the face of it, to be more natural than that told by the defence. It is impossible to conceive that the scene would have been laid at the *pasi khana* if there had not been some occurrence there. The bricks were found by the Police on the morning of the 8th scattered about over an area of '5 *into* '5. The defence give no explanation for the death of Japit; the bricks certainly corroborate the prosecution. The prosecution witnesses have no doubt made contradictory statements as to the exact place where Japit fell, but it seems quite clear, on a careful examination of the whole evidence, that Japit fell in a *bajra* field about ten yards from the verandah of the toddy shop. A *bajra* crop had been grown upon the site but at the time of the occurrence it was waste and on the evidence it is spoken of either as *parti* or a pathway. There is no substance in the suggestion that the prosecution have laid the scene at a place two or four *rassis* from the shop.

Then, as regards Japit's presence, it is clear that he was not there when the quarrel originated but arrived when it was going on.

The learned Sessions Judge has been considerably influenced by the discrepancies as to the course of the earlier part of the quarrel. It appears that on the 7th May, when examined by the Sub-Inspector, Nathuni stated that he and four others were drinking below the verandah when Ramjit came and joined a number of his co-villagers who were drinking inside the shop and that Ramjit straightaway began to abuse the Badka Chanda men for having come to drink there. This story is certainly inconsistent with that told at the trial which was to the effect that Ramjit was in the inner room from the beginning and that the complainant's party had not begun to drink but had merely asked for a cup when Ramjit began the abuse. In my opinion no very great importance ought to attach to this discrepancy. There was no object in telling a different story in Court and it may well be that the statement recorded under section 161, Criminal Procedure Code, by the Sub-Inspector was in no sense exhaustive and that the more detailed and accurate sequence of events has been elicited in the trial. If the case had been a concocted one, I should have

expected no variation in this part of the story.

Then, as to the weapon with which Japit was struck, Ramkishun said to the Sub-Inspector that Ramjit struck Japit with a *lathi* and Jhulan states that Japit had a *lathi* in one hand and was throwing bricks with the other. The balance of evidence is entirely in favour of the witnesses who state that Japit was struck with a brick. Jhulan may be right in saying that Japit had also a *lathi*, but it is certain that the injuries upon Japit and those on his s de were inflicted not with *lathis* but with bricks.

The learned Sessions Judge next draws attention to the fact that neither Ramlagan Passi nor his two brothers nor his wife, nor some strangers from other villages, who were proved to have been present in the shop, have been called by the prosecution.

With regard to Ramlagan and members of his household , it is scarcely likely that they would give evidence against their own customers. Their inclination would be to say that nothing disorderly had taken place at their shop which they hold under a license from Government. With regard to the men from other villges, it has not been shown that the Police had information as to who these persons were.

The seven eye-witnesses called for the prosecution are certainly men of the same party and all of them have a fued with Ramjit's party and the Court was entitled to take this fact into consideration in weighing their evidence and to draw an inference adverse to the prosecution on the ground that independent eye-witnesses had not been called; but I do not think that, if the witnesses called by the prosecution are otherwise worthy of credit, the Court was entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution. It has sometimes been said that it is the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution and who must be able to give important information; if such witnesses are not called without sufficient reason being shown the Court may properly draw an inference adverse to the prosecution. But this statement of the rule is, in my opinion, too wide and has been qualified by a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Durga* (1). The Court there observed as follows:

"In our opinion a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness-box, he is not bound ....to call that witness or to tender him for cross-examination." It would seem also to follow that if the Police consider a witness to be a false witness or that his evidence is unnecessary, they would be justified in not sending up that witness as a witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is, of course, not for the Police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it; but that proposition does not, in my opinion, affect the present case. The sole question is whether the witnesses called can be believed on the main points and, in my opinion, the answer should be in the affirmative. The learned Sessions Judge has drawn attention to Jap t's delay in lodging information. The explanation given by the prosecution is that Japit was waiting for the return of Kobari, the head of the family, who was absent from home that night. The defence allege that Japit was in his house all along and that he took part in the cattle rescue which is the subject of their counter-case; but there is no reliable evidence on the record to support these allegations. On the following day Japit was started off in a cart just before Kobari returned and

(1) 16 A. 84 (F. B.); A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55.

NAINI MAL *v.* EMPEROR.

Kobari overtook him before Japit had left the village. In the circumstances, I do not think the omission to go straightaway to the *thana* immediately after the occurrence is evidence that a false story was being concocted.

Having regard to the fact that no external injury was visible and that Japit was only complaining of pain in the abdomen, the probability is that if the accused's party had not set out for Arrah for the purpose of lodging a complaint Japit would not have gone to the Police at all.

Even the Sub-Inspector who saw him did not consider the case serious and declined to record a First Information. The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. The Medical Officer was not examined upon this point and it is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy.

I think, therefore, on a careful review of the evidence, that the appellant should have been convicted of the charge of rioting with the common object of beating Nathuni and others. But as he has been acquitted of that charge, the only question is whether the conviction under section 325 can be sustained. Now, having regard to the fact that the brick was hurled from a distance of a few paces there could have been no difficulty in recognizing the person who hurled it. There was no doubt a free fight, both sides using bricks, but for all that there does not seem to be any reason for disbelieving the allegation that Japit fell on being struck by Ramjit in the stomach. There is no evidence, however, as to the size of the missile and it is difficult to believe that Ramjit acted with the knowledge that he was likely to cause death.

An offence under section 325, however, has been made out, but having regard to the circumstances and to the fact that each party was pelting the other with whatever they could pick up, I think a sentence of six months' rigorous imprisonment will meet the ends of justice. The sentence is accordingly reduced to that period.

Kulwant Sahay, J.—I agree.

Z. K. *Sentence reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 344 OF 1923.

June 15, 1923.

Present:—Mr. Justice Walsh.

NAINI MAL—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 517—Court, jurisdiction of—Order for restoration when can be made—*Bona fide *purchaser in possession—Remedy.*

Where stolen property has passed into the hands of a third person, and a question of *bona fides* and of title by purchase or otherwise clearly arises, the duty of the Criminal Court, so far as restoration of the property is concerned, is to leave the complainant to his remedy in the Civil Court if he thinks he has one. [p. 709, col. 1.]

Under section 517 of the Criminal Procedure Code, the jurisdiction of the Criminal Court is confined to an order at the conclusion of the trial for the disposal of the property which has been stolen and which is before it in the criminal proceedings. It need not be in the possession of the Court, but it must be capable of being ear-marked, and such an order must be made in the presence of the purchaser of the commodity who has a right to be heard. [p. 709, col. 1.]

An order under section 517 made six months after the trial is bad. [p. 709, col. 2.]

Criminal revision against an order of the Sessions Judge, Mainpuri, dated the 7th of April 1923.

Mr. *J. M. Banerji*, for the Petitioner.

JUDGMENT.—This appears to be an outrageous proceeding lacking either in legal justification or common sense, so far as I can understand. From the somewhat scanty materials before me, it appears that four men were charged a long time ago with stealing 59 bags of mustard seed from the grain market. The thieves appear to have dealt with the seed by selling 113 maunds of it to the firm of the present petitioner. This transaction by the present petitioner's firm took place at a considera-

able distance, *i. e.*, 30 or 40 miles from the scene of the crime. No charge has been made against them for receiving nor could any such charge be reasonably made. They allege that they gave every facility to the prosecution to trace the accused, showing the dealings which the thieves had had in the commodity and produced their books to show that they themselves as purchasers had dealt with the grain in the ordinary course of business. Under such circumstances as these, a Criminal Court ought to hesitate a long time before making an order for restitution even if the goods were still *in esse*. Where a question of *bona fides* and of title by purchase, or otherwise, clearly arises, the duty of the Criminal Court is to leave the complainant to his remedy in the Civil Court if he thinks he has one. But so far as I can gather from section 517 the jurisdiction of the Criminal Court is confined to an order at the conclusion of the trial for the disposal of the property which has been stolen and which is before it in the criminal proceeding. It need not be in the possession of the Court but it must be still capable of being earmarked, and such an order can only be made at the conclusion of the trial and in the presence of the purchaser of the commodity who has a right to be heard. According to the allegation made before me, which derives corroboration from what the Sessions Judge has said in his judgment dealing with an application which was subsequently made him, it appears that what has happened is this. After one trial of three of the thieves had taken place in the year 1921, and after a second trial of the fourth thief had taken place in midsummer 1922, on the 17th of February 1923 a First Class Magistrate issued an order attaching other property of the applicants as security, or by way of satisfaction, for an assumed liability of the value of the grain which they had purchased two years before in the ordinary course of their business, and it is alleged before me that moveable property of the applicants is now under attachment. Put, shortly, the action of the Magistrate may be summarised in this way that, it is equivalent, nor merely to hearing and adjudicating, but also to issuing execution upon a judgment in a suit for damages in favour of some body or another, who is not before him, against somebody else who had no notice of the proceeding. Such a proceeding has no relation as far as I can see to anything known to the law either in the Criminal or Civil Code. If it is possible to give it legal terminology; it would appear that the order of attachment is equivalent to an order of an Execution Court executing a decree for Rs. 855-8-3 as damages for a cause of action which I am unable to specify against a person who has never been sued and who was not even before the Court. If it be the fact that the order was made six months after the last trial that is sufficient to condemn it, but apart from that the proceeding seems to be absolutely unintelligible and to have no reasonable basis. I am quite unable to understand what the Magistrate thought he was doing. The Sessions Judge himself was obviously in a difficulty in applying any legal phraseology to the proceeding, and he resorted to the convenient colloquialism in saying that the original owners of the mustard seed "wanted their mustard back." I have no doubt they did, but most people whose property is stolen want it back, or its price. That does not give a cause of action, and certainly does not give jurisdiction under this section. I have taken the unusual course of dealing with the matter summarily because the petition which ought to have been supported by an affidavit, appears to state facts which are uncontradicted, and which are corroborated by the Sessions Judge's judgment. I am not surprised that the Sessions Judge felt himself incompetent to deal with the proceeding and got out of the difficulty by denying himself jurisdiction to interfere with an order, which had no jurisdiction in its inception. I am willing to listen to any representation which the District Magistrate chooses to make to me, or the Magistrate who made this order, if they find it worth while to pursue this matter any further. No harm can be done by quashing the whole proceeding forthwith, because if this application is based upon any misrepresentation of fact, I can set aside this order and revive the attachment, and if the Magistrate is right in thinking that he can make this order at any time after the trial, there is no

reason why, on giving notice to the applicants, he should not try and make another, though I do not suggest that he should do so. A copy of this order must be sent to the District Magistrate of Agra with a direction that no further proceedigs of any kind in relation to this attachment be permitted, and I direct that such property as has been attached be released from attachment. A further copy must be sent to the District Magistrate of Mainpuri and I suggest to him that he should call upon the First Class Magistrate who made this order to explain himself. If either of these gentlemen wish to submit any explanation to this Court, it may be sent to me and I will deal with it in due course, but I do not require this to be done because I think the whole proceeding was illegal and the less I hear of it the better.

M. A. A. *Proceedings quashed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 206 OF 1923.
May 1, 1923.
Present:—Justice Sir John Bucknill, KT.
CHOTE LAL MODI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Sanction for prosecution—Essential particulars—Private non-judicial enquiry—Magistrate, whether can give sanction.

Sanction must not be given to prosecute a person merely because an officer without proper judicial investigation or inquiry, is of opinion that such person ought to be prosecuted for some offence. [p. 712, col. 2.]

Where a private or a personal enquiry was conducted by a Magistrate on non-judicial lines without the recording of any evidence, without cross-examination and based on unrecorded and irregular methods of taking testimony and as a result of such enquiry the Magistrate passed an order under section 476 of the Criminal Procedure Code for the prosecution of the accused:

Held, that the Magistrate had no jurisdiction to make the order. [p. 711, col. 2.]

Criminal revision from an order of the Deputy Magistrate, Monghyr, dated the 3rd April 1923.

Mr. *G. C. Pal*, for the Petitioner.

JUDGMENT.—This was an application in Criminal Revisional Jurisdiction to set aisde an order of the Deputy Magistrate of Monghyr, dated the 3rd April last, under which he ordered that the applicant should be summoned for prosecution in connection with an alleged offence against the provisions of section 182 of the Indian Penal Code. The circumstances under which this order has been made appear to me to be very unusual. The history of the matter is a somewhat lengthy one. The applicant's mother is a tenure-holder under the Darbhanga Raj in village Matsumbha in the Monghyr District. A number of persons are *betaidars* under the petitioner who looks after his mother's properties. Now, it is admitted that there had been some ill-feeling of late between the petitioner and these *betaidars*. Suits under section 40 of the Bengal Tenancy Act for commutation of rent were instituted and applications under section 69 of the same Act for division of crops under the supervision of an officer of the Court were made. According to the applicant's petition it is laid that, when the persons, who were ordered by the Court to go to the locality to cut the crops, arrived there, it was found that the crops had been cut and removed by the tenants. Now, on the 27th February last the applicant filed a petition before the Sub-Divisional Officer, the gist of which was that he had himself reaped the crops on his own *khash* lands and stored them in his own *khalihan*; that he was afraid that the tenantry, when he began to thresh his crops, might cause trouble, in view of their previous action in removing the crops from the *betai* lands before it was possible for the peons to arrive so that division could properly be made between the applicant and the tenants. He, therefore, asked that a notice might be issued under section 144 ordering the tenants not to go to his *khalihan* during these operations. The Sub-Divisional Magistrate, however, ordered the Police to make an enquiry, which they did; and, in their report, dated the 5th March, they clearly came to the conclusion and informed the Deputy Magistrate that the allegations which had been made by the petitioner were substantially correct. Upon this the Magistrate issued notice against both parties

under section 144 on the 9th March, and on the 12th the applicant asked by a petition that he might be allowed to thresh out and remove such portion of the crops in his *khalihan* as were not claimed in any way by the tenants; for one of the matters which was alleged by the tenantry appears to have been that some of the crops which were in the *khalihan* of the applicant in fact had come from their *raiyati* lands. On the 12th March the Magistrate, on the ground stated in an order of that date, ordered the Police to let the applicant remove that part of his crop from the *khalihan* which was not claimed by the second party but that the remainder was to be threshed and stored with a third person. Now, on the 28th March both parties appear to have filed their statements under the orders which had been passed on the 9th in connection with the proceedings under section 144. The Deputy Magistrate then seems to have considered that it was desirable that he should make some local enquiry, for in his order-sheet he says: "Petitions filed by parties. I will enquire locally at 8-30 A. M. on the 30th instant. Parties must produce their witnesses on the spot. No adjournment will be given." I suppose that what was contemplated by the Deputy Magistrate was that he would hold his Court at the actual locality. However, on the 30th, the Deputy Magistrate was at the spot and entered upon a line of investigation which I can only think was irregular. He appears to have made a large number of personal enquiries. He does not seem to me, so far as I am aware and, so far as appears on the records before me, to have made any notes or kept any record of this evidence. There appears, so far as I know, to have been no sort of cross-examination on the part of either party and, in short, the enquiry or hearing which was made, was not conducted in a judicial manner but merely, so far as I can understand, as a kind of personal investigation. At any rate, there was nothing done which was required to be done under the procedure which is laid down for the conduct of any enquiry of a judicial nature.

Now, there is no doubt that the Magistrate took a very serious view of the position. He gives in his order-sheet of the 30th March a long account of the enquiry which he made, and he, apparently, came to the conclusion that what has been said in the petition of the applicant of the 27th February was not altogether true. In fact, he remarks upon it as being false. I have pointed out that there had been so far as I can see, no sort of judicial enquiry; but, notwithstanding this, the Magistrate thereupon ordered the applicant to show cause on the 4th April why he should not be prosecuted for an offence against the provisions of section 182 of the Indian Penal Code, that is to say, for having given, by his petition, false information to the Magistrate himself, thereby causing him to issue the notice under section 144 forbidding the second party from coming to the *khalihan* and thereby using his lawful power to the injury of these persons. I must at once point out here that it appears to me that this decision which was come to by the Magistrate was based upon an arbitrary opinion and not upon any judicial enquiry or investigation. If he had made a local inspection in a proceeding under the provisions of section 144 and had conducted the enquiry at the place (as it appers it was his intention so to do) under the provisions of that section in a judicial manner, that is to say, by properly recording the evidence of the parties, giving opportunities for cross examination and the like, and at the end of his investigation, had come to the conclusion that the applicant's petition of the 27th February was of such a false character that it ought to form the subject-matter of a prosecution under the provisions of section 182 of the Indian Penal Code, it would then undoubtedly have been perfectly open for him, under the provisions of section 476 of the Criminal Procedure Code, to have sent the case for enquiry to another Magistrate and even to have sent the accused to such Magistrate in custody. But in view of the nature of the investigation in which the Magistrate engaged it does not seem to me that he had any jurisdiction to do what he did at that time. In addition to this, I should also point out that he remanded the applicant in custody in default of the bail for Rs. 500.

The next thing which happened was that on the 4th April the applicant showed

MAHADEO v. EMPEROR.

cause why he should not be prosecuted under section 182 of the Indian Penal Code. The cause, so far as I can see, appears to have been contained in a petition which was dated 4th April. This petition appears to comprise a somewhat pathetic attempt to show to the Magistrate that the Magistrate's procedure had been irregular. He points out that he had had no chance to cross-examine these persons upon whose unrecorded statements the Magistrate had come to the conclusion that the applicant's petition of the 27th February was false. He reiterated the story which he had told before and hoped that the matter would be treated as a civil dispute. No notice, however, was taken of this petition by the Magistrate who in his order-sheet simply remarks, "The cause shown is not satisfactory. I have held a full and careful local enquiry. Even witnesses named by applicant as independent supported the opposite party. I am fully statisfied that the allegations in his petition dated the 27th February were false and malicious. I, therefore, under section 476, Criminal Procedure Code, sanction his prosecution under section 182 of the Indian Penal Code and send the case to Babu R. N. Pande for disposal." This is the order against which an application was made to this Court and in connection with which a Rule was granted on the 16th ultimo by Mr. Justice Mullick and Mr. Justice Macpherson. I do not consider that the circumstances under which the Magistrate came to the conclusion that he was justified in thinking that the petition made by the applicant was, as he says, false and malicious, were circumstances under which he could judicially come to any such opinion. A private or a personal enquiry conducted on non-judicial lines without the recording of any evidence, without cross-examination and based upon such un-recorded and irregular methods of taking testimony do not, in my opinion, justify any presumption such as that to which the Magistrate came. The proceeding of the 30th March appears to me to have been very irregular. I have already pointed out what he should have done had he contemplated taking any such steps to sanction a prosecution of this applicant.

Now, it is pointed out that at present no final order under section 144 of the Criminal Procedure Code has been passed at all. The order, however, for the sanction of the prosecution of the 3rd April will be quashed.

With regard to the necessity for any order under section 144 it is no part of my duty to direct that any proceedings should take place thereunder. As to whether it is necessary that such proceedings should take place or not depends upon circumstances connected with an apprehension of a breach of the peace as to which I am in no way concerned. But assuming that the condition still remains which existed before I take it that those proceedings under section 144 should be carried out to their completion; but they should be carried out in accordance with law and not in such a manner as they were attempted to be carried out hitherto. If, as a result of such proceedings, or of another proceeding, properly conducted, it is thought that the applicant should be prosecuted for any kind of offence the matter can easily be arranged. But sanction must not be given to prosecute a person merely because an officer, without proper judicial investigation or enquiry, is of opinion that such person ought to be prosecuted for some offence.

K. S. D. & Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 305 OF 1922.

November 9, 1922.

Present:—Mr. Dalal, A. J. C.

MAHADEO—ACCUSED—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300 Excep. I, 302, 304—Grave and sudden provocation—Altercation between husband and wife—Abuse of husband by wife—Culpable homicide not amounting to murder.

JHARU LAL *v.* MADAN DAS.

Deceased was in the habit of going away from her husband's house though she was not ill-treated there. One day the husband, on having heard that she was running away from the house, followed her to a grove and tried to persuade her to accompany him back home but she refused and gave him foul abuse. He thereupon struck her with a chopper which he happened to carry at the time, but which he had not taken with him with the intention of hitting her, and caused her death:

Held, that, in view of the circumstances of an Indian household, where the wife is expected to obey and respect her husband the conduct of the wife amounted to grave and sudden provocation within the meaning of Exception I to section 300 of the Penal Code, and as the accused had not carried the chopper with an intent to hit but merely accidentally, the case was one of culpable homicide not amounting to murder under section 304 of the Penal Code.

Appeal against the order of the Sessions Judge, Sitapur, dated the 9th September 1922.

Mr. *H. C. Dutt*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Mahadeo Brahman, about 22 years of age, has appealed from his conviction under section 302, Indian Penal Code, for causing the death of his wife. It is admitted that he killed his wife and what the learned Counsel has urged is, that the offence falls under section 304, Indian Penal Code, and not under section 302 under which section the learned Sessions Judge has convicted the prisoner. The learned Counsel has very rightly accepted the findings of fact arrived at by the lower Court. The learned Sessions Judge found that the appellant did act under provocation and that the provocation was sudden but in his opinion it was not grave such as to bring the appellant's action under Exception I, to section 300, Indian Penal Code.

The facts as found by the learned Judge are, that the wife was in the habit of going away from the appellant's house though she was not ill-treated there. One day at noon the appellant somehow heard that his wife was again running away from home, so he followed her to a grove. Unfortunately, he happened to carry a chopper at the time. The learned Judge was of opinion that the appellant did not take the chopper with the intention of hitting his wife, but it so happened that he was doing some work in the field which required the use of a chopper. The learned Judge has also believed that when the appellant came up with his wife in the grove he tried to persuade her to accompany him back home but that she refused and gave him foul abuse whereupon the appellant struck her with the *gandasa*. Having regard to the unfortunate habit of the woman of running away from home, the foul abuse given by her to a young husband, who tried to take her back home, was in my opinion grave provocation. The circumstances of an Indian household where the wife is expected to obey and respect her husband should also be considered in weighing the nature and amount of the provocation given by the foul abuse to her husband by his wife. The woman was in an advanced stage of pregnancy and it appears from the medical evidence that at least three blows were struck her. This was cruel conduct but the learned Judge has believed that the accused had a chopper in his hand at the time accidentally and not with an intent to hit. Having regard to all these circumstances, I alter the conviction to one under section 304, Indian Penal Code. The appellant acted in a cruel and merciless manner but having regard to his youth I reduce the sentence to rigorous imprisonment for eight years.

Z. K. *Sentence reduced.*

PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 66 OF 1922.

November 7, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Justice Sir John Bucknill, Kt.

JHARU LAL—PETITIONER

versus

Mahanth MADAN DAS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 195, 439—Penal Code (Act XLV of 1860), ss. 468, 471—Bihar and Orissa Public Demands Recovery Act (IV of 1914), sale under—Application to withdraw surplus money—Forgery—Sanction, whether necessary—Revision—High Court, whether can restrain subordinate Court from trying accused person.

A certain *mahal* was sold by a Collector for arrears of Road Cess under the Bihar and Orissa

JHARU LAL *v.* MADAN DAS.

Public Demands Recovery Act, and after paying the Government demand a surplus was lying in the Collectorate to the credit of the certificate debtors. A *mukhtar* subsequently filed a *mukhatarnama* purporting to have been executed in his favour by all the co-sharers in the *mahal* and withdrew the amount in deposit. Complainant, one of the co-sharers, lodged a complaint before a Magistrate that the accused, the other co-sharers in the *mahal*, had forged his name on the *mukhtarnama* and praying that process should issue against them for offences under sections 468 and 471 of the Penal Code. The Magistrate issued process against the accused and the latter moved the High Court in revision to quash the proceedings on the ground that the sanction of the Certificate Officer under section 195 of the Criminal Procedure Code had not been obtained for the prosecution of the accused:

Held, (1) that the certificate proceedings had terminated after the sale of the property and the deposit of the money and that thereafter it was open to any ministerial officer of the Court to return the surplus money to the persons entitled under proper safeguards;

(2) that the application to withdraw the money was not made to the officer entrusted with the custody of the surplus sale-proceeds in his capacity as a Court;

(3) that, therefore, no sancton under section 195 of the Criminal Procedure Code was necessary for the prosecution of the accused.

Semble:—Section 439 of the Criminal Procedure Code does not authorize the High Court to direct a subordinate Court to refrain from trying an accused person against whom it has issued process.

Criminal reference made by the Sessions Judge, Purnea, dated the 8th August 1922.

Mr. *K. N. Chaudhury* (with him Mr. *S. P. Sen*), for the Petitioner.

Mr. *H. L. Nandkeolya* (Assistant Government Advocate), for the Crown.

JUDGMENT.

Mullick, J.—Mahanth Madan Das and his wife and the petitioners, Jharu Lal and Baijnath Chowdhury were co-sharers in Mahal Amirpur Hardas which was sold by the Collector of Purnea for arrears of Road Cess under the Public Demands Recovery Act and after paying the Government demand a surplus of Rs. 126 was lying in deposit in the Purnea Collectorate to the credit of the certificate debtors. On the 5th September 1921 a *mukhtar* named Basdeo Naram filed a *mukhtarnama* purporting to have been executed in his favour by all the debtors including Madan Das and his wife and he drew out the whole amount of Rs. 126 from the Collectorate. On the 12th June 1922 Madan Das lodged a complaint before the Magistrate of Purnea, stating that Jharu Lal and Baijnath had forged his name and that of his wife on the *mukhtarnama* and praying that process should issue against them for offences under sections 468 and 471, Penal Code.

The Magistrate, after calling for a report from the Certificate Officer, issued process as prayed for. Thereupon Jharu Lal and Baijnath moved the Sessions Judge in order that the case might be referred to this Court under section 439, Criminal Procedure Code, and the Sessions Judge has done so on the ground that there being no sanction by the Certificate Officer under section 195, Criminal Procedure Code, for the prosecution of the petitioners the proceedings must be quashed.

Apart from the objection that section 439 does not seem to authorize the Court to direct a Subordinate Court to refrain from trying an accused against whom he has issued process, I think, on the merits, the present application must fail. The application of the 29th June 1922, was not, in my opinion, made to the officer entrusted with the custody of the surplus sale-proceeds in his capacity as a Court. The certificate proceedings terminated after the sale of the property and the deposit of the money and thereafter it seems that it was open to any ministerial officer of the Court to return the money to the persons entitled under proper safeguards. The only proceeding of a judicial nature which the Public Demands Recovery Act contemplates after the deposit of the money is an inquiry by the Certificate Officer under section 32 (2) where the certificate-debtor disputes a claim made by the certificate-holder to receive any amount which might be due to him under section 32 (1) (*c*). It does not seem that it was necessary for the *mukhtar* to institute any proceeding at all for the withdrawal of the money. A verbal application would have sufficed and in the present case the officer who directed the refund of the money was not, in my opinion, acting as a Court or disposing of any proceeding required by the Act.

In these circumstances, the sanction required by section 195 was not necessary and the reference cannot be accepted.

Buchnill, J.—I agree.

Z. K. *Interference declined.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 109 OF 1923.

April 17, 1923.

Present:—Mr. Dalal, J. C.

MOHAMMAD YUNIS KHAN—ACCUSED—APPLICANT

versus

GULAB AND ANOTHER—COMPLAINANTS.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Suspicion in mind of accused.

A Magistrate, in the discharge of the multifarious duties of his office, has to perform a very large number of extra-judicial functions and in the discharge of his executive duties, he may be compelled to act in a way which would raise a suspicion in the mind of an accused person that he is not likely to get justice when the Magistrate came to enquire into a particular matter judicially. In such a case it is advisable that the judicial trial should be held by another Magistrate.

Application for transfer of case under section 526, Criminal Procedure Code, from the Court of the Sub-Divisional Officer, Malihabad, Lucknow.

Mr. *H. C. Dutt*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—There are certain proceedings pending against the applicant, Muhammad Yunis Khan, under section 107 of the Code of Criminal Procedure in the Court of B. Jhumak Lal, Sub-Divisional Officer, Malihabad. This is an application of Muhammad Yunis Khan for the transfer of the proceedings to the Court of some other Magistrate. No application was first made to the District Magistrate because it was under his orders that the case was re-transferred to the Court of B. Jhumak Lal. There are various allegations in an affidavit filed by one Bhiknari Singh on behalf of the applicant. As is usual in such cases, all kinds of suspicions have found expression in it. It is not necessary to enquire as to their truth because the forceful explanation sent to this Court by B. Jhumak Lal makes it clear that the trial had better be held by some other Magistrate. A Magistrate, in the discharge of the multiferious duties of his office, has to perform a very large number of extra-judicial functions and it may so happen that, in the discharge of his executive duties, he may be compelled to act in a way which would raise a suspicion in the mind of an accused person that he was not likely to get justice when the Magistrate came to enquire into a particular matter judicially. It is certain that the Magistrate of the experience and capacity of B. Jhumak Lal would keep the two portions of his duties entirely distinct and would not permit any information gained by him outside the Court to influence him in a judicial trial. At the same time, when an occasion has arisen to give an accused person grounds for suspicion, it is advisable that the judicial trial should be held by another Magistrate, specially where such Magistrates are easily available as in Lucknow. B. Jhumak Lal himself transferred the proceedings from his Court to that of Munshi Mamnun Hasan Khan and in his explanation he rightly indicates a desire that the proceedings had better not be held in his Court. This is a proper position to take up such as I myself would have taken in his place.

I transfer the proceedings for trial to the Court of Munshi Mamnun Hasan Khan, First Class Magistrate, of Lucknow, or to his successor, if he should be transferred.

M. D. J.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 554 OF 1922.

January 10, 1923.

Present:—Mr. Justice Daniels.

MATA PALAT AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203 437—Complaint dismissed without notice to accused—Further enquiry—Order of dismissal, whether can be set aside without notice.

Where a complaint has been dismissed under section 203, Criminal Procedure Code, without notice to the accused, the order of dismissal may also be set aside without notice to him.

Angan v. *Ram Pirbhan*, 18 Ind. Cas. 146; 10 A. L. J. 531; 14 Cr. L. J. 2; 35 A. 78, followed.

Criminal revision from an order of the District Magistrate, Jaunpur, dated the 14th October 1922.

Mr. *A. P. Dube*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—These applications arise out of the same riot in connection with which Appeal No. 819 has just been decided.

A cross-complaint was filed by the party who were accused in that case. It was dismissed under section 203. In his judgment in the riot case the learned Sessions Judge came to the conclusion that the cross-complaint should not have been dealt with so summarily and asked the District Magistrate to set aside the order of dismissal. The Magistrate upon this did set aside the order of dismissal, and it is against this order and that portion of the Sessions Judge's order which refers to this matter that the present applications are filed.

The applicants' complaint is two-fold. Firstly, they say that if the Sessions Judge wished to take action he should have set aside the complaint himself instead of asking the Magistrate to do so. In the second place, they say that the order of dismissal should not have been set aside without notice to them.

As regards the first point, I am, to some extent, in agreement with the applicants, but I do not think that this is a sufficient reason for setting aside the order which has been passed.

As to the second point, there are several rulings of this Court and of other Courts, *e.g.*, *Angan* v. *Ram Pirbhan* (1) that where a complaint has been dismissed under section 203 without notice to the accused the dismissal may be set aside without notice to the accused. On the whole, I am not prepared to interfere and I reject the applications.

K. S. D. *Applications rejected.*

(1) 18 Ind. Cas. 146; 10 A. L. J. 531; 14 Cr. L. J. 2; 35 A. 78.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 337 OF 1923.

June 14, 1923.

Present:—Mr. Justice Ryves.

JAMALUDDIN AND OTHERS—ACCUSED APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

First Information Report, nature and value of—Contradictory statement on oath—Court, whether can rely on report for conviction.

The First Information Report in a criminal case is not substantive evidence of the facts recorded therein and cannot serve as the basis of a conviction.

It is not legitimate for a Court when witnesses tell a different story in the witness-box and contradict the report made by them to discard the evidence given on oath and to rely on the report.

Criminal appeal against an order of the Sessions Judge, Shahjahanpur, dated the 23rd of March 1923.

Mr. *Nehal Chand*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—That a riot took place about sunset in the village of Rawatpur on the 22nd of January last in which one Abid Ali unfortunately was fatally injured is established beyond doubt. Ten men were sent up for trial under sections 147 and 304 of the Indian Penal Code to the Court of Session at Shahjahanpur. The learned Judge has convicted three of them and these have appealed. The learned Judge has come to the definite conclusion that the evidence on both sides is wholly unreliable. He says: "as the witnesses on both sides are unreliable there remains only the reports on which to base any definite conclusion." This is not a legitimate use of a First Information Report. Such reports are not substantive evidence of the facts recorded in them and a conviction cannot be based on a report. They can be used to corroborate the witnesses who made them and are of value as showing that they told the same story at the first possible occasion. If they told a different story in Court, the First Report can be used to contradict them or discredit their testimony. But it is not legitimate for a Court when witnesses tell a different story in the witness-box and contradict the report made by them to discard the evidence given on oath and to rely on the report. The result probably is that there has been a miscarriage of justice in this case, but that is not the fault of the Court but of the complainants themselves and their witnesses. If they choose to suppress the real facts and give false evidence in order to implicate their enemies, the only result is that persons who are probably guilty have to be acquitted. I allow the appeal, set aside the conviction and sentence and direct the appellants to be released.

K. S. D. *Appeal allowed.*

RITLAL SINGH v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION No. 321 OF 1923.

June 19, 1923.

Present:—Mr. Justice Macpherson.

RITLAL SINGH AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *ss.* 149, 326 —*Acquittal on charge under s.* 326 *read with s.* 149—*Accused separately tried under s.* 326 —*Conviction, whether legal.*

Petitioners with nine others were charged with an offence under section 326, read with section 149, of the Penal Code, and acquitted, but the petitioners on being separately charged under section 326 were convicted and the conviction was upheld by the Sessions Judge. They applied to the High Court in revision:

Held, that although in the previous case the petitioners were acquitted owing to the fact that the elements constituting a riot had not been established, nevertheless, inasmuch as they had by using cutting weapons caused grievous hurt in circumstances to which the right of private defence of property did not extend, they were rightly convicted in this case.

Patali Singh v. *Emperor*, 47 Ind. Cas. 73; (1918) Pat. 288; 5 P. L. W. 157; 19 Cr. L. J. 877, distinguished.

Criminal revision from an order of the Deputy Magistrate, Gaya, dated the 12th April 1923.

Messrs. *K. B. Dutt, B. P. Jamuar* and *G. C. Pal*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision on behalf of two accused who have been convicted by the Deputy Magistrate of Gaya under section 326 of the Indian Penal Code and sentenced to six months' rigorous imprisonment and whose convictions and sentences have been upheld on appeal by the Sessions Judge with the addition of an order under section 106 of the Code of Criminal Procedure.

The petitioners with nine others were charged with an offence under section 326, read with section 149, of the Indian Penal Code and acquitted. The petitioners were, however, also separately charged under section 326. The contention on their behalf is that, upon the findings of fact arrived at by the Sessions Judge, they are entitled to acquittal of the charge under section 326, since the witnesses on whose testimony they have been convicted, have been disbelieved in respect of their evidence tending to establish the charge under section 326, read with section 149, of which they have been acquitted.

The case for the prosecution was that Jamuna Prasad Singh was irrigating his *jagir* land at spot A when the accused, who are servants of the Tikari Raj came up in a mob of ten to fifteen armed men, of whom the two petitioners carried swords, directed him to desist as they would take the water to Punawan; when he refused he received a sword blow on his right arm from Ritlal Singh and ran away pursued by the mob who surrounded him in Jugdeo Singh's field, a *rassi* southwest of the *jagir* land; their he was struck by the accused with their swords, by Tiloki on the left arm and by Ritlal on the head, and then the whole mob assaulted him with swords and *lathis* till he was unconcisous; on recovery of consciouness he sent for his brother Shiunandan whom he directed to inform at the *thana*. Shinandan lodged the First Information. The medical witness proved twelve injuries of which no less than five were incised wounds of a severe nature, and there can be no doubt that these injuries constituted grievous hurt with a cutting weapon.

The Magistrate found that the alleged motive was not quite convincing and that the alleged common object of the unlawful assembly was, therefore, not made out and accordingly the charge under section 149 failed. But he found that the assault probably took place in connection with a *parti* field closed to Jagdeo's field of which the Raj had obtaind possession through the Court, and that Jamuna was unarmed and the brutal assault on him with cutting weapons by the petitioners in Jagdeo's field after he had left the disputed land, negatived any defence of right of private defence of property, which could not in the circumstances have necessitated such severe injuries with cutting weapons.

The learned Sessions Judge found that the injuries were not fabricated and believed that the occurrence took place substantially in the manner described by the prosecution, having arisen out of some dis-

pute as to irrigation the nature of which was not convincingly established. He found that the accused took part in the attack upon Jamuna and had no right of private defence when the latter had left the *parti* land, even on their own case (which he doubted) that the dispute related to the *parti* land near Jagdeo's field. From the weapons used by the petitioners and the injuries inflicted, clearly more force had been used than was necessitated by the nature of the case, especially as the *thana* was only a mile distant.

On behalf of the petitioners reliance is placed upon the case of *Patali Singh* v. *Emperor* (1). But that case is distinguishable since there the story for the prosecution had been disbelieved in its most essential details. Here such is not the case. Though the evidence for the prosecution does not establish the precise nature of the irrigation dispute or the precise place where the dispute took place and, therefore, the charge of rioting has failed, nevertheless it has been satisfactorily established that the petitioners, using cutting weapons, voluntarily caused grievous hurt to Jamuna in circumstances to which the right of private defence of property, whether a right of irrigation or *parti* land, could not possibly extend. The Appellate Court has accepted the complainant's testimony corroborated as it is by the First Information. That testimony is sufficient to establish the charge under section 326 of the Penal Code. This disposes of the matter in revision, but perusal of the record leads me to the further conclusion that if the case had come before me on appeal, I should have found myself in complete agreement with the findings of fact of the learned Sessions Judge in respect of the conviction now under consideration.

The sentence being light this application fails and is dismissed. The petitioners must surrender to serve the unexpired portion of their sentences.

K. S. D. & Z. K.

Application dismissed.

(1) 47 Ind. Cas. 73; (1918) Pat. 288; 5 P. L. W. 157; 19 Cr. L. J. 877.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 23 OF 1923.

April 17, 1923.

Present :— Mr. Dalal, J. C.

BALDA PASI— COMPLAINANT

versus

M. NASIR ALI KHAN— ACCUSED.

Criminal Procedure Code (Act V of 1898), s 203—Complaint against Police Officer—Enquiry —Procedure.

Where a complaint is made against a Police Officer it should be enquired into with care and every opportunity given to the complainant to prove his complaint. If the complaint is false the Magistrate has considerable powers of granting compensation by inflicting a fine on the complainant and of prosecuting him for perjury. [p. 719, col. 1.]

Criminal application against the order of the Sessions Judge, Lucknow, dated the 19th December 1922, upholding the order of dismissal, dated the 8th December 1922, of Officiating Sub-Divisional Officer, Malihabad, Lucknow.

Mr. *H. C. Dutt*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—A complaint presented by Balda Pasi to the District Magistrate of Lucknow has been dismissed by a Sub-Divisional Officer of Malihabad. As the complaint was against a Police Officer the complainant was under the impression that the sanction of the District Magistrate for the prosecution was necessary under section 197 of the Code of Criminal Procedure, and the complainant also desired the trial to be held by the District Magistrate. On the same date, the 5th December 1922, the District Magistrate passed the following order :— " To S. D. O. for enquiry." The learned Government Pleader takes this order to be one of transfer under section 192 of the Code of Criminal Procedure. This is likely, because the complainant was not examined by the District Magistrate and he would have been bound to do so under section 200, Criminal Procedure Code, unless he transferred the case under section 192 of the Code. The words " for enquiry " may indicate that the District Magistrate ordered an enquiry under section 202 of the Code of Criminal Procedure but I shall accept the position taken up by the Government Pleader.

KIRAN SARKAR v. EMPEROR.

In my opinion, however, the Sub-Divisional Officer has dismissed the complaint on insufficient grounds. To begin with, he has not even taken, the trouble of making a memorandum of the complainant's statement in English. The vernacular record was made during two days and the Sub-Divisional Officer must have trusted to his memory to remember on the 8th of December what the complainant had stated on the previous day. The reasons given by the Sub-Divisional Officer for dismissing the complaint are:—

(1) That a relative of the complainant was bound over (not convicted as the Sub-Divisional Officer puts it) under section 110 of the Code of Criminal Procedure.

(2) That the complaint was lodged eleven days after the occurrence;

(3) that the delay has not been accounted for, and

(4) that the allegations in the complaint are very serious.

He sums up by saying: "I am not prepared to accept any complaint under such circumstances.' 'It follows that, wherever these circumstances occur, the Magistrate of the Trial Court would never listen to a complaint, however well-supported it may be. I am not prepared to accept this conclusion. When a complaint is made against a Police Officer it should be enquired into with care and every opportunity given to the complainant to prove his complaint. If the complaint is false the Magistrate has considerable power of granting compensation by inflicting a fine on the complainant and of prosecuting him for perjury.

I set aside the order which has been passed under section 203 of the Code of Criminal Procedure, and return the case to the learned District Magistrate with a request that a serious enquiry may be made into the complaint by some Magistrate other than the Magistrate who passed the order of 8th December 1922.

Z K. *Order set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 264 OF 1923.

June 8, 1923.

Present:—Mr. Justice Foster.

KIRAN SARKAR AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 248, 403—Complainant, absence of—Acquittal, effect of—Presence of accused, whether necessary.

The important matter for an order under section 247 of the Criminal Procedure Code is the presence or absence of the complainant. It cannot be said that the accused must either be present or must have been summoned to Court. [p. 720, col. 2.]

An order under section 247 is a final order of acquittal which operates as a bar under section 403 of the Code to the trial of the accused for the same offence. [p. 720, col. 2.]

In re Guggilapu Peddaya, 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 12 Cr. L. J. 41, followed.

In re Muthia Moopan, 21 Ind. Cas. 159; 36 M. 315; 14 Cr. L. J. 559, distinguished.

Criminal revision from an order of the Sub-Deputy Magistrate, Hazaribagh, dated the 11th April 1923.

Messrs. *B. N. Mitra* and *S. N. Banerji*, for the Petitioners.

JUDGMENT.—The complainant, Lodha Manjhi, filed a criminal complaint on the 2nd January 1923 against Kiran Sarkar and the order of the Magistrate was that the accused should be summoned under section 426 of the Indian Penal Code for the 23rd January. On that date neither party appeared. The complainant was ill and has since produced a medical certificate to prove the fact; and the accused Kiran Sarkar had received no summons. The Magistrate thereupon recorded an order of acquittal under section 247 of the Criminal Procedure Code. On the 17th February 1923 Lodha Manjhi filed a second criminal complaint on exactly the same subject-matter and against the same accused Kiran Sarkar as the previous complaint. The accused Kiran Sarkar appeared and filed a petition asking the Court to dismiss the complaint on the ground that he had been already acquitted. The Magistrate rejected this petition, his reason being that section 403 of the Criminal Procedure

KIRAN SARKAR v. EMPEROR.

Code can only come into operation when a person has been "tried" by a Court and convicted or acquitted. The Magistrate expressed the opinion that the word "tried" could only be applied when an accused was brought before the Trying Court and put in peril of conviction. The accused Kiran Sarkar is now moving this Court in revision in respect of the order of the Magistrate refusing to apply section 403 of the Criminal Procedure Code to his case.

I have no hesitation in holding that the Magistrate's order is incorrect. The question is whether Kiran Sarkar has been tried and acquitted. Looking at Chapter XX "Of the trial of Summons-cases by Magistrates" we see that it is headed by section 241. The following procedure shall be observed by Magistrates in the trial of Summons-cases." Sections 242 to 246 certainly portray a trial of the nature referred to by the learned Magistrate where the accused appears, shows cause, the evidence is heard and he is either acquitted or convicted. But that is not the whole of the Chapter describing the procedure for the trial of Summons-cases. There are the provisions of sections 247 and 248. In regard to these two sections I cannot understand how, either on the wording of the section or on general principles, it can be asserted for a moment that the accused must either be present or must have been summoned to Court. A complainant may come into Court even before process has been served upon the accused and withdraw the complaint or he may imply a withdrawl by absenting himself. In both cases the only restraint upon his discretion in the matter is the general control of the Court; the Magistrate may refuse permission to withdraw, or if the complainant absents himself he may adjourn the case without taking notice of the complainant's abstention. On the other hand, the Magistrate may, and he would ordinarily, follow the wishes of the complainant, who it should be remembered is in a summons-case ordinarily the person in charge of the conduct of the case. Here the complainant Lodha Manjhi had notice of the date and was in charge of the conduct of his own case; he did not appear, and the Magistrate, quite within his jurisdiction, acquitted the accused. The fault in the argument of the learned Vakil who has opposed this petition is that he lays stress upon a matter which is only of secondary importance, if of any importance at all, namely, the presence or absence of the accused. The important matter for an order under section 247 of the Criminal Procedure Code is the presence or absence of the complainant. In my opinion the order under section 247 is a final order of acquittal which operates as a bar under section 403 of the Code. I am prepared to follow in this respect *In re Guggilapu Peddaya* (1). Another Madras ruling *In re Muthia Moopan* (2) that has been quoted does not appear to me to be of much value for the decision of the present case. In that case the Magistrate had received a charge-sheet from the Police recommending proceedings under section 107 of the Code of Criminal Procedure and he endorsed the charge-sheet with an order acquitting the accused. When a second proceeding was instituted the parties quite incorrectly appealed to the terms of section 403 of the Code which in fact has no bearing on proceedings under Chapter VIII. But in that judgment there is a remark that neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all. In the present case the accused had been directed to appear in the order passed upon the complaint. The order had certainly not reached the accused, but, as I have shown before, that is not necessary where the Magistrate proceeds under section 247 or section 248 in the course of the trial.

The petition is allowed, the order of the Sub-Divisional Magistrate is set aside and it is declared that the petitioners have been duly tried and acquitted in the sense of section 403 of the Criminal Procedure Code. The proceedings in this case will be quashed.

Petition allowed.

K. S. D. & Z. K.

(1) 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 12 Cr. L. J. 41.

(2) 21 Ind. Cas. 159; 36 M. 315; 14 Cr. L. J. 559.

FAKIR CHAND *v.* NANUG RAM.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 239 OF 1920.
March, 29, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Lala FAKIR CHAND *alias* KULLO MAL—PLAINTIFF—APPELLANT

versus

NANUG RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Registration Act (XVI of 1908), s. 17 (1)—Writing off large sum in consideration of transfer of immoveable property—Will whether compulsorily registrable—Joint Hindu family—Partnership—Inference—Contract Act (IX of 1872), s. 253 (10)—Minor—*De facto *trustee, transactions by—Execution proceedings by minor on attaining majority—Ratification.*

Where it was distinctly stated in a Will that Rs. 6,500 out of a partner's share of the partnership assets were written off in consideration of the transfer by the other partner of his moiety share in a certain *kothi*:

Held, that the document was an instrument which acknowledged the receipt of payment of consideration on account of the assignment or extinction of a right, title or interest in immoveable property of the value of more than Rs. 100 within the meaning of section 17 (1) of the Registration Act, and the non-registration of such a document made it inoperative in so far as is purported to affect those of the executants in respect of whom it was not registered. [p. 739, col. 1]

In the case of a partnership between members of a joint Hindu family, a stipulation that the partnership will not be dissolved by the death of any one partner is ordinarily to be inferred. [p. 740, col. 2.]

Where a minor on attaining majority conducted the execution proceedings of a decree obtained by the *de facto* trustees of his monies and obtained payment:

Held, that this did not amount to a ratification and did not estop the minor from bringing any claims which he may have against the trustees. [p. 742, col. 1.]

First appeal from the decision of the Subordinate Judge, Agra, dated the 17th June 1920.

JUDGMENT.

I. REVIEW OF FACTS LEADING UP TO THE INSTITUTION OF THE SUIT.

Piggott, J.—The facts out of this litigation arise may be stated as follows. About the end of the year 1900 there were living in Agra four brothers, named Anandi Lal, Narain Das, Ram Dayal and Sham Lal. After the death of their father in the preceding year there had been a separation, accompanied by a complete partition of the joint family assets, between the brothers. This, again, was speedily followed by a business partnership between Anandi Lal and Ram Narain. No deed of partnership was ever drawn up, but the two brothers undoubtedly re-united in business, while maintaining their status as separated Hindus. Early in 1901 Anandi Lal fell into ill health; reading between the lines of the evidence it seems fairly clear that he was suffering from consumption, and knew it. On May 29th, 1901, he drew up his last Will and testament, which was presented for registration two days later at his residence in the City of Agra. It is admitted that this document (page A 23 of our record) was executed by Anandi Lal and that the following persons signed it as attesting witnesses:—Narain Das and Ram Dayal (two of the brothers), also Dwarka Das, Damodar Das, Makhan Lal, Ghasi Ram and Badri Das. The document begins by reciting the existence of a business partnership between the executant and Narain Das in four specified shops, in which the interest of Anandi Lal is ten-sixteenths and that of Narain Das is six-sixteenths. It then declares that the heirs of the executant, both in respect of his interest in the aforesaid business and in all his other properties, are his wife, *Musammat* Chameli, and his son Faqira, now two months old. It then proceeds to create an elaborate trust for the benefit of the said Faqira, or Faqir Chand, appointing as trustees Narain Das (the brother) and four of the attesting witnesses, namely, Makhan Lal, Damodar Das ("who is my relative"), Dwarka Das and Ghasi Ram "who is my old *karinda* and a very honest man in whom I have great confidence." The trustees are to see to it that the partnership business is carried on until Faqira attains majority and elaborate instructions are laid down for their guidance. Provision is made for contingencies which never in fact occurred, such as the premature death of Faqira, the adoption by *Musammat* Chameli of another son, or the death of that lady herself. *Musammat* Chameli takes a monthly allowance of forty rupees, with a lump sum in the event of her desiring to go on pilgrimage; the remaining assets are to be

held in trust wholly for the benefit of the minor son. In no event, not even if Faqira should die and no son be adopted in his place, shall *Musammat* Chameli "have any power or right to interfere with my business in any way." The executors or trustees may fill up vacancies in their own body caused by death. They are to see the business carried on "with their advice, consultation and unanimity. They should watch and protect the whole of my property, and no such measure should be adopted as may lead to the waste of any part of my money or property." Only in certain specified eventualities are they empowered to dissolve the business partnership. In the meantime they "should keep defraying the expenses incurred in maintaining Faqira, my minor son, and imparting education, etc., and also the proper expenses incurred in marriages, funerals, illness, etc."

There has been some little controversy before us as to how far the persons who signed this document as attesting witnesses are affected with notice of its contents. I think I may dispose of this point briefly and at once. On the pleadings and the evidence, as well as in consideration of the manifest probabilities of the case, I have no doubt that the trustees or executors named in the Will, when they attested this document, did so with full knowledge of the trust thereby created and of their own appointment as executors: also, that by signing it they intended to signify, and did in fact signify, their own acceptance of the trust. It is a more arguable point how far any of them, and more particulary Narain Das and Ghasi Ram, are bound, in virtue of their signatures, to an admission of any recitals in the deed regarding the nature and extent of the partnership business, or of Anandi Lal's share in the same. I note, however, that the more material points, such as the designation and location of the four shops and the specifications of the shares of Anandi Lal and Narain Das, are admitted in the pleadings. The question of the accuracy of Anandi Lal's assertion that his personal share in the partnership capital amounted to Rs. 58,000 on the date of the Will, does not arise at the stage which the litigation has now reached.

Anandi Lal died on the 13th October 1901. It is alleged by the defendants to this suit that, in the interval, namely, on the 27th June 1901, he and Narain Das executed, each in favour of the other, two unregistered documents (Exhibits A and B, pages 25 and 26R) which materially modified the conditions of the partnership. The defendants are put to proof of these documents and the question whether they have proved the same will be discussed in due course.

In the month of October 1905 Narain Das was on his death-bed, and he died on the 23rd of that month. Two days previously he executed three documents around which the controversy in this litigation largely hinges: they were presented for registration by Narain Das at his own residence in the City of Agra, on the 23rd October 1905, within about four hours of his death. They are marked Exhibits C, F and E and are re-produced at pages R 27 to R 37 of our record.

Two of these, *viz.*, Exhibits F and E, are documents of which Narain Das is the sole executant, their execution is admitted, the controversy is as to their binding effect, if any, on the interests of Faqir Chand. Their main importance lies in the fact that their drafting, execution and registration formed part of the same transaction as resulted in the preparation and partial registration of the remaining document, Exhibit C. It will be convenient to examine the three documents at once. Exhibit E, executed by Narain Das alone, and duly registered in his name, recites that the executant is the owner of a half share in a certain building in the City of Agra, "in the *kothi* of Mr. Campbell," originally purchased by him jointly with his brother Anandi Lal. He relinquishes this moiety share to Faqira, minor son of Anandi Lal and owner of the other moiety, in lieu of a sum of Rs. 6,500 for which the executant has already received credit upon a settlement of partnership accounts

between himself and the lawful guardians of the said minor. Exhibit F is the last Will and testament of Narain Das. It was undoubtedly executed by him and duly registered in his name under the circumstances already stated. It starts with the dissolution of the partnership between himself and Faqira, treated as an accomplished fact, the executant describing himself as the sole owner of the seven shops into which the partnership business appears to have now expanded. It recites that the executant leaves as his sole heirs his wife, *Musammat* Pisto, and his daughter, *Musammat* Munni: it appoints as executors to carry on the business for the benefit of the said heirs three persons. One is Ghasi Ram, the faithful servant whom Anandi Lal had already chosen as one of the trustees under his Will, the other two are the surviving brothers, Ram Dayal and Sham Lal. *Musammat* Pisto is given authority to adopt a son after the testator's death. The executors are to carry on the business, the control of which is vested in Ram Dayal and Sham Lal; but minute directions are given in respect of a variety of matters, including the apportionment of the profits. It is laid down that the first charge on the net profits is to be a deduction of ten annas per cent. in favour of the legatees; the balance is to be divided, one-fourth going to Ghasi Ram and three-fourths to the executors for the benefit of the legatees. In one particular shop Dwarka Das and Ratan Lal are given an interest of a one-eighth share each in the profits, after the deduction of ten annas per cent.; while a similar interest to the extent of three-sixteenths of the profits is created in favour of a servant of the firm named Chhatar Mal. Provision is made for the remuneration of these three men by monthly salaries in the event of the shops in which they are concerned being carried on at a loss; but there is no similar provision in respect of Ghasi Ram. The provisions of the Will which purport to affect the minor Faqira are important enough to be worth quoting textually:—"I have to pay Rs. 44,439 to Faqira minor on account of the share of Anandi Lal in partnership business, and Rs. 2,000 belonging to Faqira minor which is with me for meeting the expenses of a *dharamsala* and I shall pay the same. If I fail to do so the said executors shall have power to take out of the funds of my business Rs. 44,439 due to Faqira minor and purchase any property with the said amount. Lala Ram Dayal and Sham Lal aforesaid shall have power to keep the money in deposit with them so long as they do not acquire any property, to meet the expenses of *Musammat* Chameli, widow of Anandi Lal, and Faqira minor with the interest on the said money, to take a receipt from the executors of Anandi Lal when property is purchased and to look after the minor and the property. Lala Ram Dayal and Sham Lal shall keep in deposit with them Rs. 2,000 out of the fund of my business and Rs. 2,000 due to Faqira minor aforesaid, in all Rs. 4,000, and shall continue to meet the expenses of the joint *dharamsala* of me the executant and Anandi Lal."

I now come to the important document, Exhibit C. It purports to be a bilateral agreement for the dissolution of the partnership referred to in the Will of Anandi Lal, and to be executed by Narain Das on the one side and on the other by Makhan Lal, Damodar Das, Ghasi Ram and Dwarka Das, the four remaining trustees, on behalf of the minor Faqira, as well as by *Musammat* Chameli "as the guardian of her minor son Faqira." It begins with a statement of the partnership business, specifying the seven shops to which it had by this time extended, and speaking of the same as "carried on in partnership with Anandi Lal, deceased, whose son is Faqira minor." It then continues:—"The accounts of the said shops have now been examined and the partnership has been dissolved. Rupees 52,939 have, after allowing credit for the money for the construction of the *dharamsala*, been found due to Faqira, minor aforesaid son of Anandi Lal, and I, Lala Narain Das aforesaid, Second Party became the owner of the entire business of the said shops, money dealings and all kinds of goods and articles in the shops." The remaining executants, described as

the "First party" purport to acknowledge the receipt of this sum of Rs. 52,939 in full discharge of all claims on the part of the minor in respect of his share in the partnership, according to the following detail:—

(a) Rs. 6,500 is credited back to Narain Das as the price of a moiety share referred to in the agreement, Exhibit C.

(b) Rs. 2,000 are to be made over to Ram Dayal and Sham Lal on the understanding that they will pay interest on the same at 6 per cent. per annum and apply this interest to "meeting the expenses of the *dharamsala*."

(c) Rs. 44,439 Narain Das acknowledges to be in deposit with himself, and he says that he will "purchase property" with the same within three months. Until this is done, however, this very considerable sum of money is to be deposited with Ram Dayal and Sham Lal, and the document continues:—"The interest of the said money shall continue to be accumulated and the expenses of *Musammat* Chameli and the minor aforesaid shall be met therefrom. Lala Ram Dayal and Sham Lal shall be liable to look after the property which exists at present or shall be purchased in future, the said minor and the business which may be carried on in future." The result of these transactions, considered as a whole, on the position of Ram Dayal and Sham Lal is peculiar. Under the Will of Narain Das they become the *de facto* managers of the partnership business. Out of the assets of that business they are to take Rs. 44,439 plus Rs. 2,000 and use the same at their discretion, provided they keep up a certain *dharamsala* and take over from the trustees all responsibility for the maintenance of *Musammat* Chameli and her minor son. If ink and paper can do it, the trustees have divested themselves of all responsibility and handed over their duties, along with the assets of the minor, to two brothers of Anandi Lal whom that gentleman, whatever may have been his reasons, had carefully excluded altogether from the provisions of his Will, Sham Lal tells us in his deposition (page 71R) that, as a matter of fact, he used the deposit of Rs. 44,439 to start a shop under the name of "Chhatar Mal-Anandi Lal," which was closed after carrying on business for eight or nine years. Out of the profits of this shop he supported the minor and *Musammat* Chameli, and he holds to the credit of Faqir Chand a balance now amounting to Rs. 47,000 and Rs. 48,000.

II.—INSTITUTION OF THE SUIT: ARRAY OF PARTIES: THEIR PLEADINGS.

Faqir Chand must have attained his majority sometime in the month of March 1919. In May of that year he issued notices to his two surviving trustees, Makhan Lal and Ghasi Ram, and to Nanak Ram, son of Narain Das, in which he asked for an account of their dealings with the partnership business in which he claimed a ten-sixteenths share in accordance with the provisions of his father's Will. He intimated, further, that he desired a dissolution of the partnership and separate possession over his own share in the accumulated assets. He received very guarded replies, drafted and forwarded under legal advice. The most significant passage in these replies is to be found in the second paragraph of that sent in by Ghasi Ram, which is to the following effect:—"All the accounts of Lala Faqir Chand were settled with *Musammat* Chameli, natural guardian and mother of the said Lala Faqir Chand, in the lifetime of Lala Narain Das, and she took all the accounts and the partnership was dissolved. The whole amount including interest etc., which was found due to Lala Faqir Chand was deposited with Lala Ram Dayal and Sham Lal, proprietors of the firm of Chhater Mal-Ram Dayal, and Faqir Chand and his mother benefited by the said sum and set up even a separate business with it." The result was the institution, on the 12th of July 1919, of the suit with which we are now concerned. Lala Faqir Chand, as plaintiff, impleads seven persons as defendants. The first three are Nanag Ram, described in the plaint as alleging himself to be the adopted son of Lala Narain Das, *Musammat* Pisto, widow of the said Narain Das, and *Mus-*

ammat Mohan Dei, his daughter, these three are impleaded as representing between them the entire estate of Narain Das. The fourth defendant is Ghasi Ram, impleaded as a trustee under the Will of Anandi Lal and also as a partner in the firm. The next two defendants are Ram Dayal and Sham Lal, impleaded as the *de facto* managers of the partnership business, and also as persons into whose hands assets of that business in which the plaintiff claims a share have actually passed. The remaining defendant is Lala Makhan Lal, the other surviving trustee. It is an admitted fact that, besides Narain Das himself, two other trustees, namely, Dwarka Das and Damodar Das, had died prior to the institution of the suit. The plaint is a lengthy document and it does not seem to me surprising, under the circumstances, that the plaintiff should have spread his net wide and appealed to the Court in broad terms to give him such relief as might be found appropriate, after a complete investigation of the facts, and against such persons as upon the facts so ascertained might be found liable. Undoubtedly, the plaint as drafted is, first and foremost, a claim for dissolution of partnership and settlement of accounts between the plaintiff and the remaining partners. It is equally certain that the liability of Ghasi Ram, as trustee under the Will of Anandi Lal, is asserted and made part of the cause of action, while Makhan Lal is impleaded solely and entirely by reason of his liability as a surviving trustee. I am further of opinion, though I do not regard the point as material, that as against the heirs of Narain Das the plaint is so drafted as to claim relief against the estate of Narain Das, both on the ground of partnership in the business, and on the ground of that gentleman's position as one of the trustees. The pleadings of the first three defendants raised a question which is certainly not before us now in appeal. *Musammat* Mohan Dei denied the adoption of Nanag Ram and apparently wished to have it put in issue at this trial. So far as we are now concerned, we take it as established, and not contested by any pleadings now before us, that Nanak Ram was validly adopted by *Musammat* Pisto, widow of Narain Das, and that he is in fact, as he has asserted himself to be throughout this litigation, the heir of Narain Das and the representative of his estate. In his written statement, as well as in that of Ghasi Ram, various pleas were taken of a more or less technical character. These defendants were obviously anxious to tie the plaintiff down to a suit for dissolution of partnership pure and simple, so that the suit might fail altogether in the event of the Court's finding that the partnership had ceased to exist on some date in the year 1905. They made it a grievance that, if the plaintiff desired to enforce any liability against the trustees appointed in his father's Will, he should not have impleaded the heirs or legal representatives of the deceased trustees, Damodar Das and Dwarka Das. Nanag Ram distinctly pleaded that the partnership was dissolved by the agreement Exhibit C of the 21st of October 1905, insisting on the fact that this agreement was entered into, not only with *Musammat* Chameli, but with all the trustees other than Narain Das himself. He contended that this dissolution of partnership was preceded by an honest and thorough examination of the accounts and that the plaintiff was given his full share in the partnership assets. In respect of that share it was pleaded that, although the original partnership between Anandi Lal and Narain Das had undoubtedly been entered into on the basis that the former held a share of ten-sixteenths and the latter one of six-sixteenths only, this arrangement had been modified by the execution of the two documents, Exhibits A and B of the 27th of June 1901 already referred to, in accordance with which the shares of the partners had been fixed from that date at one moiety each. There was also a plea to the effect that the plaintiff had so benefited by the settlement embodied in the agreement of the 21st of October 1905, and appropriated the same since he attained majority, that he was in some way estopped from attempting to go behind that settlement. The written statement of Ghasi Ram follows much the same lines. There has been some little argument

before us as to whether Ghasi Ram did or did not admit himself to have been at any time a partner in the business referred to in the plaint. I do not think there can be any real doubt as to the position taken up by Ghasi Ram. He never admitted having been a partner of the plaintiffs at any time, his case being that the partnership in which the plaintiff was concerned came to an end in October 1905. But he did admit having become a partner in business with the heirs and successors of Narain Das from the date of that gentleman's death, and I might add that it is obvious that he did become a partner under the terms of the Will of Narain Das. In one particular, the written statemet filed by Nanag Ram goes beyond that of Ghasi Ram. The latter, in my opinion, distinctly pins himself down to the plea of a dissolution of partnership effected in the lifetime of Narain Das by the execution of the deed, Exhibit C. The former, in paragraph 32 of his defence, does put forward as a sort of alternative pleading the allegation that any partnership existing in the lifetime of Narain Das was, in any event, dissolved by that gentleman's death. Of the remaining defendants, Ram Dayal entered no appearance. Sham Lal filed a brief written statement, in which he alleged that he, at any rate, had no concern in any business in which the plaintiff was ever a partner, that the plaint disclosed no cause of action as against him, that he had kept full accounts of all monies entrusted to him for the benefit of the plaintiff, and that he was ready at any moment to pay into Court any sum of money which the Court might direct. I think I may fairly add in this connection that, although Ram Dayal entered no formal appearance, there are a number of pleadings on the record which show that he practically made common cause with Sham Lal and the two fought the case together. At one stage of the trial in the Court below these defendants offered to pay into Court a substantial sum of money which they admitted themselves to be holding in deposit on the plaintiff's account. At the last moment, however, the Counsel representing these defendants insisted that his clients would make no such payment into Court, unless the plaintiff were prepared to accept the same as a full and complete discharge of their liability towards him. As the plaintiff, not unnaturally, declined to accept any such condition, no deposit was ever made. The last defendant, Makhan Lal, was eventually exempted by the plaintiff from his claim. He went into the witness-box on the plaintiff's behalf and gave evidence of considerable importance to which I shall have to refer later. There has been no little controversy as to the credibility of the evidence given by Makhan Lal, and it has been suggested that he has colluded with the plaintiff and made statement in the latter's favour, in return for the latter's exempting him from liability in respect of any misconduct or negligence in the performance of his duties as one of the trustees. On this point I think I might say at once that Makhan Lal, on his own showing, did so neglect his duties as a trustee that it would have been open to the plaintiff, as a matter of law, to hold him liable, in the last resort, for any loss which the plaintiff might prove that he had suffered in consequence of such neglect. On the other hand, it is obvious enough that Makhan Lal, from the plaintiff's point of view, is not worth powder and shot. There is no reason to doubt that the defendants Nanag Ram, Ghasi Ram, Ram Dayal and Shyam Lal are in a position between them to make good to the plaintiff any sum which may be found due to him, and the latter had no adequate motive for pressing his case against Makhan Lal.

What I have called the technical pleas sought to be raised by various defendants have no real force. As a matter of fact, in the conclusions at which I have arrived on the main issues of fact and of law, the plaintiff has made out his case for relief by way of a decree for dissolution of partnership and rendition of accounts; but in any case I think he was quite entitled, in one and the same suit, to claim relief either as a partner in a subsisting business, or in the alternative as against trustees who had played ducks and drakes with his interests during his minority. Nor was he bound to implead the legal representatives of the deceased trustees, Damodar Das and Dwarka Das. The liability of the trustees was joint and several and

the defendant Nanag Ram was being impleaded principally on the allegation of a subsisting partnership, although his possible liability as an heir in possession of the assets of a defaulting trustee was also included. The position of the defendants, Ram Dayal and Sham Lal, was certainly peculiar; but it arose naturally and inevitably out of the responsibilities which they took upon themselves in connection with the Will of Narain Das and the transactions which followed thereupon. If the plaintiff succeeds in making out his case that there had never been any dissolution in law of the partnership which subsisted between himself and Narain Das the position of these two defendants seems to me clear enough. As executors under the Will of Narain Das they virtually took over the entire assets of the partnership business and made themselves responsible for its management. They chose to open certain books of account, according to which the greater part of the business was carried on as a business in which the partners were Ghasi Ram and the heirs of Narain Das, three other employees of the firm being remunerated by way of a percentage on the profits earned by particular branches of the business. One shop was carried on in the building at Agra referred to in the exhibits as the *kothi* of Mr. Campbell. This the defendants elected to treat as a separate business, carried on for the benefit of Faqir Chand, alone, the capital of which was stated to be a specified sum and earmarked as the separate property of this particular person. The plaintiff, however, supposing that he makes good his plea as to there having been no legal dissolution of the partnership, is entitled to go behind this artificial division of the partnership assets and to have all the shops carried on under the management of Ram Dayal and Sham Lal, including the shop described as that of Chhater Mal-Anandi Lal in Mr. Campbell's *kothi* at Agra, treated as branches of one and the same partnership business. As the *de facto* managers of this business, Ram Dayal and Sham Lal are liable, along with Nanag Ram and Ghasi Ram, to render to the plaintiff true accounts of the same. As to any liability which might attach to these two defendants in the alternative, that is to say, in the event of its being found against the plaintiff that the previously existing partnership was dissolved, either on the 21st of October 1905 by the execution of the document, Exhibit C, or on the 23rd of October 1905, at the death of Narain Das, this question does not really arise in view of the findings I propose to record on the main issues in the case. I am, however, clearly of opinion that, on any possible view of the pleadings, these two defendants were admittedly liable to the plaintiff for a sum of money stated by Sham Lal himself in his deposition to be something between Rs. 47,000 and Rs. 48,000. This is the first case I have ever come across in which two defendants against whom relief was undoubtedly sought (at least in the alternative) by way of a decree for money, who admit themselves to be liable to the plaintiff for a large sum of money, have had the entire suit against them dismissed, merely on the ground that they had offered to pay that money into Court, but had eventually declined to do so except upon a condition which it was obviously impossible for the plaintiff to accept.

The case went to trial in the Court below upon a multitude of issues, loosely framed and overlapping one another to such an extent that seven out of the thirteen issues were finally lumped together by the Trial Court when it came to write its judgment. In substance, the learned Subordinate Judge has found that the agreements, Exhibit A and Exhibit B, of the 27th of June 1901, are proved, so that from this date Anandi Lal and Narain Das became owners of the partnership business in equal shares. He has found that the agreement, Exhibit C, of the 21st of October 1905, was duly executed by all the persons who purport to have executed it, that it is binding on the plaintiff, that it operated as a dissolution of the previously existing partnership and as a complete discharge, in favour of Narain Das and his heirs after him, in respect of all liabilities in connection with the said partnership. Curiously enough, as it seems to me, this finding has nevertheless been qualified. The learned Subordinate Judge has held that the settlement of accounts effected on the 21st of October

FAKIR CHAND v. NANUG RAM.

1905 was incomplete, in that it failed to take into account the profits for the last year of the partnership. He has held that the heirs of Narain Das (from the use of this word in the plural I presume that he means defendants Nos. 1, 2 and 3) are liable to render an account to the plaintiff from a date somewhat vaguely specified in the decree up to either the 21st or the 23rd of October 1905, the period indicated being apparently the last of the partnership. The Trial Court has further found, in the alternative, that if the previously subsisting partnership was not dissolved on the 21st of October 1905, it came to an end two days later (October 23rd, 1905), on the death of Narain Das, by operation of the principle of law embodied in section 253, clause (10), of the Indian Contract Act, IX of 1872. He has held that all the defendants, other than the heirs of Narain Das, are exempt from liability so far as this suit is concerned, because the suit could only be treated as one for dissolution of partnership and rendition of accounts, and could succeed if at all on that basis alone. Against the decree framed in accordance with these findings the plaintiff has filed First Appeal No. 239 of 1920. The memorandum of appeal is unnecessarily prolix and argumentative. Some of the paragraphs are merely general pleas, to the effect that the conclusions arrived at by the Court below are wrong. A number of others are directed against details in the procedure followed in the Trial Court: none of these seemed to me of any particular consequence, or to be seriously pressed upon us in the course of argument. A large number of pleas, argumentative in form, attack the finding of the Trial Court as to the execution of the deed, Exhibit C, of the 21st of October 1905 by the trustees other than Narain Das and Ghasi Ram, and as to its validity against the plaintiff, either by reason of its execution by *Musammat* Cameli, or in the event of its execution by the whole body of trustees being proved. Along with this question it will be necessary to take the question whether the two unregistered deeds, Exhibits A and B, of the 27th of June 1901, are genuine and valid. For one thing, the settlement of the 21st of October 1905 avowedly proceeds upon the basis that Anandi Lal and Narain Das were partners in equal shares on the date of Anandi Lal's death: it being admitted that the partnership was constituted on the basis that Anandi Lal held a ten-sixteenths and Narain Das a six sixteenths share, the agreement of the 21st of October 1905 fails; independently of any other considerations unless the contesting defendants can prove affirmatively that Anandi Lal had agreed before his death to an arrangement which reduced his share in the divisible profits to half. Moreover, it so happens that a signature purporting to be that of the trustee Damodar Das who is a brother of *Musammat* Cameli, the widow of Anandi Lal, appears as an attesting witness both to Exhibit A (Anandi Lal's agreement of the 27th of June 1901) and as an executant of Exhibit C (the agreement of the 21st October of 1905). It was a matter of particular importance for the defendants to prove that Damodar Das had signed both these documents, and the result is that a mass of evidence has been produced on this point which must, in my opinion, either be accepted as proving the signature of Damodar Das to both documents, or must be held insufficient to prove his signature to either. Of the remaining pleas in the plaintiff's memorandum of appeal there are only two which seem to require notice. One is against the Trial Court's finding by which Ghasi Ram is exempted from all liability to render accounts and awarded his full costs: the other relates to the entire dismissal of the suit as against the defendants Ram Dayal and Sham Lal. We have also before us a petition of objections by the defendant-respondent, Sham Lal, to the effect that the Trial Court ought to have awarded him his costs. Finally, a separate appeal, First Appeal No. 347 of 1921, has been filed by the defendant, Nanag Ram. This defendant, not unnaturally as it seems to me, contends that the Court below, on its own findings, was clearly mistaken in passing any decree whatever against him. If the agreement, Exhibit C of the 21st of October 1905, is a duly executed document and binding on the plaintiff, it must operate as a full discharge of Narain Das from all liability

in respect of the partnership accounts other than the liability stated in the agreement itself. It has been conceded before us in argument that, if this Court on the plaintiff's appeal, arrives at the conclusion, either that the deed, Exhibit C, is not proved to have been executed by all the trustees under the Will of Anandi Lal, or that this document even if so executed is not binding on the plaintiff, or does not operate as a full discharge in favour of Narain Das, then there is nothing in this appeal which can be pressed.

III.—TWO MAIN ISSUES OF FACT.

I now take up the two main issues of fact in the case, which (for reasons already stated) I think must be considered together.

Is it proved that Anandi Lal executed the agreement, Exhibit A, of June 27th, 1901?

It is proved that Makhan Lal, Damodar Das and Dwarka Das, that is to say, the trustees other than Narain Das and Ghasi Ram, executed the agreement, Exhibit C, of October 21st, 1905?

I have come to the conclusion that the finding on both these issues must be in the negative, and that it is, therefore, unnecessary to consider the further questions of law which could only arise in the event of an affirmative finding on the question of execution.

The plaintiff probably did himself harm in the Court below by overstating his case on these issues. He denounced Exhibit A, as also the corresponding document, Exhibit B of the same date, purporting to be executed by Narain Das, as forgeries concocted for the purposes of the present suit. In doing this he laid much stress on certain details apparent on the face of the documents themselves. There is an obvious erasure, unattested, in the middle of Exhibit A; while the companion document not merely shows a long erasure, purporting to be attested by the signature of Narain Das, but the scribe has made a curious blunder in the dating. He obviously wrote, in the first instance, "July 27th and then altered the name of the month clumsily to read like "June". It was on this last detail that the plaintiff particularly insisted as suggestive of a forgery perpetrated in the month of July 1919, just after this suit was launched. These points seem to me of little weight and susceptible of being argued both ways. The two documents embody an agreement such as Anandi Lal and Narain Das might very naturally have come to under the circumstances in which they were placed, in view of the serious illness and anticipated decease of Anandi Lal. A perfectly conceivable theory would be that the two brothers had in fact discussed some such arrangement, but had never reduced it to writing, and that Narain Das actually executed Exhibit B and forged his brother's signature to Exhibit A, shortly after the latter's death. My main point, however, is that it is not for the plaintiff to prove a forgery. The defendants produced these documents; they are not thirty years old and can scarcely be said to have been produced from proper custody, for Exhibit B ought, strictly speaking, to have been made over to the executors of Anandi Lal's Will, if not to Anandi Lal in his lifetime. There is also a certain probability that the brothers, if they intended to enter into a transaction so important, would have taken the precaution to register the documents. I should attach less importance to this argument if I were satisfied that Damodar Das, the brother of *Musammat* Chameli, and one of the trustees under Anandi Lal's Will, actually signed both documents as an attesting witness. Here, however, I am in danger of arguing in a circle; for if I were satisfied as to the signature of Damodar Das I should hold the two exhibits to be proved. Before, however, I turn to the direct evidence, I must mention one other argument from probability. Much stress was laid on behalf of the defendants on the fact that the partnership accounts from the death of Anandi Lal to that of Narain Das were kept on the basis of an equal division of profits between Narain Das and Faqir Chand. The argument has no great force in itself unless it could be shown that Damodar Das or some other trustee (not Narain Das or Ghasi Ram) troubled himself to

exercise some effective supervision over the accounts; but it is open to a most powerful rejoinder. The agreement embodied in Exhibits A and B does not merely effect a re-apportionment of the shares in the partnership; it also defines the partnership capital, and provides that Anandi Lal shall be entitled to charge interest upon all capital in excess of Rs. 40,000 which he may invest in the business. The accounts which have been submitted to us show that Anandi Lal's capital was in excess of this sum and that he was not credited with interest.

I return now to the plain issue: —"Have the defendants proved, by such evidence as the Court, in view of all the circumstances, may fairly accept and act upon, that Anandi Lal signed Exhibit A?"

The document purports to be attested by Ghasi Ram (defendant No. 4) by Chhatar Mal (an old servant of the firm, in whose favour there is a provision in the Will of Narain Das) and by Damodar Das. It also purports to have been written "by the pen of Mirza Wazir Beg, scribe, Agra"

Ghasi Ram went into the witness-box and deposed to the due execution of Exhibits A and B and their attestation by the marginal witnesses. In cross-examination he stated that both brothers had intended to register the two agreements and that he did not know why they abandoned that intention. He offered no explanation of the fact that both documents "remained in the shop" and that Exhibit B was never made over to Anandi Lal, or to the executors of his Will. His attention was drawn to one peculiar feature about the attestation of both documents: over the signatures of Ghasi Ram and Chhatar Mal, the scribe has written out their names and parentage in the *Urdu* character, adding in the case of Chhatar Mal his caste and residence. On each document the signature of Damodar Das bears every appearance of having been added after the attestation was otherwise complete: it is an all but illegible scrawl in the *Mahajani* or *Sarafi* character, underneath a simple line, with no specification of the witness in the *Urdu* handwriting of the scribe. All that Ghasi Ram could say was that the scribe was certainly present when Damodar Das signed; that all three attesting witnesses affixed their signatures in succession at one and the same time, and that he could suggest no explanation of the peculiarity to which his attention had been drawn. He was positive also (and the importance of this point will appear presently) that the scribe of Exhibits A and B was the same "Wazir Beg" who had written out the Will of Anandi Lal.

The signature of the attesting witness Chhatar Mal, who died in 1906 or 1907, was identified by his grandson, Lachhman Das. I attach little importance to this: Chhatar Mal was an old servant of the firm; his position and prospects were improved by the will of Narain Das and he might well have consented to sign his name in the margin of any document handed over to him by Narain Das, without inquiring too scrupulously what the paper contained.

To prove the really critical signature of Damodar Das, the defendants called one Mahendra Nath, whose paternal grandfather's sister was the mother of Damodar Das. He professed to identify with certainty the signatures of Damodar Das to Exhibits A and B, as well as to the even more important document, Exhibit C. Now, if there were nothing else in the case, I should not feel the faintest hesitation in holding that the evidence of this witness is utterly worthless. His relationship to Damodar Das is a distant one; his cross-examination showed that the intercourse between the two was slight. Damodar Das admittedly wrote both the *Urdu* (*Persian*) and the *Nagri* (*Hindi*) character it is a controverted point whether he ever used the *Mahajani* or *Sarrafi* character at all. I shall have to refer to this point again; but for the present it is quite enough to say that I am abundantly satisfied that this young man was not in a position honestly to identify the words "*Gawahi Damodar Das ki*," written in the *Mahajani* chraracter, as being in the hand-writing of Damodar Das, the brother-in-law of Anandi Lal. Moreover, these words, as they appear at the bottom of the right-hand margin of Exhibits A and B, are such an intolerable scrawl that

hould find it difficult to believe any :ness who swore to positive and unsitating recognition o the hand-writing. do not understand the learned Sublinate Judge himself to have placed y reliance on the testimony of this witss.

So far, I have reached the conclusion at the evidence to prove Exhibit A is stinctly thin, it is stretching a point to ld an important document like this oved by the all but uncorroborated testiony of an interested party like the dendant Ghasi Ram. The question of the edit to be attached to this man's evidence propose finally to re-consider after I have viewed the whole evidence bearing on e execution of the still more important shibit C. For the present I am concerned note that the defendants certainly d not improve their position by the tempt they made to put in the witnessox the scribe of the document. The Will of Anandi Lal purports to have been ritten " by the pen of Mirza Wazir Ali eg, son of Mirza Inayat Ali Beg, sect oghal, a scribe by profession, resident *Mohalla* Moti Katra, Agra." Exhibits and B are marked as " by the pen of irza Wazir Beg, scribe, Agra." The inrval in date between the two documents rather less than one month; it seems ir matter of inference that, if Exhibits and B were genuine documents, actually xecuted on June 27th, 1901, the same Wazir Beg" would be employed to write iem who had already written the Will, while Ghasi Ram was under cross-examination on April 7th, 1920, he deposed as follows:—' I have not caused Wazir Beg to be summoned. The scribe of these documents (A and B) was the same Wazir Beg who wrote Anandi Lal's Will. I do not know if Wazir Beg was implicated in forgery case and absconded." On April th, 1920, there appeared in the witnessbox, as a witness called by the defendants, Nanak Ram and Ghasi Ram, a man who ave his name as Wazir Beg, son of Amir Beg, Moghal, resident of Hing-ki Mandavi, Agra, City. He had apparently been summoned to bring with him any registers r account-books kept by him in the regular course of business which would show the dates on which he had written particular documents. He deposed that he kept no such books and that his entire income from document writing was not more than thirty rupees a year. On looking at the Will of Anandi Lal and at the agreements Exhibits A and B, he deposed that these were not in his hand-writing. He added that, while he knew Ghasi Ram by face, he had no recollection of Narain Das, Anandi Lal or their father. On this Ghasi Ram put in a petition supported by affidavit, asserting positively that the witness in the box was the very man who had written all three documents and asking leave to cross-examine him. Leave having been granted, the defendants put the witness through a feeble and inefficient cross-examination. The most favourable answer they got out of him was that " Hing-ki-Mandavi," where he resides might be regarded as a sub-division of " *Mohalla* Moti Katra." He insisted that his own father was Amir Beg, denied that he was ever known by any other name and gave details of documnets in which he had signed himself as " Wazir Beg, son of Amir Beg." He gave the names of his father's brothers, and added:—" Inayat Beg was no relation of mine." The defendants refrained from asking him plainly whether he knew of any Inayat Beg, or Inayat Ali Beg, who had a son called Wazir Ali Beg; the plaintiff put the question and evidently added some details as to the personal appearance of this other man, but the witness merely replied that he knew of no scribe of that name, parentage and description. He admitted that he was himself carrying on the business of a scribe in t e year 1901. When questioned by the defendants about the summons in obedience to which he had come to Court, he replied that he had received a summons that very day addressed to a Wazir Beg of parentage unspecified.

On this last point the record reveals a state of fact which I can only describe as surprising. On September 16th, 1919, the defendant Nanak Ram put in a list of the witnesses he desired to have summoned for a hearing fixed for September 18th, 1919. On this list appears the name of "Mirza Wazir Beg, son of Mirza

FAKIR CHAND v. NANUG RAM.

Inayat Ali Beg, Moghal, resident of Moti Katra, Agra, with his register containing the drafts of the sale-deeds for 1901," the summons then issued is on the record, endorsed as having been received by some Wazir Beg of unspecified parentage. The case was not heard on September 18th, 1919: we do not know if any Wazir Beg attended the Court, and when Wazir Beg, son of Amir Beg, was in the witness-box this summons was never put to him. On April 8th, 1920, the defendants (the record at page 199 does not show which) caused process to issue against four witnesses for the day following. One of these is "Mirza Wazir Beg, father's name not known, a Moghal by race, resident of Hingki-Mandavi, Agra." This is the summons on the strength of which the witness attended the Court on April 9th, 1920.

The learned Subordinate Judge has discussed this issue at length. He thinks the hand-writing of the body of the documents Exhibits A and B, does not, at first sight, resemble that of Anandi Lal's Will, but suggests that the scribe was writing out the Will in his best "copper-plate" hand, while he wrote the agreements Exhibits A and B more freely and rapidly. In the margin of the Will the names of the witnesses are written "in an offhand manner," and there the learned Subordinate Judge thinks the hand-writing corresponds with that of Exhibits A and B. He is, therefore, of opinion, that the three documents were written out by one and the same person. He believes the witness Wazir Beg when the latter asserts that he did not write any of them. As he also believes Ghasi Ram to be a witness of truth he is driven to the conclusion that Ghasi Ram must be making a *bona fide* mistake when he asserts that the witness Wazir Beg in fact wrote all three of them.

I can only say that this suggestion seems to me too improbable to be seriously entertained; either the witness Wazir Beg is a shameless liar, who has been won over by the plaintiff, or Ghasi Ram is trying to mislead the Court by swearing to something which he knows to be untrue. In argument before us it was the former theory which we were urged on behalf of the respondents to adopt.

It cannot be denied that we have to deal with a peculiar and somewhat complicated problem of evidence. It would be quite sufficient for my purpose to hold that I am not prepared to believe Ghasi Ram where he is flatly contradicted by other evidence, and that I cannot accept the charitable theory of the learned Subordinate Judge as to a mistake on his part. It is, however, fairer to the parties that I should set down what seem to me, on the whole, the most reasonable inferences of fact to draw from the evidence. I am far from satisfied that either the defendant, Ghasi Ram, or the witness, Wazir Beg, has been perfectly candid with the Court. The respondents, at any rate, cannot complain of my not entirely trusting the latter. I approach the question by laying firm hold on the initial facts as to which there seems no room for doubt. The Will of Anandi Lal is a genuine document; there was no reason why its scribe should misdescribe himself. There was, therefore, in May 1901, a scribe named Wazir Ali Beg son of Inayat Ali Beg, living in the City of Agra. I agree with the learned Subordinate Judge that the witness, Wazir Beg son of Amir Beg, cannot be that man. The inference I draw is that on some date, as to which I formulate no theory except that it was subsequent to the death of Anandi Lal, certain parties found it expedient to bring into existence the documents Exhibits A and B. They realised the importance of at least leaving open the possibilty of representing these as being from the same pen as the Will of Anandi Lal. They found out the existence of Wazir Beg son of Amir Beg, and induced him to draft the documents, antedating them to the 27th June 1901. When this case came into Court they applied for a summons in the name of Wazir Ali Beg son of Inayat Ali Beg, and got it served upon Wazir Beg, son of Amir Beg. At this point there was a hitch. My conjecture is that the witness cried of when he found that he was not merely expected to admit having written Exhibits A and B and give some pre-arranged account of the circumstances under which he had done so, but that it was proposed to put him forward as Wazir Ali Beg, son of Inayat Ali Beg, and the scribe of a document which

on the face of it, did not look at all like any hand-writing which he could produce. He may have known that the legal advisers of the plaintiff were prepared to confront him with documents which he had signed as Wazir Beg, son of Amir Beg, and to challenge him to produce, in the presence of the Court, the highly trained hand-writing of the Will. The defendants made an attempt to get out of the difficulty. They took out a second summons for a Wazir Beg of unknown parentage, living in a quarter of Agra so restricted that the summons could scarcely fail to find the only available Wazir Beg, the son of Amir Beg. With their man in the witness-box they may have hoped to force him to go the whole way with them; at worst, they could appeal to the Court to treat him as a rascal who had been bought over. The witness decided not to put his own neck in the noose to please anybody, and so adopted what was, from his point of view, the safe course of denying having written any one of the Exhibits.

Before passing on to the question of the execution of Exhibit C, I think it worthwhile to add that I have taken no notice of the stamp-vendor's endorsements which appear on the back of the Exhibits A and B. Those endorsements do not prove themselves. There is no evidence on the record that there was in Agra, in May 1901, a stamp-vendor named Ganeshi Lal, much less that the man, if he ever existed, is now dead, or that the endorsements can be recognised as in his handwriting. If these facts were proved I do not think they would have affected my conclusion, but I decline to discuss allegations of fact unsupported by any evidence whatever.

I now pass on to Exhibit C, the bilateral agreement of October 21st, 1905. The document is written by a professional scribe of the name of Kashi Nath, who died in the autumn of 1912. His hand-writing is proved by his brother Kedar Nath at page R9. One of the details which leave an unpleasant taste in my mouth when I review the transaction as a whole is that this Kashi Nath was not merely put forward to identify *Musammat* Chameli when Exhibit C was registered at the house of Narain Das on October 23rd, 1905, but was described to the Sub-Registrar as "uncle of the *Musammat*." We have it from Kedar Nath that his father's sister was the paternal grandmother of Damodar Das, and thus of *Musammat* Chameli. Kashi Nath was, therefore, a cousin of that lady's father. It looks to me as if his relationship was over-stated in the registration endorsement, just as the defendant, Ram Dayal, was carefully specified to be the brother of *Musammat* Chameli's deceased husband, in order to create a general impression that the lady was surrounded by relatives to whom she could turn for disinterested advice. One of the numerous details on which I quite definitely disbelieve the evidence of the defendant Ghasi Ram, is where he asserts that Damodar Das was present when the Sub-Registrar came to the house of Narain Das. Had Damodar Das been present we may be certain that he would have been put forward to identify *Musammat* Chameli, and not this "cousin-uncle" of a professional scribe, or the adversely interested brother-in-law, Ram Dayal.

The evidence of *Musammat* Chameli was taken on Commission. She does not deny her thumb-impression on Exhibit C or on the registration endorsement; but she is positive she never gave her assent to any such document with knowledge of its contents. Her story is that when she went to see Narain Das on his death-bed she was asked to put her thumb-impression to a paper, about which she was told that its effect was to appoint *Panches* (she uses this word to describe the executors or trustees under Amardi Lal's Will) who would look after the interest of her son when Narain Das was dead. Incidentally, she denied that Kashi Nath, the scribe, or his brother Kedar Nath, were relations of hers at all. She was subjected to the sort of intolerably lengthy, bullying and yet futile, cross-examination that we come across in cases when some third rate legal practitioner, at once unscrupulous and incompetent, takes the bit between his teeth in the presence of a Commissioner who is unable to exercise the slightest control over the proceedings. I must frankly confess that I have not had the patience to read the record of this cross-examination completely through: if I happen in conse-

quence to have missed any point of real importance, the blame must rest on the legal gentleman who inflicted this outrage on the witness and on the Court. So far as I can judge, the witness was not shaken in cross-examination: the defendants certainly never got to close quarters with her on the one point that really mattered, namely, her admission of execution in the presence of the Sub-Registrar. That officer has certified that the contents of the document "were explained to the *Musammat*": he does not say that he himself explained them. He was not called as a witness, and there is nothing on the record to show whether he is alive or dead. Of course, from one point of view it matters little how much *Musammat* Chameli understood or did not understand of the document which she joined in executing. It is all very well for the defendants to speak of her as the "natural guardian" of her minor son; the latter was under the guardianship of the trustees appointed by his father's Will and *Musammat* Chameli had been excluded by the terms of the Will from any effective control over, or responsibility for, the affairs of the minor. Indeed, the manner in which this illiterate *pardanashin* lady was involved in the transactions of October the 21st and October the 23rd 1905, and the manner in which she has been put forward by the defendants, Nanak Ram and Ghasi Ram, both in the replies returned to the notices issued by the plaintiff and in their pleadings in the suit itself, serve only to accentuate my suspicion that there is something wrong about the execution of the agreement, Exhibit C on the part of the remaining trustees. If the defendant, Ghasi Ram, who is fully acquainted with all the facts, were really confident that a valid agreement for dissolution of partnership and final settlement of accounts had been entered into between Narain Das and the remaining trustees, I do not believe he would have put forward *Musammat* Chameli, in the way he has attempted to do as the natural guardian of the plaintiff during the latter's minority. From another point of view, however, the evidence of *Musammat* Chameli is of real importance. If she is telling anything like the truth, then Ghasi Ram has told a series of falsehoods about the transactions of October the 21st and 23rd 1905 and is not entitled to be believed when he deposes that the document Exhibit, C, was executed in his presence by the trustees, Dwarka Das, Damodar Das and Makhan Lal.

The only surviving trustee other than Ghasi Ram himself is Makhan Lal, whose position in this litigation has already been indicated. This man went into the witness-box on the 13th of April 1920, after the examination of Ghasi Ram, and gave evidence in support of the plaintiff's case. We were asked in argument to regard his statement as shifty and disingenuous. The impression left on my mind by a perusal of the record of that evidence is that we have to deal with a somewhat puzzle-headed man, distinctly uneasy in his own mind with respect to his own neglect of his duties as one of the trustees under the Will of Anandi Lal, but that he was trying to tell the truth to the best of his recollection and belief. The one thing he was quite positive about was that he had never executed any such document as the agreement Exhibit C; he contradicted Ghasi Ram by asserting that no partnership accounts had ever been gone into with him, or with *Musammat* Chameli in his presence; nor had *Musammat* Chameli ever affixed her mark or thumb-impression to any document in his presence. When shown the signature on Exhibit C which purports to be his, he admitted that the hand-writing was very like his own and that it was only in the formation of the letter *dal* (the abbreviation for the word *dastkhat*, which precedes the signature) that he could detect any definite divergence in the form of the letter from his usual hand-writing. He added that he had no recollection whatever of having made this signature. I do not think this statement was intended in any way to qualify the witnesses' assertion that he had never executed any such document as Exhibit C. He went on to add that no such document had ever been presented in his presence for registration, either by Narain Das or by *Musammat* Chameli. In cross-examination he was put to what I have always considered a somewhat un-

fair test. The disputed signature along with a number of others (genuine signatures of the witness) was shown to him in such a manner that no portion of the paper was visible to him apart from the signatures themselves. I have always maintained that, if I myself were subjected to such a test in the witness-box, I would begin by protesting that I did not profess to be able to distinguish a genuine signature of my own from a tracing for a really clever forgery, if I were shown nothing but the signature of signatures and debarred from refreshing my memory by inspection of the documents to which they purported to be appended. However, the witness Makhan Lal emerged from this test more creditably than I should have expected to do myself. Out of all the signatures shown to him he picked out the disputed signature, that is to say, the one which is alleged to evidence his execution of the document, Exhibit C and deposed, "This signature looks to be uncertain." He was not pressed further on the point; I understand him to mean that out of all the signatures in question this was the one which struck him as at any rate unlike his ordinary style of writing. Another remarkable point about the evidence of this witness is that his name appears in the stamp-vendor's endorsement on the paper Exhibit C as that of the man to whom the stamp-paper was sold "for purposes of dissolution of partnership." He denied emphatically having purchased the stamp paper in question. I am bound to say that I believe his denial. It seems to me that if everything were straight-forward and above-board about the transaction embodied in Exhibit C, the stamp-paper would have been purchased by Ghasi Ram, or by some other person indirectly concerned in the management of the partnership firm; if, on the other hand, Narain Das and Ghasi Ram were engaged on a transaction which would not bear examination, the purchase of the stamp-paper in the name of one of the other trustees would be an exceedingly likely step for them to take by way of a preliminary precaution. I do not know that the defendants got anything particular out of this witness in cross-examination over and above the points already noticed. The witness was undoubtedly reluctant to admit that he had ever definitely accepted the position of a trustee under Anandi Lal's Will. He seems to me to have told the truth on this point in the first part of his cross-examination, but to have tried, not over ingeniously, to modify the effect of the admissions previously made by him when he was further cross-examined on the day following. He was ready to give everybody a good character, including the scribe Kashi Nath and another witness for the defendants, presently to be noticed, who may conveniently be referred to as Narain Das the second.

For the present I record my conclusion, to the effect that the credibility of the evidence given by the defendant, Ghasi Ram, is, to my mind, seriously shaken by the depositions of Makhan Lal and *Musamma* Chameli; where these two contradict Ghasi Ram I am certainly disposed to believe them.

I now pass on to consider the evidence by which it has been sought to prove this document, or rather to prove the disputed signatures on the said document of Makhan Lal, Damodar Das and Dwarka Das. Of course, the document was executed by Narain Das, who presented it for registration, and I have no doubt it was executed by Ghasi Ram, who stood to gain by the arrangement made under the Will of Narain Das, an arrangement only possible if the existing partnership had been dissolved in the lifetime of Narain Das by the execution of the agreement, Exhibit C. There are four marginal witnesses to this document; two of them are the defendants, Ram Dayal and Sham Lal. They were not called as witnesses and when Sham Lal was examined by the Court at a late stage of the proceedings the document, Exhibit C, was not put to him and he was not asked if he admitted or denied his signature to the same. I do not think the defendants can be permitted to evade responsibility for the non-production of Ram Dayal and Sham Lal as witnesses to prove the complete execution of Exhibit C, merely because of their contention that these two defendants were colluding with the plaintiff. I am by no means satisfied

FAKIR CHAND v. NANUG RAM.

that any such collusion is made out by the evidence, and in any case it seems to me a serious matter for defendants who are put to proof of an important document, vital to their case, deliberately to refrain from putting into the witness-box two attesting witnesses who are alive and available for examination. The remaining two marginal witnesses are Bansi Dhar and Ratan Lal. A summons is to be found on the record issued to the former at the instance of the defendants, in accordance with the description and address appearing above his signature on Exhibit C: this summons has been returned with an endorsement that the witness could not be found. There is no further information available on the record concerning Bansi Dhar. We do not know whether he is alive or dead. The name of Ratan Lal, with a description of his parentage and residence apparently identical with that appearing above his signature on the disputed document, is to be found in the list of witnesses whom the defendants applied on the 16th of September 1919 to have summoned for the hearing fixed for the 18th of September 1919. Nothing more is known about the witness, so far as can be ascertained from this record. I am bound to say that I do not remember having come across any other case of equal importance with the present, in which a litigant who had been put to proof of a document vital to his case succeeded in obtaining from the Trial Court a finding in his favour, when he had neither produced a single one of four attesting witnesses, nor offered a word of explanation respecting his failure to do so. The defendants called a witness, Mansukh Das, who deposed that the trustee, Dwarka Das, was his father and that he could identify the signature of Dwarka Das as that of one of the executants to Exhibit C. In cross-examination he admitted that his father was formerly in the service of the partnership business and that he himself was still in the service of the defendants, Nanag Ram and Ghasi Ram, on a small monthly salary. He made the curious admission that he did not know whether his father and mother had ever been married. This makes me inclined to believe a witness named Har Bilas, who was called by the plaintiffs to prove that he was himself related to Dwarka Das and that Dwarka Das was never married at all. I am not satisfied, under the circumstances, that the Court should accept the evidence of Mansukh Das as sufficient to prove execution by Dwarka Das of Exhibit C. I do not know that the point is one of great importance. Dwarka Das was one of the servants of the firm, whose position was improved by the provisions of the Will of Narain Das, though not to the same extent as that of Ghasi Ram. He might conceivably have joined with Ghasi Ram in any fraud that was perpetrated in connection with Exhibit C. However, on the available evidence, and in view of the failure of the defendants to call any of the marginal witnesses, I decline to accept the evidence of Mansukh Das as proving execution by Dwarka Das of Exhibit C.

The controversy regarding the signature of Damodar Das is connected, as I have previously remarked, with the question of this man's signature which purports to appear on the margin of Exhibits A and B. All three signatures purport to be in the *Mahajani* or *Sarrafi* character. It so happens that the paper of Exhibit C, as it now appears on the record, has been torn, or more probably perforated in the course of binding, just in the middle of this contested signature. I cannot tell what was the condition of the paper when the signature was inspected by the witnesses in the Court below. It is somewhat better written than the two preposterous scrawls which are supposed to represent the signatures of Damodar Das in the margins of Exhibits A and B. Assuming that it had not been mutilated at the time of the trial in the Court below, I should regard it as a signature susceptible of identification by any one who was really acquainted with the hand-writing of Damodar Das when the latter was using the *Sarrafi* character. The defendants have sought to prove it by the evidence of Mahinder Nath on which I have already commented. They also put in the witness-box an aged man, whom I have referred to as Narain Das the second. He de-

posed that he remembered being sent for by Narain Das when the latter was on his death-bed. He remembered that when he came to the house three documents had already been drafted for signature. Damodar Das was present and *Musammat* Chameli was sitting there beside Narain Das. He heard some conversation about the necessity of settling the affairs of Anandi Lal's son and he professed to remember certain details regarding the arrangements arrived at about Fakir Chand's half share in the shop in Mr. Campbell's *kothi* and about the Rs. 4,000 which were to be set apart for the expenses of the *dharamsala*. No account-books were gone into in his presence, but Damodar Das told him that the accounts had been examined. He was present again two days later when the Sub-Registrar came to the house of Narain Das to see about the registration of the three documents. He identified Narain Das as executant of his Will and also as executant of the agreement about the transfer of the half share in the house for a consideration of Rs. 6,500, but he did not identify Narayan Das as the executant of the disputed document, Exhibit C. This document was never put to him in examination or in cross-examination, and I do not understand him to depose that Exhibit C was either executed, or attested, or presented for registration in his presence.

This is the case for the defendants regarding the execution of this document, *plus* the evidence of Ghasi Ram, who asserts that all the signatures, including those of Damodar Das, Makhan Lal and Dwarka Das, were affixed in his presence. The plaintiff seems to have fatally prejudiced his case in the Court below by asserting, and attempting to prove, that Damodar Das never used the *Sarrafi* character, and was in fact totally unacquainted with that character. It was over this matter that a prolonged and complicated controversy took place in the Court below. The plaintiff called Kishun Lal, an own brother of Damodar Das, and he gave evidence to this effect. On the other side the defendants produced a registration copy of a document purporting to have been executed by Damodar Das in the year 1915, on which there appears a note to the effect that the signature of Damodar Das is in *Sarrafi*. There was considerable controversy as to whether the defendants had sufficiently accounted for the non-production of the original and also as to the evidential value of this note by some copyist regarding the character of a signature which he presumably could not read. Over and above this, the defendants called Kanhaiya Lal, the peon of a certain Girls' School in the City of Agra. He produced two books which it had been his duty to circulate when taking round notices of meetings of the Committee of Management, or collecting subscriptions. We have spent a great deal of time, which might I think have been better employed, over examining the entries in these two dilapidated volumes. Damodar Das undoubtedly knew both the *Urdu* and the *Nagri* character. His signature as a witness to the Will of Anandi Lal is in the former, while he admittedly signed his name in the *Nagri* character on a number of occasions. The whole question is complicated by the fact that there were at least two men of the name of Damodar Das connected with the affairs of this Girls' School. The gentleman with whom we are concerned was no doubt distinguished in the notices circulated by the hand of the witness Kanhaiya Lal, by being described either as Damodar Das the physician (*Hakim*) or Damodar Das the druggist (*Attar*). Opposite his name where it appears in these books there are signatures purporting to be his, frequently written in the *Nagri* character and about as frequently in *Sarrafi*. There are also several pages in the books where the name of Damodar Das, *Hakim* or *Attar*, appears with a blank space on the line opposite to it; presumably on those occasions the peon had failed to find Damodar Das. The learned Subordinate Judge has come to the conclusion that on these materials it is established beyond doubt that Damodar Das was acquainted with the *Sarrafi* character and occasionally signed his name in that character. He says that, as the plaintiff has committed himself to the attempt to prove the contrary, the Court must accept the evidence of Ghasi Ram as sufficient to prove that the disputed signature on Exhibit C is in fact

that of Damodar Das. I am wholly unable to accept this view of the case. After a minute examination of the two peon books, I am not prepared to hold that the entries therein prove affirmatively, beyond reasonable doubt, that Damodar Das, the physician or druggist, was in the habit of signing his name in the *Sarrafi* character. I do not profess to be an expert in the reading of that character; but there are beyond question extraordinary dissimilarities between the various writings in *Sarrafi* which purport to represent the signature of Damodar Das, whereas the *Nagri* signatures seem to me to be fairly uniform in character. In view of the condition of the books and the undoubted presence of blank spaces opposite the name of *Hakim* Damodar Das on some of the pages, I can ot exclude the possibility that these books may have been got at, since the institution of the suit, and the name of Damodar Das jotted down in the *Sarrafi* character in various places where a convenient space presented itself. I quite agree that the plaintiff attempted to prove too much, and I do not consider that he has succeeded in proving the universal negative to which he committed himself, that is to say entire ignorance of the *Sarrafi* character on the part of Damodar Das and inability to make use of the same if he wanted to set down his own name in a hurry. The fact remains that it was on the defendants to prove that the contested signature on Exhibit C is that of Damodar Das, the late brother of *Musammat* Chameli. It seems to me that I have already given abundant reasons for declining to hold that signature to be proved on the evidence of the defendant, Ghasi Ram, and of the one witness, Mahindra Nath. I ought perhaps to have mentioned that this man was a marginal witness to the document of 1915 which Damador Das is said to have executed by signing his name in the *Sarrafi* character. He says that he remembers that Damodar Das did employ that character when signing his name on that occasion, and my only comment on the point is that I do not believe that he in good faith retains any recollection on the point.

There are two other matters yet to be considered. I think I have already made it clear that Exhibit C was registered only in respect of its execution by Narain Das and *Musammat* Chameli. The remaining four executants, including Ghasi Ram himself, never presented themselves before the Sub-Registrar during the prescribed period of four months, and on the 22nd of February 1906 that officer recorded a formal order that registration was refused in respect of Makhan Lal, Damodar Das, Ghasi Ram and Dwarka Das. No attempt was ever made by any person interested in the propounding of this document to make use of the procedure provided by the Indian Registration Act and the rules made thereunder to compel registration in respect of these recalcitrant or negligent executants. Ghasi Ram asks us to believe that the whole four of them were actually present when the Sub-Registrar came to the house of Narain Das on October the 23rd 1905, that they offered to admit execution and attest their signatures then and there, but that the Sub-Registrar, said that under the rules he had no authority to register the fact of their execution unless they presented themselves at his office Ghasi Ram adds that some days later, he and Dwarka Das did go to the Sub-Registrar's office in order to effect registration, but that officer replied that he was unable to proceed with the matter unless the four remaining executants came there together. I frankly disbelieve this assertion. I can understand that the Sub-Registrar, standing upon a somewhat technical and pedantic view of his duties under the Registration Manual, might have refused to accept the attestation of the document at the house of Narain Das by any executants other than Narain Das himself and *Musammat* Chameli, in respect of whom formal applications had been made for their attestations to be taken at the residence of Narain Das. I do not believe that he either would or could have refused to accept the attestations of Ghasi Ram and Dwarka Das, if the two had presented themselves at his office on some later date. His certificate of non-registration when read in connection with the rules under which it was made, distinctly implies that no one of the four executants, Makhan Lal, Damodar Das, Ghasi Ram and Dwarka Das, had

put in an appearance in the course of the four months which had elapsed since the execution of the document on the 21st of October 1905. Moreover, I have already recorded my conclusion, arrived at on other grounds, that Damodar Das was not present when the Sub-Registrar took the attestation of *Musammat* Chameli to the document at the house of Narayan Das.

While I am on this question of registration, there is a point of law on which it is perhaps expedient that I should express an opinion, namely, the effect of the non-registration of this document on behalf of four of the executants, Makhan Lal, Damodar Das, Ghasi Ram and Dwarka Das. It is not a question whether the partnership business purporting to be thereby dissolved did, or did not, in the month of October 1905, possess immoveable property of the value of Rs. 100, and upwards. The document itself avoids making any statement on the subject, taking refuge in an "*et cetra*", just where one would have expected a reference to such immoveable property. When, however, the executants come to specify what is being done about the sum of Rs. 52,939 which represents the share of Faqir Chand in the partnership assets, it does distinctly state that Rs. 6,500 of the above are written off in consideration of the transfer by Narain Das of his moiety share "in godown No. 1564 in the *kothi* of Mr. Campbell, Belanganj, Agra." In my opinion this provision does make the document in question an instrument which acknowledges the receipt of payment of consideration on account of the assignment or extinction of a right, title or interest in immoveable property of the value of more than Rs. 100, within the meaning of these words as they appear in section 17 (1) of the Indian Registration Act, XVI of 1908. Apart, therefore, from other considerations, the non-registration of this document makes it inoperative in so far as it purports to affect those of the executants in respect of whom it was never registered.

Returning from this digression to the question of the execution of the document, there is one last argument from probability which I ought perhaps to notice before recording my conclusion. It has been strongly pressed upon us on behalf of the respondents that the arrangements made in this document were in fact acted upon from the date of its execution, and must have been so acted upon to the knowledge of the trustees under the Will of Anandi Lal, and more particularly of Makhan Lal and Damodar Das. The suggestion is, that these two men at any rate, if they had not actually joined in the execution of Exhibit C at the time, must have seen from the way in which the business was being carried on that a dissolution of the partnership had actually taken place, must have been put upon enquiry and must, therefore, have come to know of the existence of Exhibit C and have denounced it as a forgery long before the institution of the present suit. This argument sounds plausible and is not without real force, though I very much doubt whether a mere argument from probability could, under the circumstances of this case, be used to supplement the failure of the defendants to prove the execution of the document by the best available evidence. I have come to the conclusion, however, that the whole force of the argument is gravely discounted when we come to consider the evidence given by the defendants. Ghasi Ram and Sham Lal, as to what was actually done after the death of Narain Das. Under the terms of that gentleman's Will the whole management of what had previously been the partnership business passed into the hands of Ram Dayal, Sham Lal and Ghasi Ram, the two first named being the responsible managers. There had previously been one of the shops belonging to the partnership firm carried on in the building in Mr. Campbell's *kothi*, and this was treated as the head-office of the firm. After the death of Narain Das this head-office was removed to another location in the City of Agra. I am by no means clear on the evidence whether there was any real interval between this removal of the head-office and what the defendants call the re-starting of the new shop in the very same building, for the sole and separate benefit of the minor Faqir Chand. In any case, the interval was one of a few months only. A trustee of the minor,

who was not scrupulously interesting himself in the discharge of his duties, would only see, at most, that there had been a change in the disposition or arrangement of the shops belonging to the partnership; but that (it may be after some brief interval) a shop of the same description as had existed previously was being carried on in the same locality, by the same persons who were the *de facto* managers of the entire partnership business. I do not consider that anything happened which was likely, on the face of it, to arouse the suspicions of Makhan Lal or Damodar Das and to put them upon enquiry. A careful examination of the partnership accounts and of the accounts maintained by Sham Lal and Ram Dayal in respect of the shop in Mr. Campbell's *kothi* might no doubt have suggested the necessity for enquiry in the interests of the minor; but I find nothing incredible in the evidence given by Makhan Lal as to his failure to make such an enquiry or seriously improbable in the suggestion that Damodar Das was equally negligent. So long as *Musammat* Chameli and her minor son were being kept in reasonable comfort, and so long as such matters as the marraige of the minor were properly arranged for in due course and the necessary funds supplied by Sham Lal and Ram Dayal, *Musammat* Chameli was not likely to make any complaint, or to appeal to the executors of her husband's Will to look into the condition of the partnership accounts. I am of opinion, therefore, that no valid inference in favour of the defendants can be drawn from the fact that neither Makhan Lal nor Damodar Das ever denounced this document, Exhibit C, as a forgery at any time prior to the institution of the present suit.

My finding, therefore, on the issue now under consideration is that it is not proved that Anandi Lal executed the agreement, Exhibit A, of the 27th of June 1901; and it is not proved that Makhan Lal, Damodar Das and Dwarka Das executed the agreement, Exhibit C, of October the 21st 1905.

IV.—TWO SUBSIDIARY QUESTIONS OF LAW.

I now pass on to consider two questions of law which are not concluded by the findings of fact hitherto recorded.

The first of these is, whether the previously subsisting partnership was dissolved by the death of Narain Das on the 23rd of October 1903. The law on the subject is contained in section 253 (10) of the Indian Contract Act, IX of 1872. The law itself is simple enough: whether the partnership be regarded as one entered into for the term of the minority of Faqir Chand, or whether it be not so regarded, the death of Narain Das dissolved the partnership "in the absence of any contract to the contrary." In a country where the terms of a partnership are usually embodied in a regular instrument such a provision is not difficult of application. In this country partnerships amongst members of one and the same family are very commonly entered into without any formal partnership deed, and in the case now before us no such deed was ever drawn up as between Anandi Lal and Narain Das. The question we have to consider is whether a stipulation that this partnership would not be dissolved by the death of either or both of the partners, but would continue on the lines of a joint family business, at least until Faqir Chand exercised an option one way or the other on attaining his majority, can be fairly inferred from the established facts and the circumstances of the case generally. The Courts in this country have frequently held that, in the case of a partnership between members of a joint undivided Hindu family, a stipulation that the partnership will not be dissolved by the death of any one partner is ordinarily to be inferred. The only case to which we were referred in argument, of which the facts present any real analogy to those now before us, is that of *Muhammad Kamil* v. *Haji Hedayatulla* (1). On the principles there laid down the partnership between Anandi Lal and Narayan Das would ordinarily have been dissolved by the death of Anandi Lal; that, it seems to me, we are on absolutely firm ground in holding that that partnership was not then dissolved by reason of a contract to the contrary, perfectly understood by both the parties and assented to by Narain Das when he signed the Will of

(1) 64 Ind. Cas. 861; 48 C. 906; 33 C. L. J. 411; 26 C. W. N. 463; (1922) A. I. R. (C.) 122.

Anandi Lal as an attesting witness. In the course of argument before us, as the importance of this point became obvious, the learned Counsel who was arguing the case for the respondents contended, or at least suggested, that we ought to hold that the original partnership of Anandi Lal and Narain Das was dissolved by the death of the former and that we are dealing with a new partnership entered into by Narain Das on the one hand and his minor nephew Faqir Chand (as represented by the trustees or executors named in the Will of Anandi Lal) on the other. There is not a trace of any such contention to be found in the pleadings of the defendants, or in any part of the record as it stood up to the conclusion of the trial in the Court below. Even if the defendants had raised the point, I think it must have been decided against them. I have already recorded my opinion that when Narain Das signed the Will of Anandi Lal as an attesting witness, he did so with a full knowledge of its contents and he intended by his signature to certify both his knowledge of the contents and his acceptance of the trusteeship. I am satisfied, therefore, that Anandi Lal and Narain Das agreed amongst themselves that their partnership would not be dissolved by the death of the former (an event which was clearly anticipated as inevitable before long), but should continue as a partnership between Narain Das and the minor Faqir Chand. I am not prepared to say that it seems to me equally obvious that it was part of the agreement that neither upon the death of Narain Das should the partnership be dissolved; but there are two or three considerations which strike me as weighty, and indeed decisive. (*a*) The partnership between Anandi Lal and Narain Das was not precisely a partnership between members of a joint undivided Hindu family. The two brothers had separated after their father's death and they certainly did not re-unite for all purposes. Each of them obviously regarded his interest in the partnership business as his own separate property, over which he retained full power of testamentary disposal and which would descend, in the absence of such disposal, to his own heirs, instead of devolving upon the other by right of survivorship. The fact remains, however, that it was a partnership between two brothers, and there is nothing surprising or abnormal in the suggestion that the partners, as between themselves, regarded it as subject to the oridinary incidents of a joint family partnership, *i.e.*, as an arrangement which would continue between their heirs after them until formably dissolved at the instance of one or other member of the partnership. (*b*) It seems to me that it would be altogether anomalous to hold that *A* and *B* entered into a contract of partnership which would not be dissolved upon the death of *A*, but would be dissolved upon the death of *B*. (*c*) I am further greatly impressed with the conduct of Narain Das on the 21st of October 1905. It seems to me a matter of clear inference from his conduct on that date that Narain Das himself did not regard the partnership as one which would be automatically dissolved by his own death. He drew up the three documents Exhibits C, E and F in imminent expectation of death, and he actually died within a few hours of their presentation to the Registration Officer. It would have been easy for him to draw up a Will based upon the assertion that the partnership would be automatically dissolved by his own death and making suitable provision for that contingency. The force of this argument is no doubt somewhat weakened by my finding against the genuineness of Exhibit C; but the Will of Narain Das itself proceeds upon the assumption of a partnership already dissolved by previous arrangement. It seems to me a matter for fair inference that Narain Das himself did not regard the partnership as one which would be automatically dissolved by his death.

For these reasons I am of opinion that a contract to the contrary, within the meaning of that expression in section 253 (10) of the Indian Contract Act, may fairly be inferred from the established facts of the present case and that the partnership did not come to an end under the provisions of clause (10) of that section when Narain Das breathed his last,

The next question of law is as to the alleged ratification by the plaintiff of the agreement of October the 21st 1905 after he attained majority. The learned Subordinate Judge framed an issue on this point, but he was not really decided it. He takes note of the fact that the plaintiff had actually been maintained during his minority, all the expenses of his marriage met, and so forth, out of funds in the hands of the defendants, Ram Dayal and Sham Lal, which they purport to provide from the profits of a shop, which they were carrying on as the separate business of the minor plaintiff. He does not appear to me, however, to have recorded any definite finding as to whether this circumstance, or any action taken by the plaintiff after he attained majority, would serve to estop the latter from claiming any of the reliefs sought in the present suit. On the findings at which I have arrived the plaintiff is obviously entitled to treat the business carried on by Ram Dayal and Sham Lal at the shop in Mr. Campbell's *kothi* as part and parcel of partenership business, and the fact that money derived from the profits of that shop was applied for his benefit during his minority in no way affects the present suit, except in so far as the defendants may claim credit for the said expenditure upon a fair settlement of accounts. The action taken by the plaintiff since he attained majority, which has been suggested as amounting to a ratification of the agreement of October, the 21st 1905, cannot possibly have any such effect. It appears that Ram Dayal and Sham Lal had invested a portion of the funds which they held to the credit of the plaintiff by lending the money out on mortgage. They had brought a suit upon the mortgage and obtained a decree. When the plaintiff attained majority he adopted this transaction, to the extent of executing the decree and obtaining payment. He was obviosuly entitled to do this without prejudice to any claim which he might have against Ram Dayal and Sham Lal or against any other of the defendants, for money due to him upon a complete settlement of accounts. Indeed, the proceedings in execution of the decree could scarcely have been continued after Faqir Chand attained majority by any one but Faqir Chand himself, and the money would have been lost altogether if the plaintiff had not taken action. The money thus realised by him will have to be taken into account upon a final settlement between the parties, but there is nothing about the plaintiff's conduct in this matter to debar him from maintaining the present suit.

V.—FORM OF DECREE TO BE PASSED ON THE PLAINTIFF'S APPEAL.

From the findings which have now been recorded it is obvious that the appeal of Nanag Ram, First Appeal No. 347 of 1921, must fail and there is nothing for us to do but to dismiss the same with costs, including fees on the higher scale. Similarly, the cross-objections taken by the respondent Sham Lal in First Appeal No. 239 of 1920 also fail and must be dismissed with costs.

The form of decree which requires to be substituted for the very inadequate decree passed in favour of the plaintiff by the Trial Court requires careful and detailed consideration. To begin with, the plaintiff has substantially succeeded in his appeal and, whatever else may happen; he is entitled to the costs of this appeal, including fees on the higher scale. I would award him these costs jointly and severally against the defendants-respondents Nanag Ram, Ghasi Ram, Ram Dial and Sham Lal.

Secondly, the plaintiff is clearly entitled to a preliminary decree for dissolution of partnership and settlement of accounts as against the same four defendants. Strictly speaking, the decree for dissolution of partnership must be against Nanag Ram and Ghasi Ram alone; but I would include the defendants, Ram Dayal and Sham Lal, in the decree for rendition of accounts, on the ground that they are the *de facto* managers of the partnership business.

The account must begin with an ascertainment of the capital to the credit of Anandi Lal on the date of that gentleman's death. I do not think that the defendants, or any of them, should be held to be bound by

FAKIR CHAND v. NANUG RAM.

the recital in the Will of Anandi Lal by which this capital is stated at Rs. 58,000. There is force in the contention raised by Ghasi Ram that this is no more than a rough estimate on Anandi Lal's part, and that it includes profits which Anandi Lal expected to make by the end of the year then current. The accounts will have to be examined up to the date of Anandi Lal's death and, amongst other things, the defendants should be permitted to prove, if they are able to do so, that Anandi Lal in his lifetime gave directions for a sum of Rs. 5,000 to be contributed out of his share of partnership capital towards the construction of a *dharamsala*. The alleged agreement by which a further sum of Rs. 4,000 was to be contributed in equal shares by the two members of the partnership, to provide for the maintenance and expenses of the *dharamsala* must also be gone into. From the date of Anandi Lal's death, after the amount due to him as his share of partnership capital on that date has been ascertained, the accounts of all the shops carried on as part of the partnership business must be gone into, and the annual profits divided in the proportion of five-eighths assigned to the plaintiff and three-eighths to the defendants. The Court need not concern itself with the apportionment of this share of three-eighths as amongst the defendants, unless this point is expressly raised by the defendants, Nanag Ram and Ghasi Ram. If it should be so raised, I think our decree must leave it open to the Court below to exercise its discretion in the matter. In this settlement of account the profits of the shop carried on by Ram Dayal and Sham Lal in the building known as Mr. Campbell's *kothi* must be treated as part of and parcel of the partnership profits and divided between the parties in the ratio already stated.

The defendants will be entitled to debit against the plaintiff, from year to year all money expended on his behalf, or for his benefit or for that of his mother provided the expenditure be such as is warranted by the terms of Anandi Lal's Will. The money actually realised by the plaintiff since he attained majority under the mortgage-decree already referred to must be brought into account as part payment of the amount due to him. I find it a little difficult to decide as to the proper directions to be given regarding certain items of immoveable property, referred to in detail in the course of the cross-examination of Ghasi Ram, which the plaintiff alleges to have been acquired out of partnership funds. I think our decree must leave it open to the plaintiff to raise this question and to the Court below to adjudicate upon it in such manner as it may determine to be just after the facts have been fully gone into.

Any money found due to the plaintiff must be recoverable, in the first instance, out of the assets of the partnership business in the hands of the various defendants. I am not sure that we are called upon to provide for the contingency of such assets being found insufficient to meet the plaintiff's claim. In case of such insufficiency Ghasi Ram, as a defaulting trustee, would certainly be liable to make it good. Nanag Ram, as the heir of another trustee, would also be liable to the extent of any monies which might have passed into his hands by reason of any breach of duty on his father's part. Ram Dayal and Sham Lal would not, I think, be liable, except to the extent of partnership funds in their hands.

In this connection, however, I think there is one point of considerable practical importance to be dealt with at once. On the admission of Sham Lal himself, these two defendants are in possession of a sum of from Rs. 47,000 to Rs. 48,000 which is due to the plaintiff and which they held to his credit. They represent it as coming out of the accumulated profits of the shop which they carried on for the benefit of the plaintiff in Mr. Campbell's *kothi* at Agra: on our findings the money represents simply a portion of what is due to the plaintiff on a fair division of partnership assets. It is admittedly in the hands of these two defendants and I can see no reason why they should not be made to hand it over at once. Some time must yet pass before a final decree can be worked out on the basis of the decision at which we have arrived: it would be clearly unfair to the plaintiff that he should be left in difficulties

for ready money while this large sum was lying to his credit in the hands of the two defendants. I think, therefore, that we ought to include in our decree a direction requiring them to fulfil their own undertaking by paying the money into Court within a period to be limited by the decree the said money to be taken into account hereafter in the final decree, in partial discharge of the plaintiff's claim and in liquidation of any sum which may be found due to the plaintiff from these particular defendants.

Walsh, J.—I have read my brother's judgment, and agree. There seems to me to be a great deal in the learned Subordinate Judge's interlocutory proceedings in the case, and in his final judgment, which is open to criticism. Once the conclusion is reached that the re-distribution of shares in the partnership sought to be effected by the deed of June 1901 was not executed by Anandi Lal, it stands as a piece of sheer robbery of the minor by Narain Das, of which his trusted *karinda* must have been cognisant, and colours the whole of the subsequent proceedings. For example, a point to which my brother has not referred, the assignment to the minor as part of his share, of the half *kothi*, for Rs. 6,500, the amount originally paid for the whole, and that without any pretence at a valuation, was a transaction which could not possibly stand, in any view of the case, and was plainly a fraud upon the infant.

Subsequently to the death of Narain, the defendant, Ghasi, was the moving spirit in the business, and he has been throughout this suit the pillar of the defence. It is sufficient to say that, in my opinion, he was a witness unworthy of credit, and is contradicted by most of the other witnesses, against many of whom nothing can be suggested. He appears to have failed to grasp the essential difference between his duty as a trustee, and his interest as a partner, or if he realised it, to have deliberately neglected the one for the benefit of the other, and then to have resorted to a method of defending his conduct, which is, unfortunately, only too common in these Courts, namely, that of setting up in Court the supposed consent of an ignorant and helpless mother to the abandonment of the legal rights of her still more helpless child. I am satisfied that, even if the document had been satisfactorily established in fact by proof, the alleged dissolution was a sham, not understood by the trustees, except those who were to profit by it, and that it was not binding on the minor whose consent could only be lawfully given by them.

By the Court. (1) First Appeal No. 347 of 1921 is dismissed with costs, including fees on the higher scale.

(2) In First Appeal No. 239 of 1920 was set aside the decree of the Court below, and in lieu thereof we decree the plaintiff's claim as follows

(*a*) We grant him a preliminary decree for dissolution of partnerships and rendition of accounts as against the defendants, Nanag Ram, Ghasi Ram, Ram Dayal and Sham Lal.

(*b*) There will be an ascertainment of the capital representing Anandi Lal's share in the partnership business on the date of that gentleman's death, subject to the directions given in the earlier part of the judgment of this Court.

(*c*) Thereafter, an account will be taken of the net profits which accrued year by year on each of the shops constituting the partnership business including the seven shops referred to in the Will of Narain Das and the shop started by the defendants, Ram Dayal and Sham Lal, (ostensibly as a separate business for the benefit of the plaintiff alone) in the building known as Mr. Campbell's *kothi* in the City of Agra: in the profits thus ascertained the plaintiff's share will be ten-sixteenths and that of the defendants six-sixteenths. The Court will have discretion to apportion the shares of the defendants amongst themselves if they move it to do so.

(*d*) The Court will enquire whether any immoveable property now belongs to the partnership firm, or has been acquired out of partnership funds, and will pass such orders regarding the same as appear just.

(*e*) The defendants will be entitled to charge against the plaintiff all money expended on his behalf, or for his benefit or for that of his mother, provided the

expenditure be such as is warranted by the terms of Anandi Lal's Will. They will also be allowed credit for the money realised by the plaintiff on the mortgage-decree referred to in the earlier part of this judgment.

(6) Any money found due to the plaintiff will be recoverable, in the first instance, out of the assets of the partnership business in the hands of the defendants, Nanak Ram, Ghasi Ram, Ram Dayal and Sham Lal. In the event of the entire amount not being realised, the balance will be recoverable from Ghasi Ram personally and from Nanag Ram to the extent of any money which the Court may find to have passed into his hands by reason of any breach on the part of Narain Das of his duties as a trustee and executor under the Will of Anandi Lal.

3. The defendants, Ram Dayal and Sham Lal, will pay into Court within two months from the date of this decree, the sum of Rs. 47,500 to the credit of the plaintiff, who will be permitted to withdraw the same unconditionally. The defendants will be allowed credit for this payment against any sum found due to the plaintiff of the final settlement of accounts.

4. The suit as against the defendants, *Musammat* Pisto, *Musammat* Mohan Dei and Makhan Lal, will stand dismissed, but these defendants will bear their own costs.

5. The plaintiff will get his costs of this appeal against the defendants, Nanag Ram, Ghasi Ram, Ram Dayal and Sham Lal jointly and severally including fees of the higher scale. The Court below will pass suitable orders respecting all costs in that Court when it comes to pass its final decree.

6. The cross-objections of the defendant, Sham Lal, are dismissed with costs including fees on the higher scale.

M. D. J. & K. S. D. *Cross-objections dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1147 OF 1921.
March 15, 1923.
Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

GIRDHARI SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BHUPAL SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Pre-emption—Time fixed for payment—Appeal—Appellate Court, power of, to extend time.

An Appellate Court has power to extend the time fixed by the Trial Court for payment of the pre-emptive price in a decree for pre-emption.

Kodai Singh v. *Jaisri Singh*, 13 A. 189; 7 Ind. Dec. (N. S.) 118 (F. B.) and *Khurshed-un-nissa* v. *Alim-un-nissa*, 17 Ind. Cas. 868; 10 A. L. J. 421, followed.

Second appeal against a decree of the Subordinate Judge, Mainpuri, dated the 26th April 1921.

Dr. *S. N. Sen* and Mr. *Baleshwari Prasad*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This second appeal arises out of a pre-emption suit. The question before us is whether the lower Appellate Court had a right to extend the time for payment into Court of the pre-emption-money.

It appears that the appellants were given a decree for pre-emption by which they were required to pay a sum of Rs. 800 into Court within a period of thirty days from the date of the first Court's decree. That decree was passed three days before the Courts closed for the long vacation, so that we have it that the plaintiffs had really only a period of three days to deposit the money.

An application was made after the vacation for the reception of the money by the Court. The application was declined on the ground that the Court had no authority to extend the time.

The plaintiffs appealed to the District Judge. In the Memorandum of Appeal, as presented, the only ground taken was that the price which had been fixed by the Court below was excessive. It seems, however, that at a later stage the plaintiffs were allowed to add another ground of appeal taking exception to the short time which the first Court had allowed for pay-

ment into Court of the pre-emption-money.

The lower Appellate Court agreed with the first Court regarding the sum which the plaintiffs pre-emptors were bound to pay, *i. e.*, Rs. 800. The learned Judge in his judgment found that the time which had been allowed to the plaintiffs for paying the money into Court was too short. Consequently, although he upheld the first Court regarding the amount of pre-emption-money, he thought that he was entitled to extend the time and he extended it accordingly.

In view of the rulings which have been cited to us, namely, *Kodai Singh* v. *Jaisri Singh* (1) and *Khurshed-un-nissa* v. *Alim-un-nissa* (2) it appears to us that this appeal cannot succeed. According to these judgments the Court below had a discretion to extend the time. If that discretion has been judicially exercised this Court does not interfere in second appeal. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Z. K.

(1) 13 A. 189; 7 Ind. Dec. (N. S.) 118 (F. B.).
(2) 17 Ind. Cas. 868; 10 A. L. J. 421.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 14 OF 1923.
April 19, 1923.
Present:—Mr. Justice Daniels.

DEVI PRASAD—DECREE-HOLDER—APPLICANT
versus
SECRETARY OF STATE FOR INDIA IN COUNCIL—OBJECTOR—OPPOSITE PARTY.

Provident Funds Act (IX of 1897), s. 2 (4)—Civil Procedure Code (Act V of 1908), s. 60 (1) (k)—Compulsory deposit, what is—Deposit, whether attachable after retirement of subscriber.

The question whether a deposit is a compulsory deposit within the meaning of section 2 (4) of the Provident Funds Act depends on whether it is re-payable on demand or at the option of the subscriber.

The expression "compulsory deposit" in the Provident Funds Act is a term with a technical meaning and a deposit which comes within the definition remains a compulsory deposit until it is drawn out.

Veerchand v. *B. B. & C. I. Ry., Co.*, 29 B. 259; 6 Bom. L. R. 921, *Hindley* v. *Joynarain*, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288 and *Nagindas* v. *Ghelabhai*, 56 Ind. Cas. 449; 44 B. 673; 22 Bom. L. R. 322, relied on.

A compulsory deposit within the meaning of section 2 (4) of the Provident Funds Act does not become attachable by a creditor on the retirement of the subscriber before it is actually drawn out.

Civil revision from an order of the Small Cause Court Judge, Allahabad; dated the 26th September 1922.

Mr. *Indu Bhushan Banerji*, for the Applicant.

Mr. *L. M. Banerji*, for the Opposite Party.

JUDGMENT.—This is a revision from an order of the learned Judge of the Small Cause Court, Allahabad. The point for decision before him was whether a deposit in a Provident Fund; which so long as the subscriber was in service was a compulsory deposit within the meaning of section 2 (4) of the Provident Funds Act (IX of 1897), became attachable by a creditor the moment the subscriber retired. The subscriber in this case has retired but has not yet drawn his deposit. The learned Judge of the Court below has followed the decision in *Veerchand* v. *B. B. & C. I. Ry., Co.*, (1), and has held that the deposit is not attachable. The learned Judges took the view that compulsory deposit in the Act was a term with a technical meaning and that a deposit which came within the definition remained a compulsory deposit until it was actually drawn out. The subscriber's retirement made no difference to its nature. The same view as was held in Bombay has been taken by the High Court of Calcutta in *Hindley* v. *Joynarain* (2), in which the Bombay case was followed and approved. Another Bombay case, *Nagindas* v. *Ghelabhai* (3) has gone even further and held that the deposit is protected even after payment to the subscriber. It is not necessary to go the length of the last mentioned decision in the present case. Against the authority of two High Courts the applicant can only cite an earlier Single Judge case of the Bombay High Court which was overruled in the case relied on by the Court below. The learned Pleader for the applicant has attempted to distinguish the Bombay ruling on the ground, that it was optional with the subscriber in the first place whether to

(1) 29 B. 259; 6 Bom. L. R. 921.
(2) 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288.
(3) 56 Ind. Cas. 449; 44 B. 673; 22 Bom. L. R. 322.

join the Provident Fund or not. This makes no difference in view of the definition contained in secton 2 (4) of the Act. The question whether a deposit is a compulsory deposit depends on whether it was re-payable on demand or at the option of the subscriber. Under the Provident Fund Rules which have been placed before me the deposit in this case was not so re-payable. It is also urged that in certain cases an advance might be given to the subscriber out of the deposit even before retirement. This also does not affect the question of law involved for this advance could only be given under the orders of the sanctioning authority for special cause shown and not at the option of the subscriber. The weight of authority is distinctly in favour of the view taken by the Court below and I dismiss the application with costs.

Z. K. *Application dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

May 15, 1923.

Present:—Viscount Finlay, Lord Atkinson and Mr. Ameer Ali.

Raja INDRAJIT PRATAP BAHADUR SAHI—PLAINTIFF—APPELLANT

versus

AMAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—Additional evidence—Other substantial cause—Privy Council—Practice.

Under r. 27 of O. XLI of the Civil Procedure Code, an Appellate Court has power to allow, at the instance of any of the parties, additional evidence or documents to be produced or witnesses to be examined, for any cause other than those particularly specified in the rule. The rule does not limit the admission of additional evidence to cases, when the Appellate Court has itself discovered some inherent *lacuna* or defect, and requires evidence to fill up the gap, or remedy the defect. [p. 751, col. 2; p. 752, col. 1.]

Kessowji Issur v. *Great Indian Peninsula Railway, Co.*, 34 I. A. 115; 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435 (P. C.), *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty*, 11 M. I. A. 28; 7 W. R. P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11, distinguished.

Rules of procedure are not made for the purpose of hindering justice. There is no restriction on the powers of the Privy Council to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. [p. 753, col. 1.]

Appeal from the Patna High Court.

Messrs. *L. DeGruyther, K. C.*, and *B. Dube*, for the Appellant.

Messrs. *A. M. Dunne, K. C.* and *W. Wallach*, for the Respondents.

JUDGMENT.

Mr. Ameer Ali.—The facts of this litigation are set out in detail in the judgments of the Courts in India; it is consequently not necessary to state them here at any length. The suit relates to two villages, named respectivey Lakhawar Khas and Lakhawar Faridpur, lying within Mahal Margaon, appertaining to the Tikari estate in the Province of Behar. It appears that in 1843 there was a Government Survey of Mahal Margaon, in the course of which a Khasra map was prepared by the Amin of these two villages along with another called Lakhawar Damodarpur. The map is Exhibit 14 in this case, and the memorandum on the back is marked 14 A.

In the middle of the nineteenth century the Tikari estate belonged to one Raja Mode Narain Singh. He died somewhere in the year 1856 or 1857 without any male issue, leaving him surviving two widows named respectively Rani Asmedh Koer and Rani Sunit Koer, a brother's son, Ran Bahadoor Singh and a sister's grandson, Krishna Pratap Sahai, the ancestor of the present appellant often named in these proceedings as the Raja of Tankuhi. On Raja Mode Narain Singh's death, in the absence of any direct male heir, natural or adopted, his widows took possession of the estate for their lives. Ran Bahadoor Singh, who, under the circumstances, was the reversioner, appears, however, to have acquired possession by some arrangement with the widows.

In 1875 Raja Krishna Pratap Sahai brought a suit against Ran Bahadoor Singh and the two widows of Raja Mode Narain Singh, for recovery of the whole estate, on the allegation that he had been adopted by the widows subsequent to the death of the Raja under authority given by him in his lifetime. This suit was

dismissed by the Subordinate Judge; from his decision an appeal was preferred to the High Court of Calcutta. Whilst the appeal was pendng the parties came to a settlement and an *ekararnama* was executed by Krishna Pratap in which were embodied the terms of the compromise. This document is marked Exhibit 20, and bears date the 30th of May 1880. By the terms of this agreement Raja Krishna Pratap Sahai undertook to withdraw all claims to the estate, in consideration of the grant to him by Ran Bahadoor Singh, of a *mokarari* settlement of certain villages set out in detail in that document. Pursuant to this agreement Ran Bahadoor Singh, by a *pattah* of even date, granted to Krishna Pratap Sahai, the *mokarari* of the villages named in the *ekrarnama* and set out specifically in the grant. The *pattah* recites the agreement already referred to and then proceeds to describe the properties demised thereunder. One of these is named as Damodarpur Lakhawar.

The controversy in the present suit relates solely to the question, what does Damodarpur Lakhawar denote?

It should be noted here that the rental fixed for the *mokarari* was Rs. 2,701 per annum.

Raja Krishna Pratap Sahai, the grantee, appears to have taken possession under the *pattah* of the properties conveyed to him thereunder by Ran Bahadoor Singh. The plaintiffs' claim that under the designation of Damodarpur Lakhawar only one village was granted to Raja Pratap Sahai and that the grantor retained possession of the other two, *viz.*, Lakhawar Khas and Lakhawar Faridpur, and that they on the 24th January 1914 obtained a grant of the same from the present owner of the 7½-annas share of the Tikari estate within whose property these villages lie, and they ask, as against the first defendant, the representative of Raja Krishna Pratap Sahai, recovery of possession of these two villages with mesne profits. The defendant No. 2 is the present possessor of the 7½-annas share and she supports the plaintiffs' claim.

The contesting defendant, on the other hand, alleges that "in the *mofassil* all the three villages are known by the name of Damodarpur Lakhawar," that they were "measured together" (in the Survey of 1843) and that all three were entered under the name of Damodarpur Lakhawar in the *Zemindari* office of the Tikari Raj; and he claims that what was granted to Raja Krishna Pratap under that name was not one village only, but all the three bearing the common designation of Lakhawar. He further alleges that the grantee and his heirs have ever since been in possession of the three villages and that the present suit has been falsely instituted against him. As already stated, the sole question at issue between the parties is, what does the name Damodarpur Lakhawar denote; in other words, whether it refers to only one village or to the three villages together.

This is an action in ejectment; in the proceedings under section 145 of the Criminal Procedure Code in 1912, the defendant was found to be in possession of the villages in dispute, against the claim of the plaintiffs; and in the Cadastral Survey proceedings taken under the provisions of Bengal Tenancy Act of 1885, they again failed to establish their allegation. Their failure in those proceedings led in fact to the institution of the present action in August 1914. The *onus* thus lay heavily on the plaintiffs to show that the defendant was not in possession of these proprerties by virtue of the title he alleges. And this they could easily have done, in order to shift the *onus*, by proving that the rent for the two *Mauzahs* was paid separately into the estate office, and that the three villages were separately entered in the estate records. Their Lordships have not observed in the judgments of the Courts in India a reference to this aspect of the case.

In both the Courts the matter in controversy has been dealt with as involving a simple construction of the words of the *pattah*. Both the Subordinate Judge and the learned Judges of the High Court of Patna have found that the three properties form separate *Mouzahs*, that the two disputed villages are not appurtenant hamlets (*Dakhihills*) of Damodarpur, that consequently what was granted under the *pattah* was only one village specifically named in the grant. They put aside the docu-

mentary evidence adduced by the defendant of the dealings with the three *Mouzahs* as a composite property, mainly on the ground of a *lacuna* in the evidence which made the transaction look suspicious.

The Subordinate Judge decreed the plaintiffs' claim, and his decree has been affirmed by the High Court, though it has held he had fallen into error on several findings of fact.

The present appeal to His Majesty is from the judgment and decree of the High Court.

In dealing with this case it is necessary to bear in mind two undisputed facts. First, that in the Survey of 1843 the lands of the three *Mouzahs* were measured together. The learned Judges of the High Court find it impossible to say why this was done. But Exhibit 14A, the memorandum on the *khasra* map prepared by the Amin for purposes of the Regular Survey which was to follow, contains the explanation. The three *Mouzahs* were measured together, as the lands were intermixed (*makhlut*). In this circumstance may be found the key to the whole history of these villages. Though the areas found on measurement are given separately, all three bear the same number in the Collector's register.

The Appellate Court thinks, that this is due to the fact that the three villages appertain to one Mahal. This explanation seems hardly well-founded. Besides, were this the correct view, all the other villages described in Exhibit 14A which also bear the name of Lakhawar would have borne one and the same number. Their Lordships have no doubt that the three *makhlut* villages bearing one number in the Collector's register were regarded as one composite revenue unit. The revenue assessed on these *Mouzahs* appears also to be a consolidated amount.

As stated already, the grant was made on the 30th May 1880. In it the name of the property is given as "Damodarpur Lakhawar." In the schedule which contains the details of the *Mouzahs* the names of the *thikadars* (lessees), who were in possession at the time and the *jama* at which Settlement was made are set out. The particular property forming the subject of the grant is described thus: "Damodarpur Lakhawar, *Pargana* Okri, Mahal Sufi, District Gaya."

Twelve years before, *viz.*, on the 5th April 1868, Rani Sunit Koer, the second widow of Raja Mode Narain Singh, had granted to one Ram Sahai, whose name appears as lessee in the list attached to the *pattah* of 1880, a lease of 7½-annas share of six *Mouzahs* for 15 years at a yearly rental of Rs. 757. In this document also the property is described as Damodarpur Lakhawar. On the 15th September 1875 Raja Ran Bahadoor himself granted to one Mohar Singh a *pattah* for 13 years in respect of the remaining 8½-annas share of the same villages at a rental of Rs. 749—thus making a total of Rs. 1,506 for both shares. On the 23rd January 1880, shortly before the compromise in the suit of 1875, Ran Bahadoor Singh gave to one Harihar Narain Singh, whose name also appears in the list attached to the *pattah* of the 30th May 1880, an usufructuary lease for 15 years. In the *kabuliyat* executed by Harihar Narain Singh, the component parts of Damodarpur Lakhawar are for the first time specifically set out. It recites that he had "obtained a *thika* settlement of the whole and entire 16 annas of *Mouzah* Lakhawar Khas, Lakhawar Makhlut Damodarpur, Lakhawar Makhlut Faridpur, Mahal Sufi, *Pargana* Okri, District Gaya, original with dependencies, on a fixed and consolidated *jama* of Cos. Rs. 1,495," together with certain other items, amounting in the aggregate to Cos. Rs. 1,507. After giving other details it goes on to state that:—

"Under the order of the authority for the time being resting with me the *Thikadar*, on payment of Cos. Rs. 10,800 as *Zarpeshgi* bearing interest at 8 annas per cent. per mensem, according to Katowli Satawa [*i.e.*, usufructuary mortgage] account given below and Rs. 501, as *Zarpeshgi* bearing no interest, to be set off at the end of the term, from Sarkar Raja Ran Bahadoor Singh . . . . . for a term of 15 years, I shall take, and hold possession of the lease-hold properties. . . . ."

A schedule is attached to this document showing the annual rental of the properties of which Harihar Narain Singh had obtained the lease, the deductions to be made therefrom on account of interest, the amounts to be deducted on account of principal,

and the balance remaining therefrom, which was to be paid to the *mokarraridar*, the grantee under the *pattah* of 1880. This document would go to show that what was granted in 1880 referred to all the three villages which were grouped under the one name of Damodarpur Lakhawar, and would be conclusive on the point in controversy. But both the Subordinate Judge and the learned Judges of the High Court think, as already mentioned, that there was a gap in the evidence which the defendants had failed to supply and that, therfefore, the story that the grant included all three *Mouzahs* could not be true. On this point the Subordinate Judge expresses himself thus :—

"Thus the grantor of the lease as shown by Exhibit 15 makes a clear profit of about Rs. 6,000 by way of interest over the *peshgi* money received, and he takes about Rs. 8,000 more as *peshgi* money than that in Exhibits L and G; under such circumstances, simply because the rental in Exhibit 15 happens to be Rs. 1,507 and 30 maunds of rice almost equal to what there is in Exhibits L and G, it cannot follow that the same profit accrued to the landlord, and, therefore, the same property was leased out in Exhibit 15 as in Exhibits L and G. In fact, the landlord for apparent larger profits might have reduced the rent and might have granted three villages by Exhibit 15 and, as the profit was not so much before he took larger rent and granted only one village and 7½-annas of Ampathua for almost the same rent."

The learned Judges of the High Court take a similar view. They say :—

"Now there is evidence to show that the portion of the *jama* which was to be set off in favour of the Tikari Raj against the *Zarpeshgi* was actually set off, but there is nothing to show that any corresponding set-off was ever made by the Tikari Raj in favour of the Tamkuhi Raj (the appellant). The only conclusion to be drawn from this is the conclusion drawn by the learned Subordinate Judge, *viz.*, that the Tikari Raj was getting the benefit of the set-off and that the Tamkuhi Raj was not in possession of the three *Mouzahs* but of only one. Even if the Tamkuhi Raj did take the whole of the cash-rent from the Ticcadar, however, this also would show nothing. Under his *mokarari* the Raj of Tamkuhi was to get a clear profit of Rs. 1,151-12 a year after deduction of *mokarari* rent. Now the highest amount that in any year was ever payable by Harihar Narain to the Tikari Raj was Rs. 708-10, so that even if the Tamkuhi Raj took the whole of this sum it was less than the whole amount to which it was entitled under the *mokarari* and the fact of taking it all would not in any way show that it had possession of the *Mouzahs* in suit."

The conclusion of the Indian Courts being thus based on the absence of evidence on the part of the defendant to show what arrangement had been made by Ran Bahadoor Singh in respect of the demands of Harihar Narain Singh, who held the usufructuary mortgage, the appellant tried to trace further transactions to elucidate the gap to which the Subordinate Judge and the High Court referred, and on which practically the case was decided. It appears that before judgment was delivered by the High Court he traced after diligent search certain documents contemporaneously executed by Ran Bahadoor Singh by which he had made effective provision for meeting the demands of the usufructuary mortgagee and the claims of the *mokararidar*; and obtained copies from the Registry Office where the documents executed by Ran Bahdoor Singh were registered, and applied to the Appellate Court, for their admission as material evidence in proof of his case. One of these documents is the *Hukumnamah* (authority) addressed by Ran Bahadoor Singh to Harihar Narain Singh which bears date the 31st May 1880. The other is a *Tunkhah* or authorisation addressed by Raja Ran Bahadoor to one Telkhari Singh dated the 24th January 1880. Telkhari Singh appears to have been a lessee of certain *Mouzahs* belonging to Ran Bahadoor Singh and the direction to him is in these terms :—

"Whereas Harihar Narain Singh, son of Babu Mukha Singh, resident of Bishunpore Pandui, *Pergannah* Ekil, District Gaya by occupaton *Zemindar*, has been granted a lease for a term of 15 years in respect of 16-annas of *Mouzah* Khas Lakhawar, Lakhawar Makhlut Damodarpur, Lakhawar Makhlut Faridpur, Mahal Sufi, *Pergannah*

Ekil, District Gaya, original with dependencies at an annual *jama* of Rs. 1,507 of Company's coin, in cash *Mal* with *Abwab* and 30 maunds of sunned rice from 1296 to 1310 for a consideration of Rs. 10,878 as an advance bearing interest at the rate of 8 annas per mensem as per *Katwa Satwa* account and Rs. 561 as advance bearing no interest to be set off against the rent of the last year of the term. And Rs. 5,520-11, as is the interest on the said advance bearing interest from November 1287 to 1295 the period of dispossession and the payment of that amount is necessary. Therefore, it is written to you that you should pay the said Rs. 5,520 as per details out of the rental in respect of Bhekhdharaut Mahal Sufi *Pargannah* Bhelawar, the lease-hold village, year after year to the said lessee (Harihar Narain Singh) after obtaining receipt."

The *Hukumnama* directed to Harihar Narayan Singh bears date the 1st June 1880, namely, the day after the *mokarari pattah* of the 30th May 1880, in favour of Raja Krishna Pratap Sahai. The document runs thus:—

"To.

"Sri Harihar Narayan Singh, son of Mukhi Singh, resident of *Mouzah* Bishunpur Pandul, *Pergannah* Ekil, District Gaya, and *thikadar* in respect of 7-annas 6-pies out of the entire 16-annas of the *Mouzah* Damodarpur Lakhawar and Lakhawar Khas, *Pargannah* Okri and of 8-annas 6-pies of the said villages in all 16-annas of the said villages by occupation *Zemindar*."

Then it goes on to say:—

"Whereas the 16-annas of *Mouzah* Damodarpur Lakhawar and Lakhawar Khas original with dependencies together with *Mauzah* Mohamadpur Khurd and Mohamadpur Kalan and Manikpur Bahari bearing an annual fixed *jama* of Rs. 2,701-12, half of which is Rs. 1,350-14 as. according to the currency have been given in perpetual *mokarari* commencing from 1288, from generation to generation, from progeny to progeny, from heirs to heirs, from successor to successors without any provision for forfeiture, cancellation and resumption from the Sirkar of this estate, in favour of Raja Krishna Partap Bahadur Sahi, son of Raja Kharga Bahadur Sahi, resident and proprietor of Raj *Reyasat* Tamkohi, *Pargannah* Sidhua Jobna, District Gorakhpore, under a *mokarrari* deed dated this day. Hence it is given to you in writing that you should pay and deliver Rs. 1,507 *mal* (rent) with cesses in cash and 30 maunds of Arwa rice the rent of the said *Mouzah* due from you, commencing from 1296 *Fasli* to 1310 *Fasli* up till the terms of your *ihika*, to the officers of Raja Krishna Partap Sahi. *Mokarraridar* from year to year, from season to season, from *kist* to *kist* in accordance with the conditions and terms of *kistbandi* embodied in *thika kabuliyat*. And in case of the non-payments of the rentals specified to the extent of cash as set forth above."

There can be no question as to the genuineness of these documents. They appear to have been duly registered on their execution, the copies produced have been obtained from the Registry Office under the rules and regulations framed by authority. The only question is, whether they can be admitted as evidence. If they are admissible, they place beyond dispute the fact that the grant was in respect of all three villages which are known under the composite name of Damodarpur Lakhawar. But the learned Judges have held that they had no jurisdiction under r. 27, O. XLI of the Code of Civil Procedure Act, 1908, to admit in evidence these documents.

Rule 27 runs as follows:—

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, *or for any other substantial cause*, the Appellate Court may allow such evidence or document to be produced or witness to be examined."

The matter does not come under clause (*a*). With regard to clause (*b*) the High Court construed the rule with the assistance

of the decision in *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1), that it implies a prohibition against the admission of additional evidence except where the Appellate Court has itself discovered some inherent *lacuna* or defect, and required evidence to fill up the gap or remedy the defect. They have apparently not considered the question that the suitor may be entitled for any "substantial cause" to apply to the Court for the admission of such additional evidence. The case of *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1), on which the learned Judges have relied, was peculiar in its character. A suit had been brought on the Original Side of the Bombay High Court against the Great Indian Peninsula Railway, to recover damages for injuries sustained in consequence of an accident occasioned by the laches of the officials of the Railway. The suit had been decreed by the Court of first instance; the Railway Company then, on discovery of some new evidence, applied for a review of judgment before the learned Judge who had decreed the claim: he refused the application. Then the Company filed an appeal, and applied to the High Court in its appellate jurisdiction for leave to produce the same evidence they had presented to the First Court and which had been rejected. The High Court not only gave permission to the appellants in that case to produce the evidence, but extended the permission to other evidence. As this Board pointed out, the procedure adopted by the Appellate Court was quite irregular. In the course of their judgment the Board laid stress on the limitations to the power of an Appellate Court to require additional evidence on their own motion to supplement what had been produced by the parties. In their Lordships' opinion *Kessowji's case* (1) has no bearing on the present debate. In this connection it may be useful here to refer to the remarks of Lord Westbury, in the case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (2), where, dealing with the power of the Appellate Court to require additional evidence under the provisions of the cognate section, section 355 in the Civil Procedure Code of 1859, he said as follows:—

"When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly; because, where it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original inquiry by the High Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice."

Both in the case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (2) and *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1) their Lordships were dealing with the power of the Appellate Court to require evidence to be produced for the purpose of enabling the Court to pronounce judgment. Those cases did not refer to the right of one or other of the parties to produce evidence which he considered essential for the determination of the action. Under O. XLVII, r. 1, which re-produces section 623 of the Civil Procedure Code, Act XIV of 1882, a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in rule 1. In the present case an appeal had been preferred and a review, therefore, was out of the question; and the defendants took the only and proper course, *viz.*, to apply to the High Court, which was

(1) 34 I. A. 115; 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435 (P. C.).
(2) 11 M. I. A. 28; 7 W. R. P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11.

in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of rule 27, which lays down that the Appellate Court may for any other substantial cause (*viz.*, other than those particularly specified) allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. As the application is now before their Lordships for the admission of the documents to which reference has already been made, it is desirable to observe, that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. It is only necessary to refer to page 289 of Mr. Bentwich's "Privy Council Practice" where he has set out the cases in which the power has been exercised.

Their Lordships, therefore, have admitted the two documents in respect of which the application is made, and on these two documents they have no doubt that Ran Bahadoor Singh, by the words "Damodarpur Lakhawar" denoted all the three villages, and that he purported to give, and gave in *mokarrari* all three of them to the grantee. On the whole, therefore, their Lordships are of opinion that the decrees of the Courts below should be set aside and the plaintiffs' suit dismissed. The appellant will be entitled to his costs both here and in the Courts in India, and their Lordships will humbly advise His Majesty accordingly.

Z. K. *Decrees set aside.*

Solicitor for the Appellant:—Mr. *H. S. L. Polak.*

Solicitor for the Respondents:—Messrs. *W. W. Box & Co.*

PATNA HIGH COURT

APPEAL FROM ORIGINAL ORDER No. 237 OF 1922.

July 6, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Foster.

K. B. DUTT—APPLICANT—APPELLANT

versus

TARAPRASANNA ROY CHAUDHRY—OBJECTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 39, O. XXI, r. 6—Decree transferred for execution to another Court—Decree-holder, duty of, to make application for execution.

Where there has been no application for the execution of a decree in the Court which passed the decree, the decree-holder is bound to make an application for execution in the Court to which the decree has been transferred, but if he has already made an application in the Court which passed the decree he is not bound to make a second application for the execution of the decree in the Court to which the decree has been transferred. [p. 754, col. 2.]

Appeal from an order of the Subordinate Judge, Dhanbad, dated the 31st July 1922.

Messrs. *S. C. Mitra* and *B. C. De*, for the Appellant.

Messrs. *A. B. Mukherji* and *B. B. Mukherji*, for the Respondent.

JUDGMENT.

Mullick, J.—On the 28th April 1910 the appellant obtained a decree in the Court of the Subordinate Judge of Dacca for a certain sum of money. It is not necessary to go into the history of the previous executions and we are concerned only with an application made by the decree-holder to that Subordinate Judge on the 21st April 1922. It seems that the application was duly registered and notice was issued under O. XXI, r. 22, Civil Procedure Code, upon the judgment-debtor to show cause, why the execution should not proceed, a period of more than one year having elapsed since the last execution. On the 25th April, the decree-holder filed a petition requesting that the decree and a certificate of non-satisfaction should be sent to the District Judge of Manbhum. On the 29th April, the certificate was duly despatched to the Court of the Subordinate Judge of Manbhum without any adjudication on the question of limitation. The Subordinate Judge of Dacca was doubtful whether he was competent to keep

the execution proceeding pending on his file, but after hearing the decree-holder, he adjourned the case till the 29th July 1922. It appears, that the certificate reached the Subordinate Judge of Manbhum, either on the 6th or on the 8th May 1922, and we find an order dated the 8th May 1922 by the Subordnate Judge of Dhanbad, who was the Subordinate Judge of Manbhum with the necessary territorial jurisdiction to the following effect: "Decree-holder states, as ordered, that the execution case is pending at Dacca. Register and issue notice under O. XXI, r. 22, fixing 25th May for return." On the 6th June 1922, the judgment-debtor filed an objection on the ground that the decree was barred by limitation, more than 12 years having elapsed since the decree was made. On the 31st July 1922, the Subordinate Judge made an order accepting the objection of the judgment-debtor and dismissing the application for execution on the ground that it was barred under section 48, Civil Procedure Code.

The present appeal is preferred against that order.

Now, the question is, what was the nature of the application before the Subordinate Judge of Dacca. Was it merely an application for the transfer of the decree or an application for the execution of the decree? If it was merely an application for the transfer of the decree, then it was necessary for the decree-holder to file an application for the execution of the decree in the Court of the Subordinate Judge of Manbhum. A distinction was drawn between an application for mere transfer and an application for the execution of a decree in *Suja Hossein* v. *Monohur Das* (1) and *Nilmony Singh Deo* v. *Biressur Banerjee* (2), and there is really no difficulty as to the law. Now, the application in question here is not before us and we can only draw inferences from the proceedings of the Subordinate Judge himself. It appears that he registered the application under O. XXI, r. 11, Civil Procedure Code, and issued a notice under O. XXI, r. 22 after doing so. We must presume, therefore, that the Subordinate Judge was acting according to law and that the application was in form and in substance an application for the execution of the decree, and so it has been held to be by the learned Subordinate Judge of Dhanbad also. Only that officer was under the impression that, notwithstanding the application in the Court of the Subordinate Judge of Dacca, it was necessary for the decree-holder after the transfer of the decree to make another application in the Court at Dhanbad. In my opinion, there is no warrant in law for this view. O. XXI, r. 6, read with section 39, Civil Procedure Code, makes it quite clear that where there has been no application for the execution of the decree in the Court which passed the decree, the decree-holder is bound to make an application for execution in the Court to which the decree has been transferred but I can find nothing in the law, which compels the decree-holder to make a second application for the execution of the decree in the Court to which the decree has been transferred if he has already made an application in the Court which passed the decree. It is to be noted here, that the Subordinate Judge of Dacca, although he complied with the law in issuing a certificate of non-satisfaction as required by section 39, omitted either to order the execution of the decee or to give a certificate that no order had been made for the same. The omission was wrong, but it did not give rise to any obligation upon the decree-holder to file a fresh application for execution in the Court of the Subordinate Judge of Dhanbad. If, then, it was not necessary for the decree-holder to file any such application the Subordinate Judge should, upon an application for the arrest of the judgment-debtor and the attachment of his properties, have proceeded to execute the decree and the dismissal of the case was in my opinion wrong.

There was some argument before us as to whether this was an application for the continuation of the proceedings, which had already been instituted in the Court of the Subordinate Judge of Dacca and we were asked to compare the reliefs claimed before the Subordinate Judge of Dhanbad with the reliefs claimed before the Subordinate Judge of Dacca. In the absence of

(1) 22 C. 921; 11 Ind. Dec. (N. S.) 610.
(2) 16 C. 744; 8 Ind. Dec. (N. S.) 493.

the application before the Subordinate Judge of Dacca we are not able to make this comparison, nor is it necessary to do so in the view which I take of the matter.

The appeal will, therefore, be decreed with costs.

Foster, J.—I agree.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 896 OF 1923.

June 20, 1923.

Present:—Mr. Justice Kanhaiya Lal.

GANESH DIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LACHMAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Tenancy Act (II of 1901), s. 22—Joint cultivation determined—Person in joint cultivation of holding or part thereof, whether can redeem mortgage.

If one parcel of a holding is mortgaged and another parcel is free from the mortgage, and a person is joint in cultivation with the mortgagor in the latter that is enough to give him a right to redeem the former.

If the entire holding is mortgaged the fact that a person was in joint cultivation with the mortgagor before the mortgage would equally give him a right to redeem the mortgage.

Jointness in cultivation is determined by the fact of cultivation itself and not by its extent.

Second appeal against the decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Allahabad, dated the 10th of March 1923.

Mr. *Damodar Das*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage said to have been effected by Diplu Singh, the ancestor of the plaintiffs, in favour of Thakur Dayal, the ancestor of the defendants. The defendants denied the existence of the alleged mortgage; but the Court below found that the mortgage in question was proved. The defendants also denied that the plaintiffs were the lawful successors of Diplu Singh; but the Courts below found against them. It appears that Diplu Singh was an occupancy tenant of the plots in dispute and that he mortgaged them with Thakur Dayal and gave him possession. The plaintiffs were his collateral descendants and were according to the Courts below joint in cultivation with him in the holding. The extent of that holding is not mentioned. Whether they were joint with him in the cultivation of the whole holding mortgaged or in the cultivation of the remainder of his holding, makes no difference, because a holding is defined as a parcel or parcels of land held under one tenure or one lease or engagement. If one parcel is mortgaged and another parcel is free from the mortgage, and a person is joint in cultivation with the mortgagor in the latter, that is enough to give him a right to redeem the former. If he is joint in cultivation with him in the holding, that is to say, in any parcel of land comprised in that holding, the entire holding can devolve on him, for it must devolve as a whole under section 22 of the U. P. Tenancy Act (II of 1901). If the holding comprised only the mortgaged plots, the fact that the plaintiffs were in joint cultivation with the mortgagor before the mortgage, would equally give them a right to redeem the mortgage. An occupancy tenant may hold a part of the land comprised in the holding in his cultivation jointly with his kinsmen and may sub-let the rest thereof, but the effect of such a sub-lease cannot prevent the devolution of the entire holding on the kinsmen, who are joint in the cultivation with him of the remainder. The fact that he has made a mortgage of a portion would similarly make no difference. In either event, the jointness in the cultivation is determined by the fact of cultivation itself and not by its extent.

It is asserted that the statements of some of the witnesses relied on were misunderstood by the Courts below in arriving at the conclusion recorded by those Courts, but there is nothing to show that that contention is well-founded. The appeal is, therefore, rejected.

K. S. D. *Appeal rejected.*

MUIZ-UD-DIN *v.* MOHAMMAD IKHLAQ.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 92 OF 1922.

May 1, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

Sheikh MUIZ-UD-DIN—DECREE-HOLDER—APPELLANT

versus

MOHAMMAD IKHLAQ AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Trust—Money paid in execution of decree by Mutwalli—*Decree set aside*—De facto Mutwalli, *whether entitled to refund of money.*

B, who was the *de facto mutwalli* of a trust, was removed from his office under a decree which also directed him to pay certain trust monies and costs to a Board of Trustees. The payment was made, but the decree was subsequently set aside on appeal. *B* died, and his son *M*, who had succeeded in getting mutation of names effected in his favour in respect of the trust property, and was in possession of it; applied for refund of the money paid by his father to the Board of Trustees:

Held, that *M*, in the capacity of a *de facto mutwalli* of the trust was entitled to claim a refund of the monies, provided he agreed to credit the same to the trust and to duly account therefor to the person or persons who may be declared lawfully entitled to the *mutwalliship*.

Execution First Appeal from a decree of the District Judge, Farrukhabad.

Dr. *Surrendro Nath Sen*, for the Appellant.

Mr. *Mushtaq Ahmad*, for Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is, whether Sheikh Muiz-ud-din is entitled to obtain a refund of the money due to Bashir-ud-din, the late *de facto mutwalli* of the trust. It appears that a suit was filed by certain persons to dislodge Bashir-ud-din from the position of the *mutwalli* of the trust. That suit was decreed by the Trial Court, and a Board of Trustees was appointed, to whom Bashir-ud-din was directed to pay certain trust money and costs. Subsequently, that decree was set aside by this Court, which came to the conclusion that Bashir-ud-din had acted as a *de facto mutwalli* of the trust sufficiently long to be entitled to remain in possession of the trust property as such. By virtue of the decree of this Court Bashir-ud-din became entitled to claim a refund of the trust money and costs, which he had meanwhile paid to the judgment-debtors. A portion of the said money was realised by Bashir-ud-din in his life-time. An application was now made by his son, Muiz-ud-din, for the recovery of the balance. His allegation is that he was appointed by Bashir-ud-din, the late *mutwalli*, as his successor to the office, but the evidence adduced by him on that point was disbelieved by the Court below, and we are not prepared to differ from that view.

It appears, however, that on the death of Bashir-ud-din, Muiz-ud-din succeeded in getting mutation of names effected in his favour in respect of the trust property, and that he has since then been in possession of the trust property as the *de facto mutwalli* of the trust. In that capacity we think he is entitled to claim a refund of the monies, provided he agrees to credit the same to the trust and to duly account therefor to the person or persons who may hereafter be declared lawfully entitled to the *mutwalliship*. It is urged on behalf of the judgment-debtors-respondents that the payment of the money to Muiz-ud-din should be withheld, till the question of *mutwalliship* is finally decided by a competent Court. The judgment-debtors can not be allowed to hold back the trust monies; but in the interest of the trust, we consider it advisible that we should not allow Muiz-ud-din to withdraw the money, which may be realized by execution, if the opposite party take steps within a reasonable period to get the question of the *mutwalliship* to the trust adjudicated in a proper Court.

We allow the appeal accordingly and, setting aside the order of the Court below, allow the execution to proceed subject to the condition that the money realised by execution or paid into Court shall remain in deposit until adequate security is filed to the satisfaction of the Court below for a refund of the same to the person entitled or for a period of six months in order to enable the judgment-debtors to contest the right of Muiz-ud-din to act as the lawful *mutwalli* of the trust in succession to his father Bashir-ud-din. If no suit is filed within that period to contest the validity of that office, Muiz-ud-din will be entitled to withdraw the money

from Court without such security If a suit is filed, the money shall remain in deposit till such security is filed or the question of the right of Muiz-ud-din to succeed to the office of *mutwalli* is determined in due course. The parties will, under the circumstances bear their own costs of this appeal.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 129 OF 1922.
February 26, 1923.
Present:— Mr. Justice Rafique and Mr. Justice Lindsay.

JAI SINGH GIR—PLAINTIFF—APPELLANT
versus
SITA RAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 149, O. XLI, r. 3—Appeal — Court-fee, deficiency in—Rejection of appeal — Procedure —Extension of time — Discretion, exercise of— Interference by Appellate Court.

The powers of an Appel ate Court to reject a memorandum of appeal are set out in O. XLI, r. 3 of the Civil Procedure Code. It has no power toreject an appeal on the ground that it is insufficiently stamped.

Under section 149 of the Civil Procedure Code a power is reserved to a Court in the matter of granting time for the making up of deficiencies in Court-fees, and where such discretion has been exercised, it will not be interfered with on appeal.

Where, however, the Court has not exercised any discretion in the matter at all, the Appellate Court will be justified in making an order of remand for the purpose.

Second appeal from the decree of the District Judge, Aligarh, dated the 7th November 1921.

Mr. *S. D. Sinha*, for the Appellant.
Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—Only one question is raised in this second appeal. It appears that the appellant who was the plaintiff had his suit dismissed in the Court of first instance. He went to the Court of the District Judge and filed an appeal. According to the valuation of the appeal, which was the same as the valuation of the suit, the proper Court-fee payable was of Rs. 55, *i.e.*, Rs. 10 in respect of a declaration which was being claimed and Rs. 45 in respect of the claim for possession

The memorandum of appeal was filed on a ten rupee stamp on the 4th November 1921.

That was the date on which the Courts opened after the long vacation. The Munsarim recorded a report on the memorandum of appeal stating that the appeal was within time but pointing out that the memorandum of appeal was insufficiently stamped. On the 7th November 1921 the learned District Judge recorded the following order:—

"I am not prepared to allow further time as only Rs. 10 Court-fee stamp has been paid and Rs. 55 were due. The appeal will be rejected as insufficiently stamped."

We may point out, in the first place, that the learned District Judge had no right to reject the appeal on the ground that it was insufficiently stamped. The power of rejection in respect of a memorandum of appeal are set out in O. XLI, r. 3. Again, it does not appear from the Judge's order, although he says that he is not prepared to allow "further time,' that any time had been allowed to the appellant to make good the deficiency. It is true that under section 149 a discretion is reserved to the Court in the matter of granting time for the making up of deficiencies in Court-fees, and if we were satisfied in the present case that the learned Judge had exercised any discretion we should not have interfered. It does not, however, appear that the learned Judge really did exercise any discretion in the matter. He does not give any reasons why he is not prepared to allow the deficiency to be made good. We think the proper course, therefore, is to allow this appeal, set aside the order of the Court below and direct the appeal to be returned to the District Judge who will give the appellant an opportunity of showing cause why the Court's discretion should be exercised in his favour under the provisions of section 149 of the Code of Civil Procedure. Costs to abide the result. We may note for the information of the learned Judge that the full deficiency which was payable in the lower Appellate Court has already been paid into this Court.

Z. K. *Appeal allowed.*

SHYAM SUNDER RAI v. JAGARNATH MISRA.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1098 OF 1921.

July 11, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

SHYAM SUNDER RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGARNATH MISRA—PLAINTIFF—RESPONDENT.

Hindu Law — Joint family—Alienation by one co-parcener—Co-parcener contesting alienation whether can sue for his share only—Amendment of plaint, whether can be allowed in second appeal.

A co-parcener in a joint family property who establishes that a member of the family has alienated the property without legal necessity can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof, for the simple reason that in a Mitakshara joint family no particular share can be predicated as belonging to any individual member. [p. 759, col. 1.]

Plaintiff sued to recover his share of the joint family property from the transferees who had purchased it from a co-parcener. The plaintiff alleged that his father had separated from the vendors and held his half share separately. It was found that the plaintiff was not separate at the time of the sale:

Held, (1) that inasmuch as the plaintiff had not only omitted to ask for the recovery of the whole property but had also failed to implead his co-sharers, the suit could not be entertained; [p. 759, col. 1.]

(2) that it could not be contended that as the plaintiff was entitled to sue for the whole he was entitled also to relinquish his claim to half and to ask for a decree for the remainder; [p. 759, col. 1.]

(3) that the plaint could not be allowed to be amended at that stage in second appeal and the plaintiff could not be allowed to alter the whole aspect of the litigation by including an additional prayer for relief and by bringing new parties on the record. [p. 759, col. 2.]

Banwari Lal v. *Sheo Sankar Misser*, 1 Ind. Cas. 670; 13 C. W. N. 815, and *Mohunt Ram Sundar Dass* v. *Barham Deo Narain Thakur*, 2 Ind. Cas. 986; 14 C. W. N. 552, referred to.

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 9th May 1921, confirming a decision of the Munsif, Bhagalpur, dated the 28th June 1920.

Mr. *Nirsu Narayan Sinha*, for the Appellant.

Mr. *Sushil Madhav Mullick*, for the Respondent.

JUDGMENT.

Mullick, J.—This second appeal raises the question of the right of a co-parcener in a joint Hindu family governed by the Mitakshara Law to bring a suit for the recovery of his share of the property from transferees who have purchased the property from a co-parcener claiming to act on behalf of the joint family and who have failed to prove that the sale was made for legal necessity.

The plaintiff and his father Bulan represented one branch while Makut and Babujan represented the other branch of the joint family and on the 15th November 1907, the property in suit was sold by Babujan and Makut to the defendant for a sum of Rs. 3,350, the plaintiff alleges that in 1902, his father separated from Babujan and Makut and began to hold his half share in the property separate from them. The present suit was brought against the transferees only on the 5th July 1918 for a declaration that the plaintiff's half share could not be affected by the sale, and for recovery of possession of that share from the defendants.

The defendants filed a written statement pleading that the family was joint and that there had not been any separation as alleged by the plaintiff. The issue upon this was: "Did Bulan separate from Makut Lal and Babujan in *Pus* 1309?" This issue, if decided in favour of the plaintiff, would have been sufficient for the decision of the case, but as the defendants pleaded jointness an additional issue was framed and ran as follows: "Was there any legal necessity and is the *kobala*, dated 15th November 1907, binding on the plaintiff?" The Munsif found that the plaintiff was not separate at the time of the sale. He found that the family was still joint, that there was no legal necessity for the alienation, and that, therefore, the sale was invalid. He, however, gave the plaintiff a decree for his half share and that decree has been affirmed by the lower Appellate Court.

The present second appeal is preferred by the defendants on the ground that, in view of the finding that the plaintiff was not separate at the time of the sale, his claim to recover a half share cannot be entertained.

SHYAM SUNDER RAI v. JAGARNATH MISRA.

Now upon the authorities this contention is undoubtedly correct. A co-parcener in a joint family property, who establishes that a member of the family has alienated that property without legal necessity, can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof, for the simple reason that in a Mitakshara joint family no particular share can be predicated as belonging to any individual member. In the present case the plaintiff has not only omitted to ask for the recovery of the whole property but he has failed to implead his co-sharers. Therefore, in my opinion, the suit ought not to have been entertained.

The only concession, which the Courts have so far made in the direction of allowing the share of the transferor to be affected is, where the share of the transferor has been attached in execution of a money-decree. In such a case the Courts have held that a co-sharer, who sues for the recovery of the whole property, will be allowed to recover, but that it will be declared that the purchaser of the interest of the transferor is entitled to partition and to recover thereafter that portion of the property which represents the transferor's interest therein. There is no justification for the contention that, as the plaintiff was entitled to sue for the whole, he is entitled also to relinquish his claim to half and to ask for a decree for the remainder. The Courts have never countenanced a suit of this kind.

The question as to other equitable relief does not arise in this case. In *Banwari Lal* v. *Sheo Sankar Misser* (1) a co-parcener sued the transferees as well as the co-parceners who had transferred the property. There a decree was made for the recovery of the whole property, but it was provided that the plaintiff should refund to the transferees the purchase-money paid by them and in the event of his failing to do so, the transferees would be entitled to retain possession of that share, which on partition would represent the interest of the transferors. A somewhat similar course was followed in *Mohunt Ram Sundar Dass* v. *Barham Deo Narain Thakur* (2). There a co-parcener sued for a declaration that a mortgage in respect of the joint family property by his co-parceners was invalid. The mortgagees having brought a suit for the enforcement of their mortgage and advertised the joint family property for sale, the declaration given to the plaintiff in his suit was, that the whole property was liable to be sold in execution of the mortgage-decree, it being notified at the sale that the plaintiff and his co-parceners were in possession in proportion to their respective interests and that the shares of the mortgagor co-parceners were held subject to the lien of the transferees. No such equity arises in the present case in view of the form in which the suit has been laid.

The result might have been otherwise if the plaintiff had put his claim in the alternative and joined his co-parceners as defendants, but he has not chosen to do so, and I think, it is not possible to allow him any equitable relief.

It is suggested by the learned Vakil for the appellants that we should allow the plaint to be amended. But, having regard to the fact that the case has now reached the second appeal stage, and that it was open to him in the Trial Court as soon as the evidence on the issue as to separation was taken, to ask for the amendment, I do not think, we should now allow him to alter the whole aspect of the litigation by including an additional prayer for relief and by bringing new parties on the record.

The result, therefore, is that the decree of the lower Appellate Court will be set aside and the suit will be dismissed with costs throughout.

Bucknill, J.—I agree.

K. S. D. *Appeal accepted.*

(1) 1 Ind. Cas. 670; 13 C. W. N. 815.
(2) 2 Ind. Cas. 986; 14 C. W. N. 552.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1062 OF 1922.
March 5, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Daniels.

SAHU GOVIND PRASAD AND OTHERS —PLAINTIFFS—APPELLANTS
versus
KUNDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Abadi *land forming part of town—Tenant, whether entitled to sell site of house—Presumption*—Muhalla *Zabtaganj, Najibabad, whether town.*

The presumption which obtains in agricultural villages that tenants have not ordinarily the right to transfer the sites of their houses has no application to towns.

Muhalla Zabtaganj is a part of the town of Najibabad and the residents of the *Muhalla* have a right to transfer the sites of their houses as proprietors.

Second appeal from a decree of the Subordinate Judge, Moradabad, dated the 7th April 1922.

Mr. *Ajudyya Nath*, for Dr. *S. N. Sen*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for possession of certain sites in the town of Najibabad on the ground that the transfer of these sites to the transferees was illegal, the allegation being that the transferors were the *raiyats* of the plaintiffs who were the *zemindars* of the village. The main defence was that the defendants-vendors were not the *raiyats* of the plaintiffs but were entitled as of right to dispose of the sites of their houses as they chose, and that the plaintiff's suit was barred by twelve years' limitation. Both Courts have found that the *Muhalla* of Zabtaganj, which is now a part of the town of Najibabad, belonged to the plaintiff's predecessors and that the plaintiffs, therefore, must be considered to be the *zamindars*; but both Courts have also found that the so-called *raiyats* are not tenants of the plaintiffs and pay them no rent, and that they have exercised full proprietary rights over their houses and have transferred them freely as of right. They have accordingly dismissed the suit.

The plaintiffs in appeal really urge two points:—

(1) that it having been found that they are the *zemindars*, according to the well-known rule which applies to agricultural village, the tenants have not ordinarily the rights to transfer the sites of their houses, and

(2) that in this case the evidence is not sufficient to enable the Court to find a custom in favour of the tenants.

It is proved that *Muhalla* Zabtaganj, whatever it was originally, has for more than fifty years formed part of the town of Najibabad and from 1866 has been under the control of the Municipal Board. It has been laid down in this Court that the presumptions which obtain in agricultural villages have no application to towns. We find that, on the evidence on the record, it was open to the Courts below to come to the conclusion to which they have, as to the right of the occupiers of houses to deal with sites and we think there can be no doubt as to the correctness of this decision. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 176 OF 1922.
June 26, 1923.
Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill KT.

KARTIK CHANDRA CHATTERJI—APPELLANT
versus
NAGENDRA NATH ROY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90, scope of—Interests affected by the sale, meaning of—Auction purchaser, whether can take benefit of rule.

The expression "interests affected by the sale" in r. 90 of O XXI, Civil Procedure Code, means interests in the property existing before the sale and which have been adversely affected thereby.

Rule 90 does not cover an interest which has been created by the sale itself.

KAUSILLA KUER v. SUKHDEI.

Bhavirisetti Gopala Krishnayya v. *Pakanati Pedda Sanjeeva Reddy*, 55 Ind. Cas. 333; 11 L. W. 184; (1920) M. W. N. 152; 38 M. L. J. 228, dissented from.

O. XXI, r. 90, Civil Procedure Code, is designed for the relief of the decree-holder and judgment-debtor so far as material irregularity and fraud are concerned. The auction-purchaser cannot, by pleading fraud, take the benefit of that rule. He must apply under rule 91.

Sheo Gobind Singh v. *Dhanukdhari Singh*, 21 Ind. Cas. 774; 19 C. W. N. 1291 and *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry*, 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.) followed.

Appeal from an order of the Subordinate Judge, Purulia, dated the 29th July 1922.

Mr. *S. C. Mazumdar*, for the Appellant.

Messrs. *G. C. Pal* and *Noorul Hassan*, for the Respondents.

JUDGMENT.

Mullick, J.—It was never suggested in the Court of the Subordinate Judge that the auction-purchaser was seeking to set aside the sale of the property in suit on the ground that the judgment-debtor had no saleable interest therein. His petition does not take any such ground and, therefore, that point is not open to him before us.

What he argued before the lower Court was that, as an auction-purchaser, he was entitled to come under O. XXI, r. 90, Civil Procedure Code, to get the sale set aside on the ground of fraud on the part of the decree-holder. He contended that the decree-holder by not notifying the encumbrances on the property had induced him to pay Rs. 6,000, when the property was not worth that money. It has been settled in this Court, that the auction-purchaser cannot apply except under O. XXI, r. 91, Civil Procedure Code. Rule 90 is designed for the relief of the decree-holder and judgment-debtor so far as material irregularity and fraud are concerned, the auction-purchaser cannot by pleading fraud take the benefit of that rule and so it has been held in the Calcutta High Court, in *Sheo Gobind Singh* v. *Dhanukdhari Singh* (1) and by the Privy Council in *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (2).

It is urged, however, that the provisions of r. 90 of the present Civil Procedure Code are wider than the provisions of the former Code and reliance is placed upon *Bhavirisetti Gopala Krishnayya* v. *Pakanati Pedda Sanjeeva Reddy* (3). With great respect to the learned Judges of the Madras High Court who decided that case, it seems to me that the language of r. 90 precludes us from holding that that rule covers an interest which has been created by the sale itself. 'Interests affected by the sale' mean interests in the property existing before the sale and which have been adversely affected thereby.' In this view of the case the appeal of the auction-purchaser cannot be entertained and the decision of the lower Court is affirmed.

The appeal is dismissed with costs.

Bucknill, J.—I agree.

K. S. D. *Appeal dismissed.*

(1) 21 Ind. Cas. 774; 19 C. W. N. 1291.

(2) 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.).

(3) 55 Ind. Cas. 333; 11 L. W. 184; (1920) M. W. N. 152; 38 M. L. J. 228.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 123 OF 1922.

April 11, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

KAUSILLA KUER—PETITIONER

versus

SUKHDEI AND OTHERS—OPPOSITE PARTY.

Succession Certificate Act (VII of 1889), s. 9—Application for certificate by Hindu widow—Security, whether necessary — Reversioners, interests of—Court, duty of.

Where the widow of a separated Hindu applies for a Succession Certificate to collect debts due to the deceased, she ought not to be called upon to give security. There may be reversioners who are interested, but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow. If there is a danger of the interests of the reversioners being injured there is a proper remedy for this, and it is not a reason for creating an obstacle to the widow recovering the debts before they become time-barred. [p. 762, col. 2.]

The object of a Court should be to grant certificates to the persons lawfully entitled to them and not to go out of its way to make it difficult for them to obtain them. [p. 762, col. 2.]

Civil revision from an order of the District Judge, Benares.

Mr. *H. Mushtaq Ahmad*, for the Petitioner.

Mr. *Mukhtar Ahmad*, for the Opposite Party.

KAUSILLA KUER v. SUKHDEI.

JUDGMENT.—This is a clear case and we are bound to interfere in revision. The learned Judge, owing to a misunderstanding on the part of his Munsarim, has declined jurisdiction. The Munsarim seems to think that the earlier order requiring the security to be given, namely, the order made on the 6th of January, was the order under appeal and a copy of that order had been filed, but he says the copy of the subsequent order was filed against which no appeal had been brought. This is a mistake. There was a copy of the judgment in the case which led to the subsequent order of the 11th of March, filed in the Appellate Court. That judgment simply struck off the application for a certificate, because the widow had failed to give security. It is true that the appellants before the District Judge had failed to file a copy of the formal order, but as the formal order was a precise copy, so far as its operative words were concerned, of the judgment of the order which they did file, the failure mattered to nobody and the objection is one of those futile and childish objections which bring the law into so much contempt in the minds of reasonable business people. They did also file, quite unnecessarily, some writing or order which the Judge made on the 18th of March, stating that he had already struck off the application on the 11th, so that when Mr. Pullan said, that no appeal lay, he had obviously been misled. An appeal did lie and a very serious appeal on the merits too.

We were at one moment almost inclined to make a short cut by passing a final order in this case, but we think the better plan is to remit the case to the District Judge to hear the appeal. We would, however, implore him to brush aside these miserable technicalities which hamper and embarrass and delay and sometimes destroy the rights of persons who can ill-afford to assert their rights and to get to close quarters with the real question. The applicant is the widow of a separated Hindu and all she wants to do is to collect debts between Rs. 3,000 and Rs. 4,000 due on *Hundis* which are rapidly becoming time-barred. She is entitled to collect these debts and she has a beneficial interest in them. So far as we can ascertain at the present moment, she is unable to obtain a decree because any Court in which she happens to sue refuses either to adjourn the proceedings or to grant her a decree without the production of a certificate, while the Subordinate Judge refuses to grant her a certificate except on terms which seem to us much too onerous. In the ordinary way, a Hindu widow ought not to be called upon to give security at all. No doubt, there are many reversioners who are interested, but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest, and to assume every thing against the widow. The learned Subordinate Judge in this case, seems to have gone rather far, apparently because he thinks that the widow is engaged in handing over the estate, either to her brother or to religious institutions but even if she were, there is a proper remedy for this, and it is really not a reason for creating an obstacle to her recovering debts before they become time-barred. It is really somewhat difficult to see what the object of the security is or what rights the reversioners have, even if the lady after collecting the money spends it upon herself for her own purposes. We will merely say, that the learned Judge seems rather to have gone out of his way to place obstacles in this woman's way and to have interfered rather unnecessarily on behalf of the reversioners. The object of a Court is to grant certificates to the persons lawfully entitled to them and not to go out of its way to make it difficult for them to obtain them.

We allow the application, set aside the order of the Court below and remit the case to the District Judge with directions to hear the appeal on the merits. The respondents must pay the costs of this application including fees on the higher scale; and the District Judge, if in the end he decides that Succession Certificate ought to be granted unconditionally, is to consider the question of costs in the lower Court caused by the objections raised by the reversioners.

Application allowed.

Z. K.

AHMADULLAH *v.* ABDUL RAHIM.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 129 OF 1921.

May 3, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

AHMADULLAH—PLAINTIFF—APPELLANT

versus

ABDUL RAHIM—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 83—Mortgage—Tender—Refusal to accept—Mortgage, whether extinguished—Mortgagor in possession as tenant—Ejectment.

The making by a mortgagor of a deposit under section 83 of the Transfer of Property Act, which the mortgagee refuses to accept, does not, *ipso facto*, extinguish the mortgage. The parties remain in the relationship to one another of mortgagor and mortgagee, and it is for the mortgagor, dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage, to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully, the mortgage still subsists, and if the mortgagor happens to be in possession of the mortgaged property as tenant of the mortgagee the latter is entitled to eject him in accordance with the terms of the tenancy notwithstanding the tender. [p. 764, col. 2.]

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Stuart, reversing a decree of the Subordinate Judge of Agra.

FACTS appear from the following judgment of the Subordinate Judge, Agra:—

"This is an appeal against a decree of the Munsif of Agra dismissing the plaintiff's claim for ejectment and recovery of Rs. 36 rent. The facts are that the defendant was owner of the house in suit and mortgaged it to the plaintiff with possession but on the same day took it on rent at Rs. 3 per month under a *sarkhat*. The rent of three years fell into arrears and the plaintiff gave a notice under section 106 of the Transfer of Property Act, but the defendant refused to vacate the house and, therefore, this suit was filed. The defence was that the mortgage was no longer subsisting as the mortgage-money had already been deposited under section 83, and, therefore, the plaintiff had no right to bring this suit. The learned Munsif has held that the mortgage-money had been deposited and, therefore, this relationship of landlord and tenant no longer subsisted between the parties, and on that finding he has dismissed the suit. The plaintiff appeals and the only point for determination is, whether the fact that the mortgage-money has been deposited under section 83 extinguished the mortgage. It is admitted that the tender under section 83 was not accepted by the plaintiff. I do not see how can it be said that the mortgage has been extinguished. When a tender under secition 83 is not accepted the mortgagor can bring a suit for redemption but if the tender extinguishes the mortgage, how can a suit for redemption be brought? No suit for redemption can be brought after the mortgage is extinguished. A tender under section 83, when not accepted, does not extinguish the mortgage and the mortgagee continues in possession as a mortgagee though he is liable to account from the date of the tender. [See *Rukhminibai Subraya* v. *Venkatesh Bab Prabhu* (1).] I do not agree with the learned Munsif that the mortgage has been extinguished and the relation of landlord and tenant does not subsist between the parties. They are still mortgagee and mortgagor and landlord and tenant. The appeal prevails and is allowed with costs. The result is that the plaintiff's suit is decreed with costs in both the Courts."

Further facts appear from the following judgment of Stuart, J.:—

"The facts are as follows:—

"Shiekh Abdur Rahim executed a mortgage of a house in Agra, by way of conditional sale on the 26th of June 1910, in favour of Sheikh Ahmadullah for a consideration of Rs. 99-15-0. On the following day, Abdul Rahim executed a *Kirayanama* by which he agreed to take the house for three years as tenants from the mortgagee on a monthly rent of one rupee. The deed provided for redemption within a period of six years. Sheikh Abdul Rahim continued in possession of the house during the period prescribed in the *Kirayanama* and afterwards. In the year 1918 he was still in possession, although the term of the *Kirayanama* had expired nearly 5 years before. He owed three years' rent. He then mortgaged the property again to *Musammat* Mariam, and it was agreed that she should pay Rs. 99-15-0 to redeem the first mortgage and Rs. 36 which he owed for rent, to Ahmadullah.

(1) 9 Bom. L. R. 958; 31 B. 527.

She accordingly paid Rs. 135-15-0 into Court under section 83, Act IV of 1882, on the 3rd of April 1918. Ahmadullah refused to take the money out. Ahmadullah instituted a suit on the 4th of September 1918. He did not say anything in the plaint about the existence of the mortgage, or the fact that the mortgage-money and the rent due had been tendered to him. He stated that Abdul Rahim was a monthly tenant of the house and that he had served a notice on him to quit because he had not paid 3 years' rent. He sued for Rs. 36 rent and for the ejectment of Abdul Rahim. The learned Munsi dismissed the suit. He held that, although the mortgage was not extinguished by the tender, the tender was a good tender and a tender which the plaintiff ought to have accepted, and that, after the tender was made, the plaintiff's position resembled that of a trustee on behalf of the defendant. As the arrears of rent had also been tendered, he came to the conclusion that the plaintiff was not entitled to eject the defendant or to any other relief. An appeal was filed to the Court of the Subordinate Judge. The learned Subordinate Judge came to the conclusion that the mortgage still existed, and that the plaintiff was entitled to possession as mortgagee and as landlord. He, therefore, decreed the suit. The case comes here in second appeal. The Courts below have not quite appreciated the facts. The mortgage is a mortgage by conditional sale. It is not a usufructuary mortgage. It contained a clause that the mortgagor could not redeem after six years had elapsed. This clause could not operate to extinguish the mortgage until the plaintiff had obtained a decree for foreclosure. It is very clear what the plaintiff has done. He wishes to obtain the property. He has, therefore, refused to accept the tender. If he can get possession of the property he thinks he will be in an assured position for then, if the defendant sues to redeem he will put up against him the clause in the mortgage-deed debarring him from redemption after six years. I express no opinion on the value of this plea, but he evidently thinks it a good one. Unless he can obtain possession he will not be in so good a position for then he must apply for foreclosure and then the Court will be in a position, apart from the provisions of the deed, to allow the defendant an opportunity of redemption. This is, I think, the reason why he has said nothing about the terms of the mortgage-deed in his plaint. He has clearly brought this suit for ejectment of the defendant as his tenant in order to enforce his mortgage. The suit should have been a suit for foreclosure. For the reasons that the plaintiff has deliberately not disclosed the true facts and has sought a wrong remedy his suit must be dismissed. I, therefore, allow the appeal and direct that the plaintiff's suit stand dismissed. The plaintiff will pay his own costs and those of the defendants in all Courts."

Mr. *Uma Shanker Bajpai*, for the Appellant.

Mr. *Narain Prasad Asthana*, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises are best stated in the judgment of the lower Appellate Court, dated the 24th of July 1919, where the essential question for determination is clearly set forth. That question is, whether the making by a mortgagor of a deposit, under section 83 of the Transfer of Property Act, *ipso facto* extinguishes the mortgage in spite of the fact that the mortgagee has refused to accept the deposit. In our opinion, that question can only be answered —as it was answered by the lower Appellate Court— the mortgage is not extinguished. The parties remain in the relationship to one another of mortgagor and mortgagee. It is for the mortgagor, dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage, to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully, the mortgage still subsists. There is some complication introduced into the present case by the fact that the mortgage had been followed by a contract of tenancy, the mortgagee having left the mortgagor in possession as his tenant. We do not see that this circumstance in any way affects the principle we have just laid down or the applicability of that principle to the parties whose case is now before us. The mortgagee is constructively in possession of the

property through his tenant, who happens to be also his mortgagor. He is entitled to a decree for ejectment. If the claim for rent, which was also put forward by the plaintiff in the suit, had been on account of rent falling due after the deposit made on behalf of the mortgagor, it would have been necessary for the Court to consider the operation of section 84 of the Transfer of Property Act, No. IV of 1882. But the claim is on account of rent which fell due before that date. We think the decision of the lower Appellate Court was right and that it should not have been disturbed by the learned Judge of this Court. We allow this appeal, set aside the decree of the learned Judge of this Court and restore that of the lower Appellate Court. All costs in this Court will be paid by the defendant-respondent.

Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 8, 1921.

Present:—Lord Buckmaster, Sir John Edge, KT., Mr. Ameer Ali and Sir Lawrence Jenkin, KT.

VENKATA ROW *alias* GANESH ROW (SINCE DECEASED)—PLAINTIFF—APPELLANT

versus

TULJARAM ROW AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Decree in favour of one branch—Compromise agreement by manager releasing rights under decree—Minor son, whether bound—Additions to family pendente lite, *effect of.*

In a suit brought by one member of a joint Hindu family against the manager for rendition of accounts, partition and other reliefs, two decrees were passed making the manager liable to pay to *R* and his branch of the family certain sums. *R* purporting to act on behalf of himself and his son entered into a compromise whereby he relinquished all claim under the decrees. The son on attaining majority sued to recover under the decrees on behalf of the joint family and it was eventually held by the Privy Council that the compromise agreement was not binding upon him and that he ought to be remitted to his original rights under the decree. The suit was remanded for decision as to the share to which he was entitled. Meanwhile, two other sons had been born to *R*:

***Held*, that, in the events that had happened, the compromise agreement must be regarded as failing wholly to convey any of the joint estate at all. [p. 767, col. 1.]**

Consolidated appeals being cross-appeals from a judgment and decree of the Madras High Court, dated the 30th August 1916, varying a decree of Wallis, J., dated the 18th December 1913, made in Civil Suit No. 194 of 1906, and Appeal from an order of the High Court, dated the 30th August 1916, made in Petition No. 2684 of 1914.

Messrs. *De Gruyther, K. C.*, and *Kenworthy Brown*, for the Appellant.

Messrs. *Upjohn, K. C.*, and *Dube*, for Respondents Nos. 3 and 4.

Mr. *C. D. Murray* (*Solicitor-General* for Scotland) and Mr. *Ingram*, for Tuljaram Row, Defendant.

JUDGMENT.

Lord Buckmaster.—The real question for determination in these appeals is as to the effect of a compromise entered into on 21st November 1897, between Rajaram Row, purporting to act both for himself and as guardian of his minor son Venkata Row, and Tuljaram Row. The compromise related to certain claims then existing between Rajaram Row and his son, as constituting a joint Hindu family, against Tuljaram Row, and it arose in this manner. Originally, Venkata Row, together with his four sons, Ramachandra Row, Luchmana Row, Rajaram Row and Tuljaram Row, formed a joint Hindu family, governed by the Mitakshara Law. Venkata Row died in 1871, survived by his sons, and in 1881 the joint family was dissolved, and a division of the joint estate took place, leaving the greater part of it in the hands and under the control of Tuljaram Row, who was the manager of the family. In 1886 a suit was brought by Atmaram, the son of Luchmana, against Tuljaram Row, for the purpose of ascertaining the extent of the family assets remaining in his hands, for the necessary accounts, partition and other reliefs, and to this suit all the members of the family were parties. Two decrees were made in that suit, one on 21st October

and the other on 17th August 1897, and by these orders Tuljaram Row was decreed as liable to pay to Rajaram Row and his branch of the family certain sums of rupees. The compromise, to which reference has been made, was a compromise of the rights possessed by Raja Ram Row and his son under these decrees.

The compromise was a very simple matter. It consisted in releasing Tuljaram Row from all liability to make the payments which he had been ordered by the High Court to make, payments which were on the face of them considerable in extent, and the only considertion mentioned was that Tuljaram would agree not to prosecute an appeal which he then had on foot against these orders. In other words, Rajaram Row, acting in his own interest and on behalf of his infant son, gave up and surrendered, without any further struggle, all the rights to which he was then entitled, together with his son, in the decrees of October 1896, and August 1897.

It is not surprising, in these circumstances, that on Venkata Row attaining his majority in 1906 he should have taken steps to challenge the validity of this compromise. A suit was accordingly instituted by him under the name of Ganesha Row against Tuljaram and Rajaram Row, seeking to recover the monies mentioned in the decrees as "the undivided son" of Rajaram Row. He failed both before the Judge of first instance and in the Court of Appeal. The matter then came before the Judicial Committee—*Ganesha Row* v. *Tulja Ram Row* (1)—and on 8th April 1913 it was decided that the compromise did not bind and could not bind the infant, who ought to be remitted to his original rights under the decrees in the suits referred to and the case was remitted to deal with the remaining issues on this footing.

Two further sons were born to Rajaram Row before the case came on for hearing on remand, and as they were also members of the joint family with their father and the plaintiff, they were added as defendants and are the third and fourth respondents in these appeals. On behalf of the plaintiff it was argued that the compromise became wholly ineffectual by virtue of the order, as the family had never been divided, that consequently the new members of the family were entitled to their share and their rights could not be established if the compromise remained.

Wallis, J., before whom the remitted issues were tried, decided that Ganesha could only be entitled to a half share but as the further members of the family had come into existence, namely, two further sons of Rajaram, he directed that they should be added as defendants, and on this being done he decreed that Ganesha and his two brothers were together entitled to a half share of the monies with interest, in other words he gave Ganesha one-sixth of the whole. The judgment also dealt with other matters no longer material, and it gave rise to as many as four appeals, of which it is only necessary to consider that of Ganesha whose representatives are the present appellants. His appeal failed because the High Court regarded the order of the Privy Council as rendering the compromise binding on Rajaram Row's then existing share but, in fact, the order only declared the compromise was not binding on Ganesha Row, who was remitted to all his original rights under the compromised suits.

The appellants urge that, in the events that have happened, this entitles the whole family to share in the whole fund, as otherwise the rights of the appellants would have been seriously curtailed by the order which intended that they should be preserved.

Their Lordships think that this argument is well-founded. The agreement of 21st November 1897 did not purport to be a release of individual rights or shares in the fund at all; it did not purport to effect any division of the joint family estate that then existed between Rajaram and his son in the subject-matter of these decrees. On the contrary, what it purported to do was, to release the whole of the debts that were then owing to the joint family, in consideration of Tuljaram not prosecuting his appeals.

Now, it has been held by this Board

(1) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N 575; 25 M. L. J. 150; 40 I. A. 138 P. C.).

that that attempted arrangement failed so far as the infant was concerned; and, if it failed so far as the infant was concerned their Lordships think that, in the events that have happened, it must also be regarded as failing wholly to convey any of the joint estate at all. They have arrived at that conclusion for these reasons. Rajaram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his capacity as manager of the estate. In his capacity as manager of the estate he was only able to deal with it for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released. It follows, therefore, that the attempt to alienate or to release, from the estate these substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated.

Their Lordships have expressly stated that this is their view of this agreement in the events that happened. It might possibly have been that different circumstances would have arisen if Venkata Row, the son, had predeceased his father and there had been no further members of the joint Hindu family. In that case it is possible that the arrangement would have been one which Raja Ram would have been unable to dispute; but those are not the circumstances that exist at the present time. At the present time the joint family continues; the joint family finds that this is a portion of the joint family estate which has been improperly alienated, and which they are entitled to recover. It, of course, follows equally upon that that Tuljaram Row will be entitled to prosecute his appeals and their Lordships are a little astonished to find that, although liberty has been given to him to proceed, an order has been made which has restrained the prosecution of these appeals until after the hearing of these appeals by this Board. Were this matter ordinary English litigation, of course, no Tribunal here would consider hypothetical rights, the exact character and extent of which could only be ascertained after the hearing of other pending litigation; but unwillingness to let litigants, who have entrusted their disputes to the Board for determination, from a place so far distant as India, be disappointed in receiving judgment, has led their Lordships to disregard the ordinary rules that are followed in these matters, and to hear the appeal, notwthstanding the fact that it is impossible to know the exact amount upon which it will operate.

In the result their Lordships will humbly advise His Majesty that the decrees of the High Court ought to be set aside, and that it ought to be declared that, whatever sums may ultimately be recovered in respect of the monies that were ordered to be paid by the decrees of 21st October 1896, and 17th August 1897, referred to in the agreement of 21st November 1897, form part of the joint family estate which was constituted on 21st November 1897, by Rajaram Row and his son Venkata Row. If, on the other hand, that family has, as is stated, been dissolved, the declaration will be that the shares in the monies are to be fixed as at the date of its dissolution. As regards the further appeal, Tuljaram Row is entitled to have the case remitted to the High Court to hear the appeal Original Side Appeal No. 4 of 1897, and to issue a revised decree in Original Suit No. 266 of 1886, finally determining the sum, if any, that is due.

As regards the costs, the respondent, Tuljaram Row, must pay one set between the appellants and the respondents, Ramachandra Row and Radha Bai.

K. S. D. *Decrees set aside.*

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitor for 1st Respondent:—Mr. *W. Graham Pole.*

Solicitor for other Respondents:—Mr. *H. S. L. Polak.*

NIAMAT-ULLAH *v.* SAFUT-UN-NISSA BIBI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1697 OF 1921.

June 20, 1923.

Present:— Mr. Justice Kanhaiya Lal.

Sheikh NIAMAT-ULLAH — DEFENDANT—APPELLANT

versus

Musammat SAFUT-UN-NISSA BIBI—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), *s.* 119 —*Partition of land and trees standing thereon—Trees allotted to one co-sharer and land to another —Suit for removal of trees, whether competent—Limitation.*

If on partition of a village a certain plot is allotted to one co-sharer, and the trees standing thereon are allotted to another, the former is entitled to have the trees removed from the plot, provided he sues the latter for this purpose within twelve years from the date of the partition.

Sarup v. *Lala,* 42 Ind. Cas. 589; 15 A. L. J. 757; 39 A. 707 (F. B.), distinguished.

Second appeal against a decree of the Additional District Judge, Gorakhpur, dated the 24th of September 1921.

Mr. *S. P. Sinha,* for the Appellant.

Mr. *Haribans Sahai,* for the Respondent.

JUDGMENT.— The question for consideration in this case is, whether the plaintiff is entitled to an order directing the defendant to remove the trees standing on old plot No. 97-13 corresponding with No. 123 new *khasra* of *Mouza* Simra Tappa. The parties were co-sharers of the village; but by a partition effected in 1909 the said plot was awarded to the plaintiff and the trees standing thereon were awarded to the defendant. The entire plot No. 97 was apparently a waste land covered by trees. The partition record summoned shows that one of the co-sharers *Musammat* Amna claimed the entire plot as her separate *maqbuza* land; but the Assistant Collector held, that the plot in question was not her *maqbuza* land and could not be allotted to her share with the trees standing thereon. That order was upheld on appeal by the Collector. The result thereof was that the land was divided separately from the trees; and some of the trees fell to the share of the defendant; while others fell to the shares of the other co-sharers. Section 118 of the U. P. Land Revenue Act has no application by analogy or otherwise. Section 119 might have been applicable, had it been alleged that the trees in question had been planted and possessed by the defendant or his predecessor-in-interest prior to the partition; but there is no allegation in the written statement, that that was so. On the other hand, it is admitted that the other co-sharers have caused the trees owned by them cut down since the partition, showing thereby that the land in question was jungle land, and that the trees partitioned belonged to the co-sharers of the village. They were separately partitioned according to their value and divided between the co-sharers in proportion to their shares. Paragraph 9 of the *tarz taqsim* prepared at the time of the partition directed that the trees scattered about the village were to be divided in that manner between the co-sharers according to their value and share. The decision in *Sarup* v. *Lala* (1) does not apply because that was a case of a house occupied by one co-sharer at the time of partition, the site whereof was allotted to another co-sharer and section 118 of the U. P. Land Revenue Act applied. Where the trees are scattered trees standing on waste land, that consideration does not arise; and if a co-sharer files a suit within twelve years from the date of the partition for the removal of the trees allotted to one co-sharer and standing on the land allotted to another co-sharer he is entitled to have the same removed, and the land vacated. The defendant has no right to stay on the land against the will of the plaintiff. The appeal is, therefore, dismissed with costs.

M. A. A. & K. S. D. *Appeal dismissed.*

(1) 42 Ind. Cas. 589; 15 A. L. J. 757; 39 A. 707 (F. B.).

MUHAMMAD AMIRUL HASAN *v.* MUHAMMAD JEWAD HUSSAIN.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 914 OF 1921.

July 19, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

Saiyid MUHAMMAD AMIRUL HASAN—DEFENDANT No. 1—APPELLANT

versus

Saiyid MUHAMMAD JEWAD HUSSAIN—PLAINTIFF AND ANOTHER—DEFENDANT No. 2—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 173 (2) —*Sale in execution of decree—Purchase by judgment-debtor, whether void.*

A sale in execution of a decree to the judgment-debtor himself is not void but voidable under sub-clause (2) of section 173, Bengal Tenancy Act, and remains valid until duly set aside. [p. 769, col. 2.]

Gopal Chunder Mitra v. *Ram Lal Goshain,* 21 C. 554; 10 Ind. Dec. (N. S.) 1000, followed.

Appeal from a decision of the District Judge, Gaya, dated the 29th April 1921, affirming that of the Additional Subordinate Judge, Gaya, dated the 23rd May 1922.

Mr. *S. C. Mitter,* for Mr. *Kailaspati,* for the Appellant.

Saiyid *Muhammad Tahir,* K. B., for the Respondents.

JUDGMENT.

Mullick, J.—This second appeal is preferred by the defendant No. 1 and relates to a question of mesne profits. The *Mouzas* Doma and Serambigha were given in *mukarrari* settlement by the Maharaja of Tikari to *Musammat* Nankho Saheba, who gave a *dar-mukarrari* to Nawab Syed Ali Hasan for his life on the 21st March 1871. On the 23rd December 1908 Nawab Ali Hasan gave to the defendant No. 1, Amirul Hasan, a *thika* lease for the years 1316 to 1327 F. S. which correspond to the years 1908 to 1919. Nawab Ali Hasan died on the 26th February 1313. In the meantime, Nankho Saheba had also died and her daughters, Sultani Begum and Fakhrun Nisa Begum, had inherited a half share in the *mukarrari* and a rent decree was obtained by the Maharaja of Tikari in respect of this 8-annas share against them in execution of which their interest was sold at auction on the 17th January 1907 and purchased by the plaintiff, Jawad Husain, in the name of his *benamdar* Muhammad Saduq. That sale was confirmed on the 8th August 1909, and the present suit was brought by the plaintiff on the 17th January 1919 against the defendant, Amirul Hasan, for possession of the *thika* property and for mesne profits from the year 1913 till the date of the suit. During the pendency of the suit the *mukarrari* again fell into arrears and was sold in execution of a decree for rent and was purchased on the 20th June 1919 by the defendant himself.

Now the question is, what is, the amount of mesne profits, if any, which the defendant is liable to pay to the plaintiff? The question of the right to possession no longer arises because by his purchase of the 20th June 1919 the defendant has already acquired that right. The Subordinate Judge has found that the plaintiff is entitled to mesne profits for three years before the suit and he has given him a decree at the rate of Rs. 850 a year.

In appeal the District Judge has come to the same conclusion and the present second appeal is preferred by the defendant, Amirul Hasan.

Now, the first contention is, that, as Jawad Hussain was himself one of the judgment-debtors in the suit against Sultani and Fakhrun Nissa at which he purchased the half share of the *mukarrari,* the sale was void under the terms of section 173 of the Bengal Tenancy Act. That section, however, seems to mean that the sale is not void but voidable. Sub-clause (2) of the section which prescribes that the judgment-debtor shall not bid for or purchase the tenure or holding is a direction to the Court prohibiting him from permitting the judgment-debtor to bid or to purchase. The consequences of a purchase without the knowledge of the Court and the action to be taken thereupon are set out in sub-clause (3) and it seems clear that the sale remains valid till it is duly set aside. There is authority for this view in *Gopal Chunder Mitra* v. *Ram Lal Goshain* (1), and no authority to the contrary has been shown to us.

(1) 21 C. 554; 10 Ind. Dec. (N. S.) 1000.

The next question is, whether the tenancy of the *thikadar* Amirul Hasan was determined. The District Judge finds as a fact that the decree-holder did repudiate it and that Muhammad Sadiq, the *benamdar*, attempted to take forcible possession of the share and was bound down by the Criminal Court at the instance of the defendant. It cannot, therefore, now be said that the defendant had no notice that Muhammad Sadiq had determined the tenancy. It has been urged that the plaintiff himself never gave notice, but in my opinion Sadiq was at that time the *benamdar* of the plaintiff and his act was the act of the plaintiff.

The third point is, what is the amount at which mesne profits are to be assessed? The finding of the Subordinate Judge is that the gross produce of the *thika* property was Rs. 1,700 per year for the two entire *mouzas*, and that half of that amount, namely, Rs. 850, is a proper assessment per annum. The learned Judge agrees with this calculation and his finding is a finding of fact which cannot be reversed in second appeal.

The appeal is, therefore, dismissed with costs.

Bucknill, J.—I agree.

Appeal dismissed.

K. S. D.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 187 OF 1920.

August 17, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

MAJOR A. Y. REILY—PLAINTIFF—APPELLANT

versus

RAJKUMARI—DEFENDANT—RESPONDENT.

Consent decree—Appeal, whether lies—Suit to set aside decree—Grounds on which decree can be set aside—Mistake, effect of—Consent-decree, whether can be set aside in part.

No appeal lies against a consent decree. Consequently, the decree can be set aside only on a ground which would justify a cancellation of the agreement; for the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded to it the command of a Judge. [p. 774, col. 2.]

A consent decree cannot have greater validity than the compromise itself, and the Court has jurisdiction to set aside the order founded upon the agreement when it is established that the agreement was invalid by reason of fraud, mistake or any other similar circumstance. [p. 774, col. 2.]

A consent order is a mere creature of the agreement and if greater sanctity were attributed to it than to the original agreement itself it would be to give the branch an existence which is independent of the tree. [p. 774, col. 2.]

Though a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake, yet as an agreement may be rectified for an appropriate mistake, so may also a consent decree based upon such agreement. [p. 775, col. 1.]

A mistake on the part of one party only, not caused or actively assisted by the act of the other party, cannot invalidate an agreement. [p. 775, col. 2.]

The law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment; and not to close their eyes to the means of information which are accessible to them. When two parties are at arm's length, either of them may *prima facie* remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. [p. 773, col. 2; p. 774, col. 1.]

A duty to speak arises wherever and only where silence can be construed as having an active property, namely, that of misleading. [p. 773, col. 2.]

When a consent decree is set aside, the effect is to revive the original suit which was terminated by the compromise decree. [p. 776, col. 1.]

A party litigant cannot be permitted to retain the benefit of a compromise in part and repudiate it as to the remainder. [p. 776, col. 2.]

A plaintiff cannot be permitted to retain the benefit of a compromise decree to the extent of his success and to re-open matters in controversy in respect of his defeat. [p. 776, col. 2.]

Appeal against a decree of the Subordinate Judge, Khulna, dated the 31st July 1920.

Mr. *W. Gregory*, Babus *Jogendra Nath Mukerjee*, (with him Babus *Sachindra Prosad Bose* and *Binayendra Nath Ganguli*), for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Bipin Chandra Bose*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for partial cancellation

of a decree in a previous litigation, for re-investigation of the boundary between two disputed tracts of land, for recovery of possession, and for incidental reliefs. The facts material for the determination of the questions raised before us may be briefly recited.

On the 18th February 1857 the Commissioner of the Sunderbans notified in the *Calcutta Gazette* that various lots situated within the limits of the Jessore and Bakerganj portions of the Sundarbans would be exposed for sale, in order that settlement might be made with the highest bidder. lot No. 5 was purchased by Kamalkumari Chaudhurani, mother of the present respondent, in the name of her officer Nilmadhab Ray and a *patta* was granted on the 12th May 1857. Lot No. 6 was purchased by George Maxwell Reily, father of the present plaintiff, and *patta* was granted to him on the 15th September 1862. The southern boundary of plot No. 5 was identical with the northern boundary of plot No. 6, and the common boundary line was described in the following terms in both the *pattas*:

"An imaginary line drawn from the mouth of a *khal* three miles and 1168 feet south of Rajapur *khal* on the Bhola river to the junction of the Bharani *khal* with Rainda *khal* and the Rainda *khal* from this point to its junction with the Baliswar river."

It may be stated here that in the Notification published by the Commissioner of Sunderbans, there was a note in the remark column against lots Nos. 4 and 5 to the following effect: "the boundaries of these two lots have been re-adjusted, so as to give both the river-facing on the Baleswar river. A map showing their respective boundaries may be seen at the Commissioner's office. The two lots will be sold separately, and their respective areas will be notified on the day of sale." Lot No. 4 was purchased by the Morels who obtained a *patta* on the 1st May 1857, later on, that lot came into the hands of General Douglas and ultimately vested in Raja Durga Charan Law for self and his brothers. The history of lot No. 4 in the hands of the Laws will require mention hereafter.

On the 29th January 1880 Reily instituted a suit against Kamalkumari for demarcation of the boundary between lots Nos. 5 and 6 and for recovery of possession of such area as might have been wrongfully seized by her. On the 16th March 1880 Kamalkumari filed her written statement. She repudiated the allegation that she had annexed any lands of lot No. 6 to lot No. 5, and also raised three points in bar, namely, first, that the claim was barred by limitation, as Reily had not been in possession of the disputed tract within twelve years prior to suit, while she had been in adverse possession for more than the statutory period; secondly, that Reily could not maintain his claim in respect of land which had not been included in a previous suit instituted by him in 1872; and thirdly, that the claim could not be maintained in respect of the land included in the suit of 1872, which had been improperly withdrawn. Issues were fixed on the 19th March 1880 and raised all the substantial points in controversy. On the same date, an order was made for local investigation, and the *Amin* was directed to prepare a map showing clearly the boundary between the estates, taking as his data the maps put in by the parties and the terms of their *pattas*. The *Amin* submitted his report in due course, and its contents were discussed before the Judge by the Pleaders on both sides, with the result that the suit was dismissed as speculative on the 14th June 1880. On the 24th July 1880 Reily applied for review of judgment. The contesting parties apparently came to a mutual arrangement, for we find that on the 16th and 17th August 1880 two applications were filed by Kamalkumari and Reily. They were not identical in terms, but the parties agreed in substance. Kamalkumari stated that if at the local investigation, on determination of the boundary of lot No. 5 as stated in her *patta* it was found that she had cultivated lands of lot No. 6 belonging to Reily, she would abide by the rules and orders that might be passed by the Court. Reily similarly stated that, after determination of the northern boundary of his lot and after verification on local investigation of his *patta* and the map filed by him, he would agree to such order as might be made by the Court regarding the possession of so much of his

and as should be found in the possession of Kamalkumari. The review was thereupon granted on the 18th August 1880 and the suit was restored. On the 23rd September 1880 Reily petitioned to the Court that, if the District Judge could not himself hold the local investigation, a Subordinate Judicial Officer or some other officer of the Court might be asked to undertake the work. On the 2nd December 1880 Mr. Manmathanath Chatterjee, Munsif of Bagerhat, who had been appointed Commissioner, filed his report. On the 7th February 1881 Kamalkumari lodged her objections to the report. On the 30th March 1881 the District Judge pronounced his decision. The judgment stated that the parties had agreed to abide by his decision as well on question of trespass as on that of compensation. The District Judge determined the boundary line and directed the plaintiff to grant to the defendant a *mourasi* lease of a triangular piece of land to be held on payment of a premium of Rs. 2,500 and an annual rent of Rs. 250. The decree was drawn up accordingly, and was signed by the District Judge on the 30th April 1881. On the 8th July 1881 Reily appealed to this Court against this decree, and on the 1st August 1881 Kamalkumari filed a petition of cross-appeal. The appeal and cross-appeal were heard on the 16th February 1883 by Wilson and Maclean, JJ. Wilson, J., reviewed the history of the litigation in minute detail, and came to the conclusion that, as regards the main part of the case, no appeal lay, as the parties had agreed to abide by the decision of the Judge on the matter stated in the order of the 18th August 1880 (based on the petitions of Kamalkumari and Reily dated 16th and 17th August 1880) and subsequently modified by the order on the petition of Reily dated 23rd September 1880. The Judges expressed a doubt, however, whether the lower Court had not, in respect of a comparatively unimportant part of the disputed land, exceeded the power conferred by the consent of the parties. The defendant-respondent thereupon agreed to abandon that portion of the property. The appeal was consequently dismissed with costs subject to the small variation indicated, and a copy of the *Amin's* map was directed to be annexed to the decree showing clearly the effect of the order of the High Court. The decree was drawn up accordingly and stated as follows:

"The defendant having abandoned her claim in favour of the plaintiff to the *jungle* land coloured green in the map hereunto annexed, it is ordered and decreed that the decree of the lower Court, in so far as the said *jungle* land is concerned, be set aside, and that, with this modification, the said decree be affirmed and the appeal dismissed with costs." The present suit was instituted on the 8th September 1913 by Alexander Yates Reily, son of George Maxwell Reily, against Rajkumari, the daughter of Kamalkumari, for cancellation of the decree of the High Court dated 16th February 1883, in so far as that decree had refused relief to the then plaintiff in respect of lands excluded from the *mourasi* lease taken by Kamalkumari from Reily. The decree is attacked on the ground that it was based on an erroneous map which had been produced by Reily himself in support of the claim then put forward. It has now been established that there were two maps of the locality in the Collectorate, one prepared in 1857, the other in 1862. Both were prepared by or under the direction of A. D. B. Gomess, Government Surveyor. The map of 1857 has been designated in the present suit as the B map and that of 1862 as the E map. It is incontrovertible that the Notification of the 18th February 1857 could not have referred to the E map, which was not in existence till a later date. Reily, however, in his litigation produced in support of his claim, not the B map but the E map, and the case for the present plaintiff is that if the B map had been produced, Reily would have been able to establish his claim in respect of a larger area than what was decreed to him. In the plaint in the present suit, as originally framed, relief was claimed on the ground of this mistake. But, subsequently, the plaint was amended, and relief was claimed on the ground of fraud, on the allegation that Kamalkumari knew that Reily had produced the wrong map and yet did not apprise the Court of the mistake which her opponent had committed. The defendant resisted, on every conceivable ground, this attempt to re-open the decree of the High Court after

the laps of 30 years. Seven points thereupon emerged for consideration, namely:—

(*i*) Whether Reily filed the E map or the B map?

(*ii*) Whether the E map or the B map was the "sale map"?

(*iii*) Did Reily file the E map under a *bona fide* mistake?

(*iv*) When did the present plaintiff become aware of the mistake?

(*v*) Did Kamalkumari know of the existence of the B map or that Reily had filed the wrong map?

(*vi*) Was Kamalkumari guilty of fraud?

(*vii*) Was the decree based on the E map on the erroneous assumption that it was the sale map?

The Subordinate Judge has found that the B map was the map mentiond in the sale Notification, and that Reily relied upon the E map in the mistaken belief that it was the sale map. These conclusions cannot be and have not been challenged. The Subordinate Judge has further held that Kamalkumari was not aware of the existence of the B map, when the litigation commenced by Reily against her was in progress, and that she became aware of it in the course of a proceeding against her carried up to the Board of Revenue some years later by the Laws. It appears that, thereafter, on the 24th November 1887, the Laws sued Kamalkumari for recovery of possession of land claimed by them as appertaining to lot No. 4. Kamalkumari filed her written statement on the 20th January 1888. The Subordinate Judge decreed the suit on the 31st August 1889. On the 5th December 1889 Kamalkumari appealed to the High Court. On the 9th June 1892 Petheram, C. J., and Ghose, J., reversed the decision of the Trial Court and dismissed the suit. It was in the course of the proceeding before the Revenue Authorities which preceded this litig tion that the boundaries of lot No. 4 held by the Laws and of lot No. 5 held by Kamalkumari were investigated, and the fact transpired that the map mentioned in the leases was not the E map but the B map. The Subordinate Judge is right in his view that this became clear only when Mr. James Ellison, Deputy Collector, submitted his report on the 30th March 1886 which formed the basis of the decision of the Board of Revenue pronounced on the 28th July 1885. There can thus be no doubt that, during the pendency of the litigation commenced by Reily against Kamalkumari, neither of the contestants was aware of the existence of the B map, and both parties acted on the assumption that the map produced by Reily, the E map, was the basis of the grants. This is not surprising. There is no question that the disputed boundary as given in the B map was different from the boundary as given in the E map, and according to the B map there would be more land included in lot No. 6 than would follow from the E map; still, the difference was not very marked. Both the maps had been prepared on the basi. of investigations made more or less contemporaneously, and the description appearing on the face of each map did not make the distinction manifest. It is significant that Gomess himself, when examined as a witness in the previous suit, took the E map as the basis of the leases. There is, consequently, no question of fraud or deception. Reily produced the map in the honest belief that it was the map mentioned in the sale Notification as well as the lease; Kamalkumari acted on the assumption that what had been produced wa: the correct map. Indeed, neither of them even suspected that another map was in existence. We are thus not called upon to discuss in detail the interesting question raised in argument, namely, whether in the course of litigation, a duty is cast upon the defendant to set the plaintiff right when the defendant discovers that the plaintiff has acted under an erroneous impression. The decisions in *Joy Chandra* v. *Sreenath Chatterjee* (1), *Jakhomull Mehera* v. *Saroda Prosad Dey* (2), *Harendra Lal Roy* v. *Purna Chandra Chatterjee* (3), which show that a duty to speak arises wherever and only where silence can be construed as having an active property, namely, that of misleading, may render an affirmative answer difficult. They rather support the view that the law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may

(1) 32 C. 357; 1 C. L. J. 23.
(2) 7 C. L. J. 604.
(3) 14 Ind. Cas. 368; 15 C. L. J. 132.

be supposed to be within the reach of their observation and judgment; and not to close their eyes to the means of information which are accessible to them. Where two parties are at arm's length, either of them may *p ima facie* remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence, and the novel proposition that a duty is cast upon every litigant to speak out and set right his adversary whenever he discovers that his opponent has made a mistake, requires very careful scrutiny. We need not, however, pursue the matter further.

We have next to consider, whether the decree in the previous suit was based on the E map, on the erroneous assumption that it was the map mentioned in the sale Notification and the grants. The Subordinate Judge has given ample reasons in support of his conclusion that the drcree could not be said to have been based on this map, though the map was part of the evidence placed before the Court. The Subordinate Judge felt himself hampered in his decision of this point, because the proceedings relating to local investigation by Mr. Chatterjee, when the suit was re-opened after review, were not produced before him. Those proceedings are, however, set out in the paper-book which was prepared in this Court when the appeal was heard by Wilson and Maclean, JJ., and they confirm the view taken by the lower Court as to the scope and method of the enquiry made by Mr. Chatterjee. The map produced by Reily was part of the evidence and is mentioned in his report. But witnesses were examined including Gomess himself, and Mr. Chatterjee made every endeavour to locate the common boundary, as set out in the leases, by investigation on the spot and by reference to prominent landmarks. It is impossible to say how far the map actually influenced and affected his determination of the boundary line; but his report and proceedings and the record of the oral and documentary evidence produced before him, leave no room for doubt that the map was a small part of the materials which formed the foundation of the decision. We have, consequently, to consider whether, in such circumstances, the plaintiff is entitled to maintain this suit for cancellation of the decree in so far as the decision proved adverse to his claim.

It cannot be disputed that the decree made by the primary Court in the previous litigation on the 30th March 1881 was in essence a consent decree. It was so held by Wilson and Maclean, JJ., and that was the reason why they decline to entertain the appeal on the merits of the controversy, applying the rule, since then frequently invoked, that no appeal lies against a consent decree: *Biraj Mohini Dasi* v. *Srimati Chinta Moni Dasi* (4), *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (5), *Shahzadi Begam* v. *Muhammad Ibrahim* (6). Consequently, the decree can be set aside only on a ground which would justify a cancellation of the agreement; for, as stated by Parke, J., in *Wentworth* v. *Bullen* (7), the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded to it the command of a Judge. To put the matter differently, a consent decree can not have greater validity than the compromise itself, and the Court has jurisdiction to set aside the order founded upon the agreement when it is established that the agreement was invalid by reason of fraud, mistake or any other similar circumstance. The real truth of the matter is, that a consent order is a mere creature of the agreement and that if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree: *The Bellcairn* (8); *Huddersfield Banking Co.* v. *Lister* (9), *Ainsworth* v. *Wilding* (10), *Wilding* v. *Sunderson* (11). It follows accordingly

(4) 5 C. W. N. 877.
(5) 29 C. 306; 6 C. W. N. 121.
(6) 59 Ind. Cas. 787; 43 A. 266; 19 A. L. J. 14.
(7) (1829) 9 B. & C. 840; 33 R. R. 353; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313.
(8) (1885) 10 P. D. 161; 55 L. J. P. 3; 53 L. T. 686; 34 W. R. 55.
(9) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.
(10) (1896) 1 Ch. 673; 65 L. J. Ch. 432; 74 L. T. 193; 44 W. R. 540.
(11) (1895) 2 Ch. 534; 77 L. T. 57; 66 L. J. Ch. 684; 45 W. R. 675.

that though, as ruled in *Kusadhaj* v. *Broja Mohan* (12) and *Bepin Krishna Ray* v. *Jogeshwar Ray* (13), dissenting from *Jogeswar Atha* v. *Ganga Bishun* (14), a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake, yet an agreement may be rectified for an appropriate mistake, so may also the consent decree based upon such agreement; see also *Rameswar Pershad Singh* v. *Ram Bahadur Singh* (15), *Sreenath Das* v. *Ghanashyam Naik* (16).

Tested from this point of view, the claim for cancellation of the former decree completely breaks down. Reily and Kamalkumari agreed to abide by the decision of the District Judge, as regards the determination of the boundary and the form of the relief to be granted on the result thereof. No doubt, Reily in his petition mentioned his lease as also the map filed by him along with his plaint, whereas Kamalkumari in her petition referred only to her lease. The District Judge thereupon made an order in the following terms: "Acting on some suggestions which I threw out, the parties have come to what is virtually a compromise. It is left to this Court to determine finally what is the boundary line and to pass such orders as may seem to it fit with regard to the possession or restitution of any land as to which trespass may be found to have taken place, and with regard to compensation in any form. The plaintiff asks that I should go personally to the locality and the defendant echoes the request. I will, if I can. The order I now pass is that the review be granted and the case remain on the file for settlement in accordance with the terms agreed to as above indicated."

The parties accepted this as a substantially correct statement of the position, and the re-trial proceeded accordingly, subject to the modification made by consent on the 23rd September 1880, that the local investigation be made by Mr. Chatterjee assisted by the Civil Court *Amin*. There was thus no mistake either in the formation or in the expression of the agreement of the parties. There was no mistake which would preclude the formation of a valid contract, such as happens when there is a mutual mistake as to the subject-matter of the contract, or a mistake is made as to the identity of one of the parties where such identity is an inducement to the other to enter into the contract, or where the mistake relates to the nature of the contract under such circumstances as would justify a plea of *non est factum*. The mistake made by the plaintiff was in respect of a portion of the evidence to be placed before the Court for determination of the boundary as described in his title-deed. It is difficult to see how, in such circumstances, a mistake on the part of one party only, not caused or actively assisted by the act of the other party, can invalidate the agreement *Smith* v. *Hughes* (17), *Morley* v. *Clavering* (18), *Tamplin* v. *James* (19), *Eastes* v. *Russ* (20), We need not consider what the position would have been, if the other party knew of the mistake and knew also that, but for the mistake, the contract would not have been entered into, or if the other party had contributed to the mistake: *Bascomb* v. *Beckwith* (21), *Caballero* v. *Henty* (22). If, in circumstances like these, the mistake made by a disappointed litigant is to furnish him with a fresh starting point for keeping his opponent in Court, the misfortune of the unfortunate adversary would be gravely increased to the public detriment.

Apart from these considerations, there is another weighty reason why the plaintiff should not succeed in this litigation. He seeks, as we have observed, not to set aside

(12) 31 Ind. Cas. 13; 43 C. 217; 19 C. W. N. 1228.

(13) 66 Ind. Cas. 345; 34 C. L. J. 256 at p. 271; 26 C. W. N. 36.

(14) 8 C. W. N. 473.

(15) 34 C. 70; 5 C. L. J. 175; 2 M. L. T. 165; 11 C. W. N. 178; 17 M. L. J. 59; 2 M. L. T. 165 (P. C.).

(16) 46 Ind. Cas. 534; 3 P. L. J. 465.

(17) (1871) 6 Q. B. 597; 40 L. J. Q. B. 221; 25 L. T. 329; 19 W. R. 1059.

(18) (1860) 29 Beav. 84; 7 Jur. (N. S.) 904; 30 Beav. 108; 131 R. R. 463; 54 E. R. 558 and 830.

(19) (1880) 15 Ch. D. 215 at pp. 217, 221; 43 L. T. 520; 29 W. R. 311.

(20) (1914) 1 Ch. 468; 83 L. J. Ch. 3[illegible]; 110 L. T. 296; 58 S. J. 234; 30 T. L. R. 237.

(21) (1869) 8 Eq. 100; 38 L. J. Ch. 536; 29 L. T. 862; 17 W. R. 812.

(22) (1874) 9 Ch. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446.

the former decree in its entirety, but to re-open matters only in so far as judgment went against him. Now, as was pointed out by Sir James Colvile when the case of *Khajooroonissa* v *Rowshan Jehan* (23) was argued before the Judicial Comm ttee, when a consent decree is set aside, the effect is to revive the original suit which was term nated by the compromise decree. This rule is manifestly just and has been repeatedly applied: *Bibee Solomon* v. *Abdool Azeez* (24), *Sharat Ch under Ghose* v. *Kartik Chunder Mitter* (25), *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (26), *Raj Kumar Roy* v. *Hara Krishna Chakravarty* (27), *Fateh Chand* v. *Narsingh Das* (28), *Chatterjee Brahmin* v. *Durgadutt Agarwalla* (29), *Dharanidhar Aditya* v. *Hemanga Chandra Jana*(30), Referencemay also be made to the decisions in *Neale* v. *Gordon Lennox* (31), *Manohar Lal* v. *Jadunath* (32), *Partab Singh* v. *Bhabuti Singh* (33), *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubba Rao* (34), *Venkata Row* v. *Tuljaram Row* (35), reversing *Venkata Row* v. *Tuljaram Rao*(36). The justice of this rule is manifest; a party litigant cannot be permitted to retain the benefit of a compromise in part and repudiate it as to the remainder. In the case before us, there was, on the previous trial, a substantial defence in bar, namely, the plea of limitation. The plea was abandoned by consent, and, as pointed out by Lord Buckmaster, this made the decree a non-appealable consent decree: *Ramachandra Deo Garu* v. *Chaitana Sahu* (37). The plaintiff cannot now be permitted to retain the benefit of that decree to the extent of his success and to re-open matters in controversy in respect of his defeat. If the decree was set aside in its entirety, the suit would be restored and then the defendant would be entitled to urge that the claim was hopele sly barred by limitation. This is a contingency which the plaintiff does not wish to face, as is abundantly indicated by the restricted scope of this litigation. We are of opinion that the Subordinate Judge rightly refused to set aside the prev ous decree of the High Court in the limited form stated in the plaint.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

B. N. *Appeal dismissed.*

(23) 2 C. 184; 3 I. A 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C).
(24) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.
(25) 9 C. 810; 12 C. L. R. 453; 4 Ind. Dec. (N.S.) 1188.
(26) 5 Ind. Cas. 236; 11 C. L. J. 346; 14 C. W. N. 451.
(27) 10 Ind. Cas. 355; 15 C. L. J. 217.
(28) 16 Ind. Cas. 988; 22 C. L. J. 383.
(29) 34 Ind. Cas. 394; 23 C. L. J. 436; 20 C. W. N. 943.
(30) 41 Ind. Cas. 956; 27 C. L. J. 592; 21 C. W. N. 1087.
(31) (1902) A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757; 18 T. L. R. 791.
(32) 33 I. A. 128; 28 A. 585; 4 C. L. J. 8; 8 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710 (P. C.).
(33) 21 Ind. Cas. 288; 40 I. A. 182; 35 A. 487; 18 C. L. J. 384; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 15 Bom. L. R. 1001 (P. C.).
(34) 32 Ind. Cas. 881; 39 M. 853; 30 M. L. J. 465.
(35) 74 Ind. Cas. 765; 49 I.A. 91; 30 M.L.T. 272; 26 C. W. N. 646; 45 M. 298; 4 U. P. L R. (P. C.) 33; (1 922) A. I. R. (P. C.) 69; (1922) M. W. N. 392; 43 M. L.. J. 298; 24 Bom. L. R. 1191; 20 A. L. J. 833; 36 C. L. J. 319 (P. C.).
(36) 38 Ind. Cas. 270; (1917) M. W. N. 30; 5 L. W. 482.
(37) 56 Ind. Cas. 539; 24 C. W. N. 1055; 18 A. L. J. 625; (1920) M. W. N. 366; 39 M. L. J. 68; 28 M. L. T. 97; 12 L. W. 260; 2 U. P. L. R. (P. C.) 122; 22 Bom. L. R. 1313; 47 I. A. 200 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 905 OF 1923.
June 22, 1923.
Present:—Mr. Justice Daniels.
Musammat AISHA BIBI—DEFENDANT—APPELLANT
versus
CHHAJJU MAL AND OTHERS—PLAINT FFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 33—Power-of-attorney authorising agent to execute documents—Agent presenting document for registration—Presentation, whether legal.

RAMAKRISHNA ANNAVI *v.* PICHANDI CHETTIAR.

Section 33 of the Registration Act applies where the person presenting a document is the general attorney of the person executing it and not where it is presented for registration by the actual executant, even though he may have executed it as agent for some one else.

Second appeal against a decree of the District Judge, Saharanpur, dated the 23rd February 1923.

Mr. *Mushtaq Ahmad*, for the Appellant.

JUDGMENT.—The point raised in this appeal is a point of law under sections 32 and 33 of the Registration Act, but as the question appears to me to be quite free from doubt on the language of the Act, I propose to dispose of the appeal at once. The document, the presentation of which is challenged, was executed by Raghunath Das, the general agent of Ram Lal and of the widow of Ganpat Rai, on their behalf. The power-of-attorney which he held authorised him to execute documents on their behalf. and he executed the document under the terms of this power-of-attorney. He then presented it for registration at the Registration Office and it was registered. The plea taken by the appellant in this Court and in the Courts below was that, in order to enable him to present the document it was necessary that he should hold a power-of-attorney authenticated before the Sub-Registrar under the provisions of section 33. A reference to section 32 shows that a document may be presented for registration either under clause (*a*) by a person actually executing it or by some one claiming under it, or it may be presented under clause (*c*) by the agent of such persons duly authorised by a power-of-attorney executed and authenticated in accordance with section 33. The provisions of section 33, therefore, clearly apply where the person presenting a document is the general attorney of the person executing it, and not where it is presented for registration by the actual executant, even though he may have executed it as agent for some one else. The person actually executing a document is entitled to present it for registration under clause (*a*) of section 32 without the necessity of any power-of-attorney. No doubt, an agent requires a power-of-attorney to empower him to execute a document on behalf of his principal, but when once the document has been executed he is, so far as the Registration Office is concerned, the actual executant of the document and is entitled under section 32 (*a*) to present it for registration and to get it registered. The appellant suggests that the case is altered by the fact that the power-of-attorney which Raghunath Das held gave him two authorities; first, an authority to execute documents on behalf of his principal, and, second, an auhthority empowering him to present documents for registration on behalf of his principal. This, in my opinion, does not affect the case, as in this case he acted under the first of the two powers. The learned Judge of the Court below has, in my opinion, properly appreciated and dealt with the point of law involved, and as his decision is, in my opinion, clearly right, I dismiss the appeal under O. XLI, r. 11.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 604 OF 1921.

March 26, 1923.

Present:—Mr. Justice Phillips.

RAMAKRISHNA ANNAVI — PLAINTIFF —PETITIONER

versus

PICHANDI CHETTIAR—DEFENDANT —RESPONDENT.

Limitation Act (IX of 1908), s. 20—Payment towards principal and interest—Limitation, saving of.

A payment towards interest operates to save limitation even though a part of the principal is also paid at the same time.

YAD RAM *v.* SUNDER SINGH.

Mohan Shaha v. *Lakshu Karikar*, 6 Ind. Cas. 16 and *Subraya Kamati* v. *Pakaya*, 4 Bom. L. R. 231, relied on.

Lodd Govindass Krishnadass v. *Rukmani Bhai*, 21 Ind. Cas. 302; 38 M. 438; 14 M. L. T. 310; 1 L. W. 529, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order, dated 14th March 1921, of the Court of the Subordinate Judge, Tinnevelly, in Small Cause Suit No. 1576 of 1920.

Mr. *T. M. Ramaswamy Aiyar*, for the Petitioner.

Messrs. *P. N. Appaswamy* and *P. V. Krishnaswamy*, for the Respondent.

JUDGMENT.—The evidence of plaintiff's witnesses shows that the payment was made towards principal and interest. If any portion was paid towards interest the ruling in *Lodd Govindass Krishnadass* v. *Rukmani Bhai* (1) is inapplicable and I agree with the decisions reported in *Mohan Shaha* v. *Lakshu Karikar* (2) and *Subraya Kamati* v. *Pakaya* (3) that the payment of interest saves limitation even though a part of the principal is paid at the same time. The Subordinate Judge has not, however, decided the question of whether the payment was made on the date alleged in the plaint. The suit is accordingly remanded for disposal in the light of the above remarks. The costs will abide the result.

V. N. V. *Case remanded.*

(1) 21 Ind. Cas. 302; 38 M. 438; 14 M. L. T. 310; 1 L. W. 529.
(2) 6 Ind. Cas. 16.
(3) 4 Bom. L. R. 231.

ALLAHABAD HIGH COURT.
FULL BENCH.

CIVIL REVISION PETITION No. 55 OF 1922.
February 19, 1923.

Present:—Justice Sir P. C. Banerji, Kt., Mr. Justice Piggott and Mr. Justice Walsh.

YAD RAM—JUDGMENT-DEBTOR—APPLICANT
versus
SUNDER SINGH—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89, O. XLVI, r. 1—Application to set aside sale—Appeal—Revision—Reference to High Court—Subordinate Courts, duty of.

Per *Curiam*:—(*Walsh, J.* dissenting)—No revision lies against an order of the lower Appellate Court passed in appeal from an order of the Trial Court disposing of an application to set aside an execution sale under O. XXI, r. 89 of the Civil Procedure Code. [p. 779, col. 2, p. 780, col. 1.]

(Case-law discussed.)

A Subordinate Court is bound to follow a reported decision of the High Court to which it is subordinate in preference to the decisions of the other High Courts. [p. 780, col. 2.]

Per *Walsh, J.*—Subordinate Judges must not be too timorous in stating their doubts to the High Court in references under O. XLVI, r. 1 of the Civil Procedure Code, in order to have them either removed or confirmed by final decisions of the High Court. [p. 781, col. 1.]

Civil revision from an order of the Subordinate Judge, Aligarh, dated the 18th January 1922.

FACTS.—In execution of a decree obtained by Sunder Singh against Yad Ram, the property of the judgment-debtor was sold by the Collector by public auction and was purchased by the decree-holder himself. After the auction sale Yad Ram sold the same property by private sale to one Jiwan Singh. Jiwan Singh, on behalf of Yad Ram, made a deposit in the Collector's Court of the amount mentioned in the sale proclamation, the solatium and of the sale expenses. Yad Ram also within limitation made a further deposit of the proper amount in Munsif's Court and put in an application, for setting aside the sale, under O. XXI, r. 89.

The Munsif ordered the sale to be set aside. On appeal, the learned Judge of the Appellate Court, relying upon a ruling of the Allahabad High Court reported in *Ishar*

YAD RAM *v.* SUNDER SINGH.

Das v. *Asaf Ali Khan* (1); set aside the judgment of the Munsif and held that Yad Ram had no right to make an application under O. XXI, r. 89.

Against that order a revision was filed.

Mr. ***Panna Lal***, for the Opposite Party, took a preliminary objection that no revision lay.

He submitted that no question of jurisdiction was involved. The learned Judge of the Court below had jurisdiction to hear and decide the appeal. If in its decision it made an error of law, that fact could not give the High Court a power to interfere in revision.

He relied on *Balakrishna Udayar* v. *Vasudeva Aiyar* (2); *Jwala Prasad* v. *East India Railway Company* (3), *Jhunku Lal* v. *Bisheshar Das* (4), *Chandu Lal* v. *Kokamal* (5).

On the question that the learned Judge of the Court below was bound to follow the ruling of the High Court he referred to *Pultu Lal* v. *Parbati Kunwar* (6).

Mr. ***Gulzari Lal***, for the Petitioner, referred to *Dhanwanti Kuer* v. *Sheo Shankar Lal* (7), *Sundaram* v. *Mamsa Mavuthar* (8); *Behari Lal* v. *Baldeo Narain* (9).

JUDGMENT.

Banerji, J.—A preliminary objection has been taken to the hearing of this application for revision, on the ground that a revision does not lie under the provisions of section 115 of the Code of Civil Procedure. The circumstances out of which the case arose are these. There was a decree for sale against one Yad Ram, and in execution of that decree the mortgage property was sold by auction. Subsequently to the auction sale, Yad Ram sold his interests in the property already sold by auction, and after this sale he presented an application to the Court under O. XXI, r. 89 of the Code of Civil Procedure, depositing the amount of the decree and the 5 per cent. penalty mentioned in the section and prayed that the sale might be set aside. The Court of first instance set aisde the sale. An appeal was preferred from the judgment of that Court to the lower Appellate Court under O. XLIII, r. 1, clause (*j*). The Appellate Court set aside the order of the Court of first instance, being of opinion that the judgment-debtor, Yad Ram, was not entitled to make the application for setting aside the sale. In so holding the lower Appellate Court followed the ruling of this Court in *Ishar Das* v. *Asaf Ali Khan* (1). From this decision of the lower Appellate Court the present application for revision has been presented.

In my judgment, in the view of the provisions of section 115 of the Code of Civil Procedure, as interpreted by their Lordships of the Privy Council and as interpreted by this Court in several rulings, the application is not maintainable. It has been held by their Lordships of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (2) that the only question which can be entertained under section 115 is the question of jurisdiction, and that if the Court has refused to exercise jurisdiction or has exercised jurisdiction, which is not vested in it by law, or if in the matter of jurisdiction the Court has acted with illegality or with material irregularity an application for revision is maintainable. This ruling of their Lordships of the Privy Council was considered in the case of *Jhunku Lal* v. *Bisheshar Das* (4) and it was held that unless the Court had acted illegally or with material irregularity in relation to the question of jurisdiction, an application for revision could not be maintained. In the present case the Court was competent to determine whether Yad Ram was entitled to make an application under O. XXI, r. 89, and it had jurisdiction to decide that question and it decided it adversely to Yad Ram. The Court may have been

(1) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.
(2) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.)
(3) 46 Ind. Cas. 99; 16 A. L. J. 535.
(4) 46 Ind. Cas. 71; 16 A. L. J. 495; 40 A. 612.
(5) 61 Ind. Cas. 36; 43 A. 334; 19 A. L. J. 110.
(6) 29 Ind. Cas. 617; 13 A. L. J. 721; 19 C. W. N. 841; 17 Bom. L. R. 549; 18 M. L. T. 61; 29 M. L. J. 63; 22 C. L. J. 190; 37 A. 359; 2 L. W. 881; 42 I. A. 155; (1915) M. W. N. 514 (P. C.).
(7) 51 Ind. Cas. 873; 4 P. L. J. 340; (1921) Pat. 364.
(8) 63 Ind. Cas. 937; 44 M. 554; 40 M. L. J. 497; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272.
(9) 48 Ind. Cas. 14; 16 A. L. J. 717; 40 A. 674.

wrong in its decision but it cannot be said that in exercise of its jurisdiction it acted illegally or with material irregularity in the sense in which those words have been interpreted by their Lordships of the Privy Council in the case to which I have referred and in earlier cases decided by their Lordships. As was pointed out in the case of *Chandu Lal* v. *Kokamal* (5), the course of rulings in this Court has since 1886 been that an application for revision in similar circumstances does not lie. I see no reason to alter the view which I have expressed in earlier cases and with great respect I am not prepared to accept the contrary view held in the case of *Sundaram* v. *Mamsa Mavuthar* (8) and *Dhanwanti Kuer* v. *Sheo Shankar Lal* (7). I would, therefore, allow the preliminary objection and dismiss this application.

Piggott, J.—I am free to admit that, when faced with the contrary view expressed by two other High Courts in the cases just referred to above, and more particularly with the carefully reasoned judgment of the learned Judges of the Patna High Court in a case which is absolutely undistinguishable from the present on the facts, I felt some difficulty in arriving at a conclusion. What impresses me most, however, is that, in the case now before us, the learned Subordinate Judge was following a decision of a Bench of this High Court, to be found in the authorised Law Reports. He had to determine the question whether on a certain date one Yad Ram, who had presented a certain application before the Court of the Munsif of Aligarh, was or was not a person either owning certain property or holding an interest therein by virtue of a title acquired before a certain date. Certain facts required to be examined, but they were admitted facts so that the Court below was not called upon to come to any judicial finding concerning them. On the admitted facts Yad Ram was not the owner of the property, or the holder of any interest therein on the date with which the Court below was concerned, if the case of *Ishar Das* v. *Asaf Ali Khan* (1) was rightly decided. The Court below was faced with a contrary decision by the learned Judges of the Bombay High Court, and our attention has since been drawn to the fact that decisions in the same sense as that of the Bombay High Court, and in a contrary sense to that of this Court, have been pronounced by the High Courts at Madras and at Patna. The learned Subordinate Judge, however, was under an obligation to follow the reported decision of this Court, *vide* the remarks of their Lordships of the Privy Council in *Puttu Lal* v. *Parbati Kunwar* (6). I cannot reconcile it with my judicial conscience to hold that, in thus fulfilling an obligation incumbent upon him as a judicial officer, the learned Subordinate Judge was acting illegally, or with material irregularilty, or going outside the jurisdiction conferred upon him by section 104, read with O. XLIII, of the Civil Procedure Code. I appreciate the fact that the practical result of taking this view seems to be that this Court will not be able upon an application in revision to re-consider the correctness of any previous pronouncement of a Bench of this Court upon a question of law. I do not know that any practical inconvenience need necessarily follow upon the adoption and enforcemnt of this view. In the case now before us it would have been undoubtedly open to the learned Subordinate Judge to have referred the somewhat difficult question of law to this Court under O. XLVI, r. 1 of the Code of Civil Procedure; and I mention this matter because the suggestion may be of value to subordinate Courts before whom this judgment may be produced for reference. For the reasons stated I concur in the proposed order dismissing this application.

Walsh, J.—I respectfully dissent. I see no answer to the judgment of Mr. Justice Mullick in the case of *Dhanwanti Kuer* v. *Sheo Shankar Lal* (7). It would appear that if that view is correct, there has been a miscarriage of justice in this case. But I agree with my brother Justice Piggott that the learned Judge might, if he felt any doubt at the back of his mind about *Ishar Das* v. *Asaf Ali Khan* (1), have sought refuge in a reference under O. XLVI, r. 1. In order, however, to avail himself of that provision it must be recognised to his credit that it required him to screw up his courage to state in writing that he entertained reasonable doubts as to the correctness of the decision of the High

Court. Subordinate Judges must not be too timorous (in this case it has been stated that serious difficulty exists in the lower Courts in applying what is understood to be the construction of O. XXI, r. 89) in stating their doubts in order to have them either removed or confirmed by final decisions of the High Court.

By the Court.—The order of the Court is that the application is dismissed with costs.

Z. K. *Application dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 215 OF 1922.

June 4, 1923.

Present:—Mr. Justice Dass and Mr. Justice Kulwant Sahay.

RAM LAL MALIK AND ANOTHER —DECREE-HOLDERS—APPELLANTS

versus

DEODHARI RAI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Execution proceedings—Issues of fact and law—Landlord and tenant—Non-transferable occupancy holding—Decree obtained by landlord against tenant—Holding, whether can be sold.

A landlord who has sued his tenant and obtained against him a money-decree can, in execution thereof, sell the non-transferable occupancy holding of his tenant without the latter's consent. [p. 781, col 2.]

An execution case is not a suit but the principle of law underlying section 11 of the Civil Procedure Code applies to proceedings in execution of decrees. [p. 782, col. 1.]

Section 11, Civil Procedure Code, draws no distinction whatever between an issue of fact and an issue of law; and an issue of law operates as *res judicata* in the same way as an issue of fact. [p. 782, col. 1.]

A landlord obtained a money decree against his tenant and attached a non-transferable occupancy holding belonging to the latter in execution. The execution was dismissed on the ground that the holding could not be sold in execution of a money-decree. It was subsequently decided by a Full Bench that a landlord was entitled to sell the non-transferable occupancy holding of his tenant in execution of a money-decree. The landlord again applied for execution of his decree:

Held, that the question having been tried and decided between the parties in the previous execution proceeding operated as *res judicata* and could not be re-opened. [p. 782, col. 1.]

Gowri Koer v. *Audh Koer*, 10 C. 1087; 5 Ind. Dec. (N. S.) 726, followed.

Alimunnissa Chowdhurani v. *Shama Charan Roy*, 32 C. 749; 1 C. L. J. 176; 9 C. W. N. 466, dissented from.

Aghore Nath v. *Kamini Debi*, 6 Ind. Cas. 554; 11 C. L. J. 461, referred to.

Appeal from an order of the Officiating District Judge, Saran, dated the 8th August 1922, reversing that of the Subordinate Judge, Saran, dated the 29th April 1922.

Mr. *B. N. Mitter*, for the Appellants.

Mr. *Harihar Prosad Sinha*, for the Respondents.

JUDGMENT.

Das, J.—The decree-holders, who are the landlord-appellants before us, got a money-decree against the tenant-respondent and in execution of the money-decree attached the occupancy holding of the respondent in Execution Case No. 70 of 1921. The respondent objected to the execution and insisted that his occupancy holding, not being transferable by custom, was not liable to be sold. The learned Subordinate Judge, following the line of decisions which was binding upon him, gave effect to the respondent's objection and dismissed the execution case.

The cases upon which the learned Subordinate Judge held that the occupancy holding of a tenant could not be sold in execution of a money-decree obtained by the landlord have now been overruled by the Full Bench of this Court, and it is now the settled law of this Province that a landlord who has sued his tenant and obtained against him a money-decree can, in execution thereof, sell the non-transferable occupancy holding of his tenant without the latter's consent. In view of the decision of the Full Bench, the appellants again applied for the sale of the occupancy holding of the judgment-debtor, and the question which we have now to decide is whether the decision of the learned Subordinate Judge in the previous execution case operates as *res judicata* so as to prevent the Court from giving the appropriate relief to the decree-holders.

In my opinion the question must be decided on the terms of section 11 of the Code of Civil Procedure. That section imposes a bar upon the Court from trying any suit or issue in which the matter directly and substantially in issue has been directly

and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue had been subsequently raised, and had been heard and finally decided by such Court. An execution case is not a suit, but it is firmly established that the principle of law underlying section 11 applies to proceedings in execution of decrees. The section draws no distinction whatever between an issue of fact and an issue of law; and in my opinion an issue of law operates as *res judicata* in the same way as an issue of fact.

The substantial question is—Was the question directly and substantially in issue in a former proceeding between the same parties or between parties under whom they or any of them claim? In my opinion it was; and it is impossible now for the Court to try the issue again between the parties. In the case of *Gowri Koer* v. *Audh Koer* (1) it was held by the Calcutta High Court that, where a Division Bench of the High Court decided as a point of law that a property had not passed under a certain deed of sale, and, subsequently, the decision on that point of law was in another case disapproved by a Full Bench the decision of the Division Bench (where the same plaintiff has again sued to recover the same property relying on the same deed of sale), is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved. Sir Richard Garth in delivering the judgment of the Court said as follows: "But although those learned Judges may have made a mistake in point of law, in the decision at which they arrived in 1873, their decision upon the point at issue is nevertheless a *res judicata* as between the parties, and it is no less a *res judicata* because it may have been founded on an erroneous view of the law, or a view of the law which this Court has sbusequently disapproved." In the case of *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (2) the facts were these —In a previous suit for rent against a permanent tenure-holder in a permanently settled area it was held, following the decision of the High Court, that the plaintiff could recover interest on the arrears only at the rate of 12 per cent. per annum, as section 67 of the Bengal Tenancy Act controlled section 179 of the Act and was a bar to his recovering at a higher rate mentioned in the *kabuliyat*. The decision upon which the previous suit was decided was subsequently overruled by the Full Bench of the Calcutta High Court. In a subsequent suit between the same parties on the same *kabuliyat* for rent for subsequent period it was argued that the previous decision between the parties operated as *res judicata*. The Calcutta High Court held that the case must be decided upon the law as it stood when judgment was pronounced, and that the plaintiff could recover the larger sum for interest, and that the decision in the previous suit would not be *res judicata*. The learned Chief Justice in delivering the judgment of the Court said as follows:—"But in the case before us the suit is brought upon a fresh cause of action, no question as to the construction of the *kabuliyat* arises, the terms are clear enough and the only question is, whether section 67 of the Bengal Tenancy Act is a bar to the present claim for interest; The law, as it now stands, says it is not and I think we are bound to give effect to that law, when the previous case was decided the law was then regarded as different:" and then the learned Chief Justice proceeded to say as follows:—"To hold otherwise would be to hold that there is one law for the parties in the Full Bench case, and another law for the parties in the present case. That does not seem to me to be right. If the defendant's contention be sound, the Court must, for all time, perpetuate an injustice, by saying the section is a bar, when the law says it is not a bar. I do not desire to be understood as saying that a point of law can never constitute *res judicata*."

So far as the actual decision is concerned, I have no difficulty in coming to the conclusion that the previous decision between

(1) 10 C. 1087; 5 Ind. Dec. (N. S.) 726.

(2) 32 C. 749; 1 C. L. J. 176; 9 C. W. N. 466.

the parties did not operate as *res judicata*. The learned Chief Justice put it upon the ground that the cause of action was different, but it seems to me that section 11 of the Code of Civil Procedure takes no note of the fact whether the cause of action is the same or is different. The only matter for investigation is, whether the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim and it is upon this investigation that the question of *res judicata* must in each case be decided. But in the case which I am considering the matter directly and substantially in issue in the subsequent suit was different from the matter which was directly and substantially in issue in the previous suit. In the previous suit the issue was whether the plantiffs could recover interest at a higher rate mentioned in the *kabuliyat* upon the rent that had accrued due to the landlord for a particular period. The issue in the subsequent suit was whether he could recover interest at the rate mentioned in the *kabuliyat* for a subsequent period. The issues, in my opinion, were different, although it may be that the question of law to be decided by the Court to give the appropriate relief to the plaintiff was the same. There is, therefore, in my opinion, no conflict between the two decisions to which I have referred.

The question was discussed at great length by Mr. Justice Mookerjee in *Aghore Nath* v. *Kamini Debi* (3). The learned Judge pointed out that the effect of the decision in *Alimunnissa Chowdurani* v. *Shama Charan Roy* (2) was to substitute in the Code the phrase "cause of action" for "the matter in issue" in so far as it lays down that, where the matter directly and substantially in issue is a matter of law, the decision may not be *res judicata* if the cause of action in the subsequent suit is different from that in the former suit, and the learned Judge thought that it was a matter of controversy whether that view could be reconciled with the language of the Code.

(3) 6 Ind. Cas. 554; 11 C. L. J. 461.

The conclusion at which the learned Judge arrived may be stated in his own words :—" The true limits of the rule may be difficult to formulate accurately, but it may be stated generally that we have to distinguish between the application of the rule mainly to two well-marked classes of cases. In one class, parties may seek to litigate again the same cause of action as had been decided between them in a prior suit; in another class, the dispute may relate to matters which have been already in controversy and formed the subject of consideration in the previous suit, although the causes of action in the two suits may be distinct. In the former class of of cases, the application of the rule of *res judicata* is obviously justifiable on principle; in the latter class of cases, the estoppel ought to be limited to matters distinctly put in issue and determined in the prior action, and it should further be restricted to questions of fact or mixed questions of fact and law, for if it was extended to pure questions of law, a Court might find itself in the position that, in so far as certain parties are concerned, it is irrevocably bound to adhere to a proposition of law erroneously laid down in a previous suit." If the question is to be determined on the terms of section 11 of the Code of Civil Procedure it is, as the learned Judge himself said, a matter for controversy whether it is permissible to substitute in the Code the phrase " cause of action" for "the matter in issue," but it is quite clear that, so far as the present case is concerned, it falls within the rule laid down in *Couri Koer* v. *Audh Kuer* (1). The decree-holder took out execution of his decree and attached in execution of the decree the occupancy holding of his tenant. The Court held that the occupancy holding of the tenant could not be seized in execution of a money-decree obtained by the landlord against the tenant. It is true that that view has now been overruled by the Full Bench of this Court, but an issue was raised between the parties in the former execution case whether the occupancy holding of the tenant could be seized in execution of a money decree obtained by the landlord against the tenant. That issue was decided in favour of the tenant and against the landlord.

SHAMSHER SINGH *v.* RAM KALI.

The landlord has now taken another execution of the same decree and his contention is that the view upon which the former execution proceeding was dismissed having been found to be erroneous he ought to be entitled now to maintain execution as against the tenant. It cannot for a moment be urged that the cause of action in the present proceeding is different from that in the former proceeding. If that be so, the decision of the former proceeding operates as *res judicata* between the parties.

The decision of the learned Subordinate Judge is right and must be upheld. This appeal must be dismissed with costs.

Kulwant Sahay, J.—I agree.

K. S. D. & Z. K.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 6 OF 1923.

March 13, 1923.

Present :—Mr. Dalal, A. J. C.

SHAMSHER SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat RAM KALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), ss. 14, 15—Pre-emption decree—Extension of time—Payment into Court, whether necessary—Benamidar *of vendee, whether can object—Vendee obtaining payment out of Court after date fixed for payment—Estoppel.*

A Court which has passed a decree for pre-emption has no jurisdiction to extend the time for the payment of the purchase-money fixed in the decree, and in order to render the payment valid, the money should be paid into Court. A vendee, however, who by inducing the pre-emptor to believe that he would part with the property on receipt of the purchase-money even after the due date, obtains the purchase-money from him, is estopped from contesting the latter's right to execute the decree. [p. 785, col. 1.]

A *benamidar* for the vendee who has no interest in the property has no right to object to the execution of the decree by the pre-emptor where the vendee himself is estopped from objecting. [p. 785, col. 1.]

Appeal against an order of the Subordinate Judge, Sultanpur, dated the 30th October 1922, setting aside an order of the Munsif, Sultanpur, dated the 12th August 1922.

Mr. *H. Husain*, for the Appellants.

Mr. *Moti Lal Saksena*, for Respondent No. 1.

JUDGMENT.—This is a second appeal from an appellate order in the execution department. The appellants, Shamsher Singh and Samrath Singh, instituted a pre-emption suit against *Musammat* Ram Kali, her son Jantri Singh and the vendors, for recovery of possession of the vended property on payment of the price. It was alleged in the plaint that the property was under the possessory mortgage of Jantri Singh and to keep that mortgage alive the sale-deed was executed nominally in the name of his mother, *Musammat* Ram Kali. It was necessary for the plaintiffs to make these allegations because only the equity of redemption was sold to *Musammat* Ram Kali and in case of the plaintiffs' success they could not obtain possession of the land in suit, unless Jantri Singh was the real purchaser.

The suit was compromised on the 3rd January 1920 and the terms of the compromise prove that the plaintiffs' allegations were accepted by the two defendants concerned. The price of the property was to be Rs. 250 as entered in the sale-deed and the mortgage to Jantri Singh was not taken into consideration. The entire sale-price was to be paid to Jantri Singh and not a single pie to his mother; Rs. 90 was paid to Jantri Singh at once and it was agreed that the plaintiffs would execute a possessory mortgage-deed of plot No. 291, a portion of the property in suit, in lieu of Rs. 60 on or before the 15th March 1920, the balance of Rs. 100 was to be paid to Jantri Singh in cash before 30th March 1920. The decree was passed in terms of the compromise and the defendants' vendors were discharged.

On 9th March 1920 the plaintiffs and Jantri Singh who were alone concerned in the compromise put in a joint petition to the Trial Court praying for extension of time for the execution of the deed and

for payment of Rs. 100 up to 3rd June 1920. This petition was granted.

On 3rd June 1920 Jantri Singh certified compliance by the plaintiffs with the compromise of 3rd March 1920.

Subsequently, when the plaintiffs applied for possession of plots other than plot No. 291 on 13th May 1922, *Musammat* Ram Kali objected to the execution of the decree. Her objections were:—

(1) that the Court had no jurisdiction to extend the time for payment of the pre-emption money even on the joint petition of the plaintiffs and Jantri Singh, and

(2) that payment out of Court of Rs. 100 was not a compliance with the provisions of section 15 of the Oudh Laws Act, which requires payment of purchase-money to be made in Court.

The Trial Court disallowed the objections on the ground that Jantri Singh, the party concerned, had waived his rights and his mother could not go behind such waiver. The time was extended and payment accepted out of Court by Jantri Singh and in consequence, in the Court's opinion, the execution of the decree could not be resisted.

In appeal the Subordinate Judge of Sultanpur accepted the woman's objections and disallowed the application for execution

In my opinion, to uphold that order under the circumstances of the case would be to abet a fraud. I am satisfied that *Musammat* Ram Kali had no interest in the property and was merely a *benamidar* for her son. The son has received Rs. 190 from the plaintiffs and has now put up his mother to deprive the plaintiffs of the benefit of the decree in their favour. It is true that the Trial Court had no jurisdiction to extend the time for payment of purchase-money of a pre-emption decree and that such money should be paid in Court to render the payment valid. In the present case, however, Jantri Singh, by inducing the plaintiffs to believe that he would part with the property on receipt of money even after due date, has obtained money from the plaintiffs. He is, therefore, estopped from contesting the plaintiffs' right to execute the decree. The woman has no interest in the property and has no right to object to the execution.

I set aside the appellate decree and restore the order of the First Court with costs here and of the lower Appellate Court. Execution shall proceed.

Decree set aside.

Z. K.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 29 OF 1921.
October 5, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

Pandit RADHIKA PRASAD BAPULI —PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 10, Sch. I, Art. 66—"Specific purpose", meaning of—Bond payable after demand at certain place, suit on—Limitation.

"A specific purpose" within the meaning of section 10 of the Limitation Act is a purpose that is either actually specifically defined in the terms in which the trust is created or a purpose which from the specified terms can be certainly affirmed. [p. 788, col. 2.]

The East India Company, while taking possession of the properties of the Raja of Tanjore in 1824, entered into an arrangement with his creditors by which the Company agreed to give them transferable bonds or certificates and to set apart a sufficient portion of the Tanjore revenues for the payment of the debts. The bonds were payable on demand being made after the expiry of fifteen months' notice of payment at the General Treasury at Madras. In a suit on one of such bonds against the successors of the Company:

Held, (1) that the Company and its successors were persons in whom property had been vested in trust for a specific purpose within the meaning of section 10 of the Limitation Act, and the suit, therefore, fell within the purview of that section; [p. 789, col. 1.]

(2) that treating the bond as a simple contract debt, limitation did not begin to run in respect of it till demand was made at the General Treasury at Madras after the expiry of a fifteen months' notice of payment. [p. 788, col. 2; p. 792, col. 1.]

SECRETARY OF STATE FOR INDIA *v.* RADHIKA PRASAD.

Appeal from a decree and judgment of Mr. Justice Coutts-Trotter, dated the 3rd of March and 3rd of February 1921 and respectively made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 689 of 1919.

The Advocate-General (Mr. *C. P. Ramaswami Iyar*), for the Appellant.

Messrs. *K. Rajah Aiyar* and *R. Ganapati Aiyar*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The history of this matter is so clearly stated in the judgment of Coutts-Trotter, J., that it is unnecessary for me to repeat it and I have nothing to add to his statement of the facts except as to the plaintiff's title and I will deal with that first.

The plaintiff is the assignee of one Mr. Kund Lal who is the direct lineal descendant of Madhu Sahai who, in the year 1845, had issued to him a document called a promissory-note of the Tanjore debt, No. 307. The plaintiff has also obtained from the District Court of Benares a Succession Certificate under the Succession Certificate Act of 1889 in the matter of the estate of Madhu Sahai, declaring him entitled to collect the money and the interest due on the said promissory-note (Exhibit M). The effect of the certificate is that the plaintiff is declared to have whatever rights Madhu Sahai would have had in the promissory-note if he had been alive, and payment to him will be a good discharge to the Government. The assignment to the plaintiff, Exhibit J, was made in 1909 and in my judgment it assigns all the rights that the assignor had as representing Madhu Sahai It is true that it recites that the assignor is entitled to the promissory-note and to a specified amount of interest Rs. 2,833-15-0½. That is the amount of interest accrued due from the date of the last payment referred to hereafter, up to the time when by Exhibit F. published in the *Fort St. George Gazette*, it was announced that, as Madhu Sahai had declared that he had not received the promissory-note No. 307, it would be paid on September 30th, 1854, and that the notice would be held equivalent to a tender of payment on that date, from which date all interest on the said note would cease. It has not been contended before us that that notice had any effect on the rights of Madhu Sahai but apparently the parties to the assignment thought that it had the effect of stopping the interest, as from that date, and that is apparently the meaning of this recital. However, the operative part of the document assigns all the interest in the promissory-note which the assignor had. In the translation before us the words are "right and authority." But we have had before us the Court Interpreters of Hindi and Gujarati and they agree that the words mean literally "the rights and powers," and convey what we understand by such words as "all the right, title and interest" and include particularly all powers of recovering by action, or otherwise, the amount due on the promissory-note. This, in my judgment, is wide enough to cover both principal and all interest due and to become due. It follows that the plaintiff had both by the assignment and by virtue of the Succession Certificate all the rights of the estate of Madhu Sahai.

I propose now to consider the rights of the plaintiff apart from the Limitation Act and, then, whether that Act applies. The history of the matter, as far as we can ascertain it, is that in 1847 one Hur Kissen Doss received through his agent one Pattam Narayanasami Chetti the arrears of interest up to October 30th, 1846 from the date of the agreement of 1824 referred to hereafter, *i.e.*, Rs. 8,411-5-1 (Exhibit 1A). The promissory-note itself has a column on the back for acknowledgment of the receipt of interest. The column contains what purports to be an order by Madhu Sahai to pay to Hur Kissen Doss, and it also contains what purports to be a further order signed by Madhu Sahai to pay to one Shri Girdharji Maharaj. This is the best that can be made out of the endorsement on the original somewhat dilapidated promissory-note, and a copy of this endorsement made by the plaintiff when it first came into his possession some 13 years ago. It is suggested tha these endorsements are forgeries, and there is some support for that theory in that in 1853 Madhu Sahai's statement that he had never received

the promissory-note is officially accepted as is shown by Exhibit F. But the East India Company paid this interest to Hur Kissen Doss in 1844 on what purports to be the direction of Madhu Sahai and, in the absence of evidence that it was not done by his direction, in my judgment, the plaintiff has failed to establish that this amount of interest was not properly paid; and, therefore, in my judgment his claim to the amount fails.

At later dates other persons made claims under the promissory-note but they were all rejected,– one by the High Court made by V. Muttuswami Chetty, as appears from Exhibit G at some date before 1864. In 1892 one Shri Jivan Lalji put in a claim which was rejected.—See Exhibit H. It would appear that Shri Jivan Lalji was the grandson of Shri Girdharji Maharaj who in Exhibit E. is stated to have died in 1842, and Jivan Lalji left surviving him, a widow and two sons, one also called Girdharji Maharaj: See Exhibit K. If Exhibit E, which does not seem to have been proved by any one, is accurate, that Girdharji whose name appears endorsed on the promissory-note, was dead, before the promissory-note was issued in 1845 and it is not surprising that doubts were thrown in Exhibit H on the honesty of any claim made through him. At any rate, no payment was made of principal or interest to Girdharji Maharaj or any one claiming under him, and the plaintiff has by Exhibit K taken the precaution of obtaining a release-deed from the present representatives of Girdharji Maharaj and in my judgment the supposed endorsement to him can be disregarded. It is not relied upon by the Secretary of State. Where the promissory-note was, until between 1901 and 1906, when it is stated that it came into the hands of the heirs of Madhu Sahai, we do not know. But it was originally issued to Madhu Sahai and was throughout his and his legal representatives' property, and I find no assignment of his rights thereunder, except for the interest dealt with above, until the assignment to the plaintiff. I, therefore, hold that the plaintiff has the full rights that Madhu Sahai would have had, if he were alive now.

Those rights, apart from limitation, are to be paid the principal, the requisite notice having been given in 1853 and apparently again in 1858 (See Exhibit G.) and interest at 4 per cent. from October 1846 until the decree herein.

It is contended that all rights to the principal and consequently also the interest are barred. It is argued that under Art. 120 of the Schedule to the Limitation Act of 1908, if under no other Article, the right to recover is barred six years after the principal debt became payable, *i. e.*, from the date of expiry of the 15 months' notice given in 1853 or 1858. There are two answers made to this. First, that time can only begin to run from the date of demand for payment made at Madras which was not until October 1916, and secondly, that the Government, who it is admitted have succeeded to the rights and liabilities of the East India Company were and are in the position of the trustees, and that, under section 10 of the Limitation Act, no period of limitation can apply. The learned Judge has found the first point against the plaintiff and the second in his favour. In my judgment the plaintiff is right on both points.

The first point turns on the terms of the promissory-note itself. By it, the Company agrees to pay to Madhu Sahai, on the expiration of 15 months' notice of payment, on demand at the General Treasury at Fort St. George, the principal sum, and to pay interest half-yearly as long as the Company was in possession of the revenue of Tanjore. The interest was to be paid at the Treasury in cash to proprietors if resident in India and in cash, or by bills at 12 months' date at the option of the proprietors, if resident in Europe.

According to the Law of England when money is payable on demand and nothing further is said, it is payable at once and without demand and time under the Statute of Limitations begins to run at once. The most common instances of the application of that principle are of money lent re-payable on demand or at request and promissory-notes payable on demand: *Norton* v. *Ellam* (1). It is

(1) (1837) 2 M. & W. 461; 1 M. & H. 69; 6 L. J. (N. S.) Ex. 121; 1 Jur. 433; 46 R. R. 646; 150 E. R. 839.

worth noticing that this principle of the English Common Law has been held not to apply to cases in the *mufussil*: *Tarinee Parshad Ghose* v. *Pran Kishen Banerjee* (2). However, the principle is in terms applied by Arts. 59 and 73 of the Limitation Act to cases of money lent and Bills of Exchange and promissory-notes payable on demand. But it is not extended to any other case. Article 73 does not apply to this case as the so called promissory-note is not a promissory-note within the definition of the Limitation Act. Further, in England the question in such cases is stated clearly by Scrutton, L. J. in *Bradford Old Bank, Limited* v. *Sutcliffe* (3) and by Bankes and Atkin, L. JJ., in *Joachimson* v. *Swiss Bank Corporation* (4), where it was established that the principle did not apply to cases between customers and bankers. The question to be considered is whether the words, 'on demand' are mere words or whether, looking at the whole document, it is really intended that the demand should be made before the liability to pay arises. Now in this connection, I attach very great importance to the fact that the payment is to be made at a named place by the person liable, which place is the address of the debtor and not the creditor. In the case *Rowe* v. *Young* (5) it was held that the presentment for payment of a Bill of Exchange payable at a named place was a condition precedent to the right to sue on the Bill. It is true, as pointed out by Coutts-Trotter, J., that that particular rule has since been altered by Statute, but the principle of the decision is, in my judgment, in no way thereby affected, and I consider it directly in point. Further it is worth observing that there has been no similar statutory alteration of the law in India. Looking at the whole document, in my judgment, it was the intention of the Company to insist on a demand at the place named, for I cannot think that it was intended that the Company should be under a duty to seek out the creditors and pay them, especially as the payment under the promissory-note was to be to the payees or their order and the Company would not know who they would be at the expiration of 15 months' notice to be given at some future date. Further, as to the interest, the Company would require to know if the proprietor for the time being was in India, in which case it was to be paid in cash at the General Treasury, or in Europe, in which case he had an option, the exercise of which he would have to communicate. In my judgment, the Company came under no liability to pay either the principal or interest until the demand was not made for payment at a particular place and in some cases a particular manner and if the Company had been sued without a demand, it would, in my judgment, have been a good defence to the action that no demand has been made. It follows, in my judgment, that the rights under the promissory-note, looked upon as a simple contract debt, are not barred.

Secondly, are the Government trustees within the meaning of section 10? Following the words of that section, —Is the Government a person in whom property has been vested in trust for any specific purpose and is the action for the purpose of following the trust property? A specific purpose is a purpose that is either actually specifically defined in the terms in which the trust is created, or a purpose which from the specified terms can be certainly affirmed. *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh* (6). In this case the terms are to be found in the articles of agreement of 1824 (Exhibit C of which, I think, if this case goes further, articles 15 and 16 should be printed). It was an agreement between the Company and, amongst others, Madhu Sahai's predecessor-in-title. In my judgment, by the agreement the East India Company undertook to set aside a sufficient part of the Tanjore revenue to be received by it, to provide for the payment to the creditors of Amar Singh, who had signed the agreement of their debts. Those creditors were to receive transferable bonds or certificates and sufficient revenue was to be set aside and applied to paying the in-

(2) 14 W. R. 224; 6 B. L. R. 160.
(3) (1918) 2 K. B. 833 at p. 849; 24 Com. Cas. 27; 62 S. J. 753; 34 T. L. R. 619.
(4) (1921) 3 K. B. 110; 90 L. J. K. B. 973; 125 L. T. 338; 26 Com Cas. 196; 65 S. J. 434; 37 T. L. R. 534.
(5) (1820) 2 Bligh 391; 4 E. R. 372; 21 R. R. 91.
(6) (1922) 1 A. C. 120; 91 L. J. P. C. 36; 126 L. T. 203.

terest on those bonds and also to creating and accumulating a sinking fund for the redemption in due course of the principal. In pursuance of this agreement a transferable bond, called a promissory-note, was issued, as the note states in confirmity with and in pursuance of the articles of the agreement of 1824, and is now held by the plaintiff. It is true that by the terms of the document the Company agreed to pay in the events that have happened, the interest and principal due on the bond to Madhu Sahai or his order. He or his assignees could have sued on the promissory-note itself and the Company undertook a liability to pay interest so long as they received the Tanjore revenue, and principal after 15 months' notice given by them, and it would have been no defence that the Company had not received sufficient revenue or that, after giving the notice, had not got sufficient sinking fund in its hands; but, this does not, in my judgment, prevent the Company from being trustees of the fund that it did get into its hands, that is, of that part of the revenue required for the purpose of meeting the principal and interest on these bonds. I agree with the judgment of Coutts-Trotter, J., that a trust was created by the articles of agreement and, in my judgment, the Company and the Government and its successors are trustees of the funds in their hands for the purpose specifically defined in the articles of agreement, namely, the payment of interest and principal of the transferable bonds to be issued under the agreement, of which the bond in suit is one. I therefore hold that section 10 of the Limitation Act applies.

The judgment must be reduced by Rs. 8,411-5-1 referred to above. That is, however, a minor part of the case, but the appellant's case partially succeeded and I think that the justice of the case will be met by awarding to the plaintiff three-fourths of the taxed costs of this appeal. Time for payment three months from today.

Wallace, J.—The plaintiff is suing to recover money due on a bond, Exhibit A, dated the 28th July 1845 under which the Governor in Council promised on behalf of the East India Company to pay certain principal and interest due to one Madhu Sahai and is successors-in-title. The said Madhu Sahai represented a creditor of the deposed Raja of Tanjore, Amar Singh, whose debts so far as they had been proved to the satisfaction of the Company under a Commission appointed for the purpose, the Company took over, and for the due payment of which they made themselves responsible. The manner in which this was done is set out in Exhibit C, dated the 11th February 1824, articles of agreement between the Company and those claiming to be the creditors of Amar Singh.

A great deal of discussion has centered round this document. On the best consideration that I can give it, the important provisions in it appear to me to mean this:—The creditors who put their hands to it agreed to abide by the decision of the Commission appointed to determine the extent of their debts. The Company who were then in possession of the revenues of Tanjore, formerly in the possession of Amar Singh on their part agreed to take over these debts so determined with simple interest on the balance found due at 4 per cent. from the date of the debt to the 30th April 1823 to consolidate that sum as the principal of bonds to be issued by them to the creditors in full satisfaction of such debts due by Amar Singh, the bonds to carry simple interest at 4 per cent. per annum, to be paid half yearly from the 30th April 1823; such interest was payable only so long as the Company retained the revenues of Tanjore, while the payment of principal was not so conditioned, such payment to be made only after 15 months' notice by the Company. In order to provide means for the redemption of these bonds, the total principal of which amounted, we are told, to nearly nine lakhs of rupees, a reserve fund sufficient to pay the interest was to be set apart by the Company out of the Tanjore revenues plus a sum equal to five per cent. of the principal annually out of the same revenues as a sinking fund, to meet the principal and on this sinking fund, the Company would pay 4 per cent. per annum to be paid from general revenues. This latter stipulation is important as showing that the Company regarded the sinking fund as

a separate fund with them belonging to and for the benefit of others. The sinking fund was to remain in existence and be a charge on the Tanjore revenues until all the bonds were discharged. Article 15 of the deed further stipulates that the deed shall not operate to make the Company's property, apart from the Tanjore revenues, liable for these debts or any other debts owing to these creditors of Amar Singh or to make even the Tanjore revenues liable, unless these are received by the Company at Madras. The effect of this agreement clearly is, I think, that the Company who had come into possession of the Tanjore revenues and recognised the justness of the claims of Amar Singh's creditors on these revenues took on themselves the obligation to pay these debts and constituted themselves trustees, so far as they were and remained in possession of the Tanjore revenues, for the payment of these bonds so issued, and undertook to set apart a sufficient portion of these revenues, as a trust fund to be used for the payment of interest on and the ultimate redemption of, these bonds until all of them were discharged.

In pursuance of this agreement bonds, as contemplated, were issued and Exhibit A, the bond under which the plaintiff sues, is one of them. It is not denied that it is undischarged as regards the principal and most of the interest.

The plaintiff's contention is two-fold; firstly, he sues on Exhibit A on the ground that he is entitled to be paid on it from the trust fund maintained *ad hoc* by the Government and, therefore, his claim cannot be barred, since the Government cannot plead limitation against a trust obligation, and secondly, that, apart from any question of trust, and even if there is no trust fund, the payment is not barred by limitation. The Government claims that the trust, if created, (and its creation is not strenuously disputed) came to an end when Exhibit A was issued and that Exhibit A is only an ordinary contractual bond between debtor and creditor, whereon payment is barred by limitation. Exhibit A itself states that it was issued, in pursuance of the agreement, Exhibit C detailed above, and the whole tenor of it shows that this was so. The Advocate General's chief contention is that, in Exhibit C, it was laid down that the amount of principal and interest found by the Commision to be due to any particular creditor of Amar Singh was to be satisfied by the bond to be issued and that that implied that, on the issue of the bond, the trust ultimately ceased. That view I cannot accept. The debt of Amar Singh was indeed to be satisfied, once for all, by the bond, but the agreement went on to make distinct provision for the ultimate satisfaction of the bond itself, by announcing a promise of a sinking fund to be maintained, until the bonds were fully discharged. It is not denied that the sinking fund was maintained and the Government Notifications of the 24th June 1853 Exhibit F, and 18th December 1858 (filed in this Court) indicate that it was so being maintained, and of course Government was bound under Exhibit C, so to maintain it until all the bonds were discharged. Government has been, since the date of Exhibit C, in possession of the Tanjore revenues and I must presume that it has carried out the promise contained in that document.

So then we have the position *pari pasu* with the issue of and running of the bonds, the sinking fund to pay them off was being accumulated, until, by 1858, all except four bonds, of which Exhibit A was one, had been paid off, and that in 1858 Government had sufficient sinking fund to clear these also. It is plain, then, that Government had been all along holding in trust for the bond-holders the amount necessary to pay off each bond. The trust had in fact not ceased by the issue of the bonds but continued and was to continue according to the agreement so long as any obligation to pay remained on any bond, and the trust fund could be dissolved only when every bond was discharged. Exhibit A has not been discharged. The trustee must, therefore, meet it from the trust fund so far as that fund is sufficient to meet it and he cannot be heard to plead that he is not bound to do so, or that the payment is barred by time, and thus in effect appropriate to himself the trust fund. To this part of the case no defence can be put forward against payment other than one of two pleas; (1) that such a loss in the Tanjore

revenues has taken place that the trust fund was exhausted so that the bonds cannot be redeemed from it; or (2) that all the bonds have been discharged. Neither plea has been here advanced.

Another argument to show that the trust came to an end with the issue of the bonds is based on the wording of Exhibit A itself. Exhibit A no doubt does not mention any sinking fund or re-produce Article 15 of Exhibit C which makes only the Tanjore revenues liable for the debt. So far as its wording goes, the Governor-in-Council is prepared to meet the obligation to pay the principal and interest from general revenues. Interest, no doubt, would not be payable if the Company had wholly lost the Tanjore revenues, but apparently the obligation to pay from general revenues, would continue even if the Tanjore revenues while not wholly lost, nevertheless proved insufficient to meet the bond. Incidentally, this shows that Exhibit A was something more than a mere warrant or declaration of intention to carry out Exhibit C, or a mere label to indicate to the holder of Exhibit A what his share in the trust fund was.

But, apart from that, the present question is, was the original trust obligation charged on Tanjore revenue then converted, when Exhibit A was issued, into an ordinary contractual obligation to pay from general revenues so that the trust obligation had come to an end? I can find no ground for such a conclusion. The wording of Exhibit A so far from indicating any novation from the agreement, Exhibit C, directly purported to be in pursuance of Exhibit C. The probable explanation of the use of language in Exhibit A loose enough to make the Company's general revenues liable for the bond, is that the risk of the Company losing the Tanjore revenues, which was a real risk in 1824 had by 1845 become negligible, and it became a matter of indifference to the Company whether the bond was redeemed from the trust fund fed by the Tanjore revenues, or from general revenues, while beyond that Government always had the safeguard that interest was not payable, if the Tanjore revenues were lost while principal was not payable until Government chose to give notice. Had there been any real risk at the time of the issue of the bond of 1845 it is obvious that the full terms of the agreement in Exhibit C would have been strictly set out in Exhibit A, and that a bond professedly issued in pursuance of that agreement would have, if it had been at all necessary, limited the liability of the Company to a charge on the Tanjore revenues as set out in Exhibit C. There is nothing in the wording of Exhibit A, then to indicate that Exhibit C was not being carried out, that the trust fund was not in being, or that there was any fresh agreement at the time of Exhibit A which put an end to that trust. In fact, its wording implies that the trust set out in Exhibit C had been accepted and was being carried out thereby.

My conclusion on this part of the case then is this: there is and ought to be a trust fund in existence for the payment of the amount due under this bond. Government cannot be heard to say, nor is it in fact pleaded, that they have broken that trust or have not maintained the fund. The plaintiff, assuming that he is the real beneficiary under the bond, is entitled to enforce his claim under Exhibit A, as if he were as he is, one of the beneficiaries under this trust, and if there is sufficient money in the fund to discharge what is due on this bond, the money due under it must be paid and payment of it cannot be barred by limitation, since a trustee cannot be allowed to vouch a Statute of Limitaion against a breach of trust, and the present suit is clearly one for the purpose of following, *i. e.*, for recovering for the *cestui que trust*, in the hands of Government trust property vested in it for a purpose specific and specified in this case by the author of the trust. So far as the trust fund will discharge Exhibit A, it must do so, but if, and so far as, the trust fund is insufficient to discharge Exhibit A and, therefore, the obligation to dischage it falls on the ordinary revenues, Exhibit A is enforceable against these general revenues, only as an ordinary contract between a debtor and a creditor. It might, in certain circumstances, therefore, have been necessary to inquire how far the trust fund will suffice to meet Exhibit A but, fortunately, in the present case it is not

necessary, for two reasons, first, Governmen has not pleaded that the trust fund is insufficient to meet Exhibit A and, secondly, I hold in agreement with the learned Chief Justice, that even as an ordinary contract Exhibit A is enforceable in plaintiff's favour.

Turning to the second part of the case *viz.*, whether, apart from any trust, payment under the bond is barred by limitation, I agree with, and have very little to add to, what the learned Chief Justice has said. As to the question of the meaning of the phrase 'on demand' at a particular place, I would note the significance of the general Notification of 1858 filed in this Court, which, after giving the necessary 15 months' notice, announced that, 'on presentation of the notes to the Accountant-General at Fort St. George" a certificate for payment both of principal and interest would be issued. It is clear then that before Government became liable to pay on the notes, whether principal or interest, that is, before any of the debt became due, there was to be a specific demand, accompanied by presentation of the note at the Accountant-General's Office at Fort St. George.

I have nothing to add to what the learned Chief Justice has said regarding what plaintiff has acquired under the assignment deed, Exhibit J, except that I do not think it necessary to consider the scope of Exhibit M, or to decide whether it is co-extensive with Exhibit J or not. Personally, I think it is limited to the sums named in it, but it is not a point of importance at present.

As to the disallowance of Rs. 8,411-5-1, plaintiff clearly has no right to that sum. The assignor believing, no doubt, that under the Notification of 1853, Exhibit F, interest ceased from 30th September 1854 calculated the interest due to him up to that date from 30th October 1846, the date up to which, according to the endorsement of the note, Exhibit A, interest had been paid by Government to Huri Kissen Doss, described in Exhibit A, as the general attorney of Madhu Sahai, the original holder, and Rs. 2,833-15-0½ represents that sum. The plaintiff has shown no reason for us to suppose that sum was not paid to the holder's attorney and the Government books, Exhibit 1 (*a*) show that it was so paid. The plaintiff's assignor claiming from Madhu Sahai and, therefore, the plaintiff himself could have no right to have this sum paid over again; and the plaintiff's assignor evidently was quite aware of this, and, therefore, refrained from assigning that sum over to the plaintiff.

I, therefore, agree in the order proposed by the learned Chief Justice.

V. N. V.

Z. K. *Decree modified.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 4 OF 1923.

March 13, 1923.

Present.—Mr. Dalal, A. J. C.

MATHURA SINGH—DEFENDANT—APPELLANT

versus

SHEO MOHAN PRASAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, rr. 17, 19, 21—Service of summons—Summons affixed to door of defendant's house—Presumption—Temporary absence—Summons sent for service to another Court—Certificate of service.

Where service of summons is effected on a defendant the very first time by affixing a copy of the summons to the door of his house, there can be no presumption that he had notice of the case or of the date fixed for the hearing. [p. 793, col. 1.]

Where a person is merely temporarily absent from his house when the process-server calls it cannot be said that he cannot be found within the meaning of r. 17 of O. V of the Civil Procedure Code. [p. 793, cols. 1 & 2.]

Where a summons is sent for service to a Court under O. V, r. 21 of the Civil Procedure Code, it is the duty of such Court, after proper enquiry, to certify whether service has been sufficient or not. A certificate of the sufficiency of service recorded by the *munsarim* of the Court is neither legal nor of value. [p. 793, col. 1.]

Appeal against an order of the Subordinate Judge, Rae Bareli, dated the 9th December 1922.

Mr. *Risheshar Nath*, for the Appellant.

Mr. *K. F. Misra* holding the brief of Mr. *G. N. Misra*, for the Respondent.

JUDGMENT.— This was an application in the Court of the Subordinate Judge of Rae Bareli under O. IX, r 13 for setting aside a decree passed *ex parte* against the defendant. The application was dismissed on the ground that the defendant had been duly served. From that dismissal the defendant has come here in appeal.

Even if the summons be considered to be duly served, which it was really not, the circumstances of the case are such that the defendant had sufficient cause to prevent him from appearing when the suit was called on for hearing. The summons to him to appear in the Court at Rae Bareli to file the written statement on the 14th of September and to appear at the fixing of issues on the 19th of September, was affixed to the door of his house at a village in the Unao District on 8th September 1922. The report of the process-server shows that the defendant was at the time away at Sultanpur. There is no affidavit that the defendant returned home before the 19th of September. When service is made the very first time by affixing summons to the door of a defendant's house there can be no presumption that he had notice of the case or of the date fixed for hearing. Obviously, the defendant had sufficient cause not to be able to appear in Court on 19th September.

As regards service, I am certainly of opinion that there was no due service. The lower Court has referred to the fact that the service was declared to be sufficient under O. V, r. 19. The summons was sent by the Rae Bareli Court to the Court at Unao for service under O. V, r. 21 and the Court at Unao was bound to act in accordance with the provisions of that rule and of paragraph 115 of the Oudh Civil Digest. It was incumbent on the Court itself, after proper enquiry, to certify whether service was sufficient or not. The Unao Court failed to do so and the certificate is signed by the *munsarim*. The presiding officer of the Court at Unao did not bring his mind to bear on the facts of the case and the certificate of sufficiency recorded by the *munsarim* is neither legal nor of value.

Under r. 17 of O. V a serving officer is directed to affix a copy of the summons on the outer door of the house of the person who is to be served where he cannot find that person and there is no agent empowered to accept the service of the summons on his behalf, nor any other person on whom service can be made. It is explained in r. 155 of the Oudh Civil Digest that if a person is merely temporarily absent from his house, when the process-server calls, it is not correct to say that he cannot be found. In the present case the defendant's absence was temporary; the process-server has stated in his statement that the family of the defendant was in the house and only the time of the return of the defendant was unknown. It was not as if the defendant had deserted his house and the process-server found a vacant house or a house in ruins, nor was the process-server told that the defendant had left the village for good. If the presiding officer of the Unao Court had himself carried out the duties entrusted to him it is certain that the service would have been certified to be insufficient.

For these reasons I set aside the order of the lower Court and the *ex parte* decree, and direct the restoration of the suit to its original number and its trial according to law. Costs here shall be costs in the suit.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 100 OF 1920.

August 21, 1922.

Present :—Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

ANANDA CHANDRA CHAKRAVARTI —PLAINTIFF—APPELLANT

versus

BROJA LAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Dedication, ceremony of, effect of—Adverse possession—Idol—Site, acquisition of—Temple, erection of—Consent of Mohnut—*Revocation by*

ANANDA CHANDRA CHAKRAVARTI v. BROJA LAL SINGH.

successor—Idol, founding of—Shebaitship, *vesting of—Rule, application of—Foundation, public or private—Principles applicable—Endowment, founder of—Trust—Devolution*—Shebait *and* pujari, *distinction between—Pleadings and proof—Variation.*

Dedication vests property in an idol, only when the founder has title. The ceremony divests the proprietorship of the temple from the builder and vests it in the image, which by process of vivification, acquires existence as a juridical personage. [p. 707, col. 2.]

Where a temple has been in existence for over twelve years on a site which was taken possession of by force by a person who erected the temple thereon and dedicated it to an idol, the idol acquires an indefeasible title to the site by adverse possession. [p. 798, col. 1.]

Damodar Das v. *Lakhan Das*, 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 624; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.), *Khaw Sim Tek* v. *Chuah Hoot Gnoh Neoh*, (1922) 1 A. C. 120; 126 L. T. 203; 91 L. J. P. C. 36, *Balwant Rao* v. *Puran Mal*, 10 I. A. 90; 6 A. 1; 13 C. L. R. 39; 4 Sar. P. C. J. 435; 3 Ind. Dec. (N. S.) 352 (P. C.). *Ram Parkash* v. *Anand Das*, 33 Ind. Cas. 583; 43 I. A. 73; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 43 C. 707; 20 M. L. T. 267 (P. C.), *Vidya Varuthi Thirtha* v. *Balusami Aiyar*, 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 620; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), referred to.

Where a temple is erected and an idol is installed in it with the concurrence, tacit or express, of the *mohunt* of a neighbouring temple his successor is not competent to revoke the arrangement thus effected. [p. 798, col. 1.]

If a number of persons provide the original endowment they may apparently together constitute the founder. But persons, who subsequent to the foundation furnish additional contributions do not thereby become joint founders: their benefaction is regarded as nothing beyond an accretion to an existing foundation. [p. 799, col. 2 p. 800, col. 1.]

Jagadindra Nath Roy v. *Hemanta Kumari Debi*, 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.), *Mohan Lalji* v. *Gordhanlalji*, 19 Ind. Cas. 337; 40 I. A. 97; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27 (P. C.), *Ramanathan Chetty* v. *Murugappa Chetty*, 33 I. A. 139; 29 M. 283; 8 Bom. L. R. 498; 16 M. L. J. 265; 10 C. W. N. 825; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189 (P. C.), *Sital Das Babaji* v. *Pertap Chunder Sarma*, 3 Ind. Cas. 408; 11 C. L. J. 2, *Raj Krishna Dey* v. *Bepin Behary Dey*, 17 Ind. Cas. 162; 17 C. W. N. 591; 40 C. 245; 16 C. L. J. 194, *Sheo Prasad* v. *Aya Ram*, 29 A. 663; A. W. N. (1907) 210; 4 A. L. J. 565, *Kunjamani Dasi* v *Nikunja Behary Das*, 32 Ind. Cas. 823; 22 C. L. J. 404; 20 C. W. N. 314, *Baldeo Das* v. *Gobind Das*, 23 Ind. Cas. 18; 36 A. 161; 12 A. L. J. 179, *Venkata* v. *Narain*, (1854) Mad. S. D. A. 101, referred to.

The rule that the parties should be kept to their pleadings is not of universal application, and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose: first, to apprise the defendant distinctly and specifically of the case he is called upon to answer and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. The test thus is whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence, or, as has sometimes been said, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. [p. 798, col. 2.]

Sital Das Babaji v. *Pertap Chunder Sarma*, 3 Ind. Cas. 408; 11 C. L. J. 2, *Jalim Singh Sri Mal* v. *Choonee Lal Jahurry*, 11 Ind. Cas. 540; 15 C. W. N. 882, *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal*. 16 Ind. Cas. 741; 18 C. W. N. 473, *Hira Lal* v. *Giribala Debi*, 34 Ind. Cas. 444; 23 C. L. J. 429, *Ishan Chandra Dhupi* v. *Nishi Chandra Dhupi*, 41 Ind. Cas. 387; 29 C. L. J. 1; 22 C. W. N. 853, *Satish Kanta Roy* v. *Satis Chandra Chatterjee*, 55 Ind. Cas. 689; 30 C. L. J. 475; 24 C. W. N. 662, *Nepen Bala Debi* v. *Siti Kanta Banerjee*, 8 Ind. Cas. 41; 12 C. L. J. 459; 15 C. W. N. 158, *Ram Kissen Joydoyal* v. *Pooran Mull*, 56 Ind. Cas. 571; 31 C. L. J. 259; 47 C. 733, relied on.

Although a plaintiff must ordinarily adhere to the claim as brought, the Court will depart from strict enforcement of this rule where it is satisfied that justice will not be done between the parties if the suit were dismissed on a technical ground, with the prospect of further litigation for the determination of a controversy then substantially ripe for settlement. [p. 799, col. 1.]

Umar Abdul Rahiman v. *Gustadji*, 34 Ind. Cas. 268; 20 C. W. N. 297; 3 L. W. 308; (1916) 1 M. W. N. 137; 30 M. L. J. 444 (P. C.), *Motabhoy* v. *Mulji*, 29 Ind. Cas. 223; 42 I. A. 103; 39 B. 399; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 12 L. W. 524; (1915) M. W. N. 522 (P. C.), *Basant Singh* v. *Mahabir Pershad*, 19 Ind. Cas. 340; 40 I. A. 86; 35 A. 273; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301 (P. C.), *Fateh Chand* v. *Kishen Kunwar*, 16 Ind. Cas. 67; 39 I. A. 247; 34 A. 579; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 17 C. L. J. 1 (P. C.), *Skinner* v. *Naunthal Singh*, 19 Ind. Cas. 267; 40 I. A. 105; 35 A. 211; (1913) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 25 M. L. J. 111 (P. C.), relied on.

ANANDA CHANDRA CHAKRAVARTI *v.* BROJA LAL SINGH.

When worship of an idol has been founded the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise, or there has been some usage or course of dealing which points to a different mode of devolution. [p. 799, col. 1.]

It is not always easy to determine who are the founders. One person may provide the site of the temple, another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol. Where the owner of the site relinquishes his right in the land, he may not be a founder, unless he indicates at the time, expressly or impliedly, that he will associate himself with the others in carrying out the object of the foundation. *Prima facie*, all the persons who establish the worship are entitled to take part in the management. [p. 799, col. 2.]

Whether a foundation be public or private, the threefold principle is applicable, namely, (*i*) the devolution of the trust, upon the death or default of each trustee, depends upon the terms on which it was created, or the usage of the particular institution where no express rust deed exists; (*ii*) the worship of the idol is vested in the founder and his heirs, in default of evidence to show that he has disposed of it otherwise, and (*iii*) where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment the management reverts to the founder and his representatives even though the endowment has assumed a public character. [p. 80[illegible], col. 2.]

A *pujari* or *archak* is not the *shebait*; he is appointed by the *shebait* as the *prohit* to conduct the worships but that does not transfer the rights and obligations of the *shebait* to the *prohit* and he is not entitled as a matter of right to be continued in his office as *pujari*. [p. 801, col. 1.]

Nafar Chandra Chatterjee v. *Kailash Chandra Mondal*, 62 Ind. Cas. 510; 25 C. W. N. 201, *Nanabhai* v. *Trimbak*, (1878) P. J. 195, *Narayan* v. *Ranga*, 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.) 477, *Jagannatha Chariar* v. *Seenu Bhattachariar*, 51 Ind. Cas. 869; 42 M. 618; 36 M. L. J. 361; (1919) M. W. N. 240 and *Seshadri Aiyangar* v. *Ranga Bhattar*, 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 580; 10 M. L. T. 14, relied on.

Appeal against a decree of the Subordinate Judge, First Court, Dacca, dated the 17th February 1920.

Babu *Sarat Chandra Rai Chaudhuri* (with him Babu *Nilkantha Ghose*), for the Appellant:—The plaintiff is the appellant. The appeal arises out of a suit for establishment and enforcement of the plaintiff's right in respect of a temple. The facts of the case are shortly these. About the year 1897 plaintiff began the construction of the Anandamoyi temple and in 1900 installed and consecrated therein the images of Siva and Durga whom he named as Rudranath and Mahamaya after his father and mother. The land whereon the temple was built was verbally gifted away in my favour by late Iswar Chandra Ghosh. In 1901 I constructed a raised pavement for facilitating the *pradakshin* ceremony of the worshippers. In 1902 I acquired further lands adjoining to the temple and dedicated it to the idols. My case is that from the very beginning till 1914 I was in free enjoyment of the temple. In 1914 the defendant No. 1 obstructed me during the Durga Puja. But I restrained him by procuring an order under section 144 of the Code of Criminal Procedure. But, subsequently, they obtained an order in their favour under section 145 of the Code of Criminal Procedure. Hence the present suit. The Court below has dismissed my suit holding that the temple is a public temple and that I have no more rights thereto than an ordinary member of the public. The contesting defendant claims to be the *mohant* of the Bura Siva temple. His defence is that the land on which the temple stands belongs to the Bura Siva temple and that Iswar Chandra Ghosh was never its owner and hence I could acquire no rights to the temple. The evidence on the record amply bears out my allegations and as a matter of fact the learned Subordinate Judge also finds that the temple was built by me and the idols were established by me. He, however, disbelieves that the land was given me by Iswar Chandra Ghosh. Assuming that is true, the learned Judge ought to have held that the idols having been established for over 12 years they have acquired right by adverse possession. Refers to *Damodar Das* v. *Lakhan Das* (1), *Khaw Sim Tek* v. *Chuah Hool Groh Neoh* (2). The contesting defendant is an impostor. He was a mere boy when the temple was built. He cannot claim to be a *mohant* of the temple inasmuch as he has acquired no religious merit and qualifications whatever. There

(1) 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 88[illegible]; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 624; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.).

(2) (1922) 1 A. C. 120; 12[illegible]; 91 L. J. P. C. 36.

is no evidence to show that the *shebaitship* of my temple vested in the *Mohant* of Bura Siva temple or that their priest conducted the worship at my temple. The *mohants* are *saivas*. They do not worship Durga. These facts clearly prove that the *shebaitship* vested in me. The mere fact that some of my friends contributed some structures on the land does not make the temple a public one. See *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (3). I submit the learned Judge clearly erred in dismissing my suit. The evidence and the facts stated fully prove my rights.

Babu *Kali Kinkar Chakravarty*, for the Respondents.—My submission is that the plaintiff has failed to make out his title to the land. He has failed to prove the gift of Iswar Chandra Ghosh. It has been proved that Iswar Chandra Ghosh had no title whatever to the lands, which are surrounded on all sides by the lands of the Bura Siva temple. The dedication vests the property in the idol only when the founder has title. Here the plaintiff had no title whatever. The finding of the Court below that it is a public temple is quite correct and is supported by evidence on the record. The idols are worshipped by the general public. Further, it is in evidence that the *pujari* of the Bura Siva temple used to worship the idols. That shows also the public nature of the temple. The learned Subordinate Judge minutely went into the evidence and found that the temple was public. I submit he is quite justified in his finding and correct in holding that the plaintiff has no special rights in the temple.

Babu *Sarat Chandra Rai Chaudhuri*, replied in brief.

JUDGMENT.

Mookerjee, J.—The subject-matter of the litigation which has culminated in this appeal is a parcel of land in the town of Dacca, a temple erected thereon, two idols installed therein, together with ornaments and other articles appurtenant thereto. The first plaintiff is Ananda Chandra Chakravarti, a member of the legal profession, practising at Dacca, and he has commenced this litigation, on his own behalf and also as *shebait* of the two idols, Rudra Nath and Mahamaya, (images of god Siva and goddess Durga respectively) who are joined as co-plaintiffs. The first defendant, Brajananda Saraswati claims to be the *mohant* of the Bura Siva temple and Asthan, an ancient religious foundation situated in the town of Dacca in the immediate neighbourhood of the disputed temple. The second defendant Ruda Tridandi Trituralinga Swami is alleged by the plaintiff to be the real *mohunt* of the Bura Siva temple, who resides at Swamibag in the town of Dacca. The third and fourth defendants are representatives of the estate of the late Iswar Chandra Ghosh, sometime Government Pleader at Dacca. The fifth defendant, Birendra Chandra Chaudhuri, is said to be a priest acting under the direction of the first defendant. The case for the plaintiff is that the disputed temple, known as the Anandamayi temple, was erected by him on land obtained by way of gift from Iswar Chandra Ghosh, that the idols were established by him, and that he peacefully exercised his rights as founder-*shebait* till the time of the Durga Puja of 1914 when the first defendant raised a dispute and obstructed him. He was, however, able to perform the *puja*, as an order under section 144 of the Criminal Procedure Code was made by the authority. But proceedings were instituted shortly afterwards under section 145 of the Criminal Procedure Code, which resulted in an order made on the 2nd March 1915, in favour of the first defendant. The plaintiff accordingly instituted the present suit on the 18th September 1916 to establish and enforce his rights in respect of the Anandamayi temple and the idols Rudra Nath and Mahamaya. The first defendant alone contested the claim; the second defendant, so far as can be gathered from the record, lent his support to the plaintiff. The contesting defendant urged that the site of the temple was land comprised within the ambit of the Bura Siva temple and Asthan and was at no

(3) 17 C. 3; 16 I. A. 137; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).

time the property of Iswar Chandra Ghose, the donor of the plaintiff. He further alleged that the plaintiff had no right in respect of the disputed temple and the idols installed therein, except such as is possessed by every member of the public. The Subordinate Judge has come to the conclusion that the site of the temple did not belong to Iswar Chandra Ghose, but was comprised in the Bura Siva temple and Asthan. He has also disbelieved the story of verbal gift by Iswar Chandra Ghose in favour of the plaintiff. He has found, however, that the Anandamayi temple was in fact erected by the plaintiff and that the idols were established by him. But in the opinion of the Subordinate Judge, this does not confer on the plaintiff any special rights distinct from those enjoyed by the members of the public in general. In this view, the Subordinate Judge has dismissed the suit. This is the decision assailed in the present appeal.

As regards the original title to the site whereon the Anandamayi temple stands, we have scrutinised the entire evidence which has been minutely discussed before us. On this part of the case, we are not prepared to dissent from the conclusion of the Subordinate Judge which is based on an accurate and exhaustive review of the evidence. The conveyances relied upon by the plaintiff contain boundaries which cannot be identified with precision, and these documents do not prove that the disputed land was owned by the predecessors-in-interest of Iswar Chandra Ghose. We cannot further overlook that there are difficulties in connection with the alleged gift by Iswar Chandra Ghose in favour of the plaintiff, which have not been satisfactorily removed. Even if it be assumed that the disputed land is covered by the conveyances, Iswar Chandra Ghose never acquired title to the entire property, whatever interest he acquired did not, so far as can be made out, exceed 17-24ths share. It is difficult to believe that the plaintiff, admittedly an orthodox Hindu, should have erected a temple on a site the title whereof was in part at least involved in uncertainty. It is well settled that dedication vests the property in the idol, only when the founder has title. The ceremony divests the proprietorship of the temple from the builder and vests it in the image which by process of vivification has acquired existence as a juridical personage; for, as Vijnaneswara puts it, gift consists in the relinquishment of one's own right and the creation of the right of another. This is feasible only when the dedicator has himself title. Apart from this, the Subordinate Judge has rightly emphasised that a person in the position of the plaintiff was not likely to accept a gift without a deed or to erect a temple on land obtained by way of gift. On the other hand, we have the undoubted fact that the lands towards the west as also towards the east of the disputed temple site, belong to the Bura Siva temple and Asthan. This, again, renders it highly improbable that the intermediate parcel should have been the property of private individuals. We must, consequently, accept the finding of the Subordinate Judge that the site of the Anandamayi temple forms part of the Bura Siva temple and Asthan. We have next to consider how and when the Anandamayi temple was erected and the idols installed therein.

The evidence, which has been accepted by the Subordinate Judge, establishes beyond dispute that in or about the year 1897 the plaintiff cleared the disputed site and commenced the construction of what is now known as the Anandamayi temple. The images of Siva and Durga were installed and consecrated by the plaintiff on the 1st May 1900 and were named Rudra Nath and Mahamaya after his father and mother, respectively. In the year following, the plaintiff constructed a raised pavement towards the north of the temple so that the ceremony known as *pradakshin* (circumambulation), might be conveniently performed by the worshippers. In 1902 the plaintiff acquired a strip of land towards the south and dedicated the same to the idols established by him. The evidence makes it abundantly clear that from 1900 to 1914 the plaintiff had free access to the temple and regularly took part in the worship. There is also evidence

to show that other structures were erected by friends of the plaintiff, for instance, the gate rooms were constructed by Krishna Kishore Basak, while the front corridor was built at the cost of Iswar Chandra Ghose. We have thus the cardinal fact that on land comprised within the Asthan of Bura Siva, the plaintiff has erected a temple, wherein he has installed and consecrated two idols and has had, for a period of more than fourteen years, free access and opportunity for regular participation in the worship. This could have happened in either of two ways. The plaintiff may have by force obtained possession of the land and erected the temple thereon; or the plaintiff may have erected the temple with the concurrence, tacit or express, of the *Mohunt* of Bura Siva temple and Asthan for the time being. In either view, the first defendant—if he be assumed to be the present *mohunt*—is not competent to treat the plaintiff as a trespasser and to exclude him from the Anandamayi temple.- If the first alternative be adopted, as the temple has been in existence for over twelve years, the idols to whom it is dedicated have acquired an indefeasible title to the site by adverse possesesion, *Balwant Rao* v. *Puran Mal* (4), *Ram Parkash* v. *Anand Das* (5), *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (6), *Khaw Sim Tek* v. *Chuah Hoori Gnoh Neoh* (2), *Damodar Das* v. *Lakhan Das* (1). If the second alternative, which seems the more probable, be adopted the present *mohunt* is not competent to revoke the arrangement sanctioned by his predecessor, which resulted in the erection of the temple and the installation of the idols. It is thus plain that even if the conclusion of the Subordinate Judge that the disputed site formed part of the Bura Siva Asthan be affirmed, it does not necessarily follow that the plaintiff has no rights on the facts admitted and proved.

It may be conceded that, as a general rule, the parties should be kept to their pleadings, but, as has been repeatedly pointed out, this is not of universal application, and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose, first to apprise the defendant distinctly and specifically of the case he is called upon to answer; and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. The test thus, is, whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence or, as has sometimes been said, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action; *Sital Das Babaji* v. *Pertap Chunder Sarma* (7), *Jalim Singh Sri Mal* v. *Choonee Lal Jahurry* (8), *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal* (9), *Hira Lal* v. *Giribala* (10), *Ishan Chandra Dhupi* v. *Nishi Chandra Dhupi* (11), *Satish Kantha Roy* v. *Satis Chandra Chatterjee* (12), *Nepen Bala Debi* v. *Siti Kanta Banerjee* (13), *Ram Kissen Joydoyal* v. *Pooran Mull* (14). It is on this ground that Viscount Haldane emphasised in *Umar Abdul Rahiman* v. *Gustadji* (15) that the principle of variance between pleading and proof should not be applied in an abstract way; the whole of the circumstances must be taken into account and carefully scruitinised, as the

(4) 10 I. A. 90; 6 A 1; 13 C. L. R. 39; 4 Sar. P.C J. 435; 3 Ind. Dec. (N. S.) 352 (P. C.).

(5) 33 Ind. Cas. 583; 43 I. A. 73; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 43 C. 107; 20 M. L. T. 267 (P. C.).

(6) 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

(7) 3. Ind. Cas. 408; 11 C. L. J. 2.

(8) 11 Ind. Cas. 540; 15 C. W. N. 882.

(9) 16 Ind. Cas. 741; 18 C. W. N. 473.

(10) 34 Ind. Cas. 444; 23 C. L. J. 429.

(11) 41 Ind. Cas. 378; 29 C. L. J. 1; 22 C. W. N. 853.

(12) 55 Ind. Cas. 689; 30 C. L. J. 475; 24 C. W. N. 662.

(13) 8 Ind. Cas. 41; 12 C. L. J. 459; 15 C. W. N. 158.

(14) 56 Ind. Cas. 571; 31 C. L. J. 259; 47 C. 733.

(15) 34 Ind. Cas. 268; 20 C. W. N. 297; 3 L. W 308 (1916) 1 M.W.N. 137; 30 M. L. J. 444 (P. C.)

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

question is, in ultimate analysis, one of circumstances and not of law. To the same effect is the decision of the Judicial Committee in *Motabhoy* v. *Mulji*(16) where Lord Dunedin said that, as evidence had been fully taken on a plea arising in the case, it was not proper for the Court to decide against a party on a strict construction of the pleadings without considering such evidence, specially when such a technical view might have been obviated by an amendment of the pleadings. Similarly, in *Basant Singh* v. *Mahabir Pershad* (17), Lord Atkinson observed that, where a defect in title was apparent on the face of the documents the Judicial Committee would decide the case accordingly, even though the point had not been clearly raised in the Courts below. Reference may, in this connection, be made to the decisions of the Judicial Committee in *Fateh Chand* v. *Kishen Kunwar* (18) and *Skinner* v. *Naunihal Singh* (19). These cases show that, although the plaintiff must ordinarily adhere to the claim as brought, the Court will depart from strict enforcement of this rule where it is satisfied that justice will not be done between the parties, if the suit were dismissed on a technical ground, with the prospect of further litigation for the determination of a controversy then substantially ripe for settlement.

Now it is well settled that when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise, or there has been some usage or course of dealing which points to a different mode of devolution; *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (3); *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (20), *Mohan Lalji* v. *Gordhanlalji* (21); *Ramanathan Chetty* v. *Murugappa Chetty* (22), *Sital Das Babaji* v. *Pertap Chunder Sarma* (7), *Raj Krishna Dey* v. *Bepin Behary Dey*(23) *Sheo Prasad* v. *Aya Ram* (24); *Kunjamani Dasi* v. *Nikunja Behary Das* (25), *Baldeo Das* v. *Gobind Das* (26). In the application of this rule, it may not be always easy to determine who are the founders, one person may provide the site of the temple, another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol. Where the owner of the site relinquishes his right in the land, he may not be a founder, unless he indicates, at the time, expressly or impliedly, that he will associate himself with the others in carrying out the object of the foundation; *Venkata* v. *Narain* (27). *Prima facie*, all the persons who establish the worship are entitled to take part in the management. In England, it has been ruled that the person providing the original endowment is the founder rather than the person who performs the act of incorporation, which involves a distinction between the *foundatio incipiens* and the *foundatio percipiens*; *Sutton's Hospital Case* (28), *Anon.* (29). Shelford on Mortmain, page 27. If a number of persons provide the original endowment, they may apparently

(16) 29 Ind. Cas. 223; 42 I. A. 103; 39 B. 399; 17 M. L. T. 402; 28 M. L. J. 589, 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522 (P. C.).

(17) 19 Ind. Cas. 340; 40 I. A. 86; 35 A. 273; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301 (P. C.).

(18) 16 Ind. Cas. 67; 39 I. A. 247; 34 A. 579; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 17 C. L. J. 1 (P. C.).

(19) 19 Ind. Cas. 267; 40 I. A. 105; 35 A. 211; (1923) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 25 M. L. J. 111 (P. C.).

(20) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(21) 19 Ind. Cas. 337; 40 I. A. 97; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27 (P. C.).

(22) 33 I. A. 139; 29 M. 283; 8 Bom. L. R. 498; 16 M. L. J. 265; 10 C. W. N. 825; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189 (P. C.).

(23) 17 Ind. Cas. 162; 17 C. W. N. 591; 40 C. 245; 16 C. L. J. 194.

(24) 29 A. 663; A. W. N. (1907) 210; 4 A. L. J. 565.

(25) 32 Ind. Cas. 823; 22 C. L. J. 404; 20 C. W. N. 314.

(26) 23 Ind. Cas. 18; 36 A. 161; 12 A. L. J. 179.

(27) (1854) Mad. S. D. A. 100.

(28) (1613) 10 Coke 23a; 77 E. R. 960.

(29) (1699) 12 Mod. 233; 88 E. R. 1284.

together constitute the founder: *In the matter of the St. Leonard Shoreditch, Parochial Schools*, (30). But persons who, subsequent to the foundation, furnish additional contributions do not thereby become joint founders; their benefaction is regarded as nothing beyond an accretion to an existing foundation, *Appasami* v. *Nagappa* (31), *Annasami Pillai* v. *Ramakrishna Mudaliar* (32), *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (3). In the case before us, there is no room for controversy that the plaintiff is, if not the sole founder, at least one of the founders. As stated by Lord Mansfield in *St. John's College* v. *Todington* (33), a charitable foundation, in so far as it is charitable, is the creature of the founder, and on this view Lord Harwicke had ruled in *Green* v. *Rutherforth* (34) that the founder may provide for the government and administration of his creature, see also the decision of the King's Bench in *Phillips* v. *Bury* (35), which was ultimately taken up to the House of Lords; *Phillips* v. *Bury* (36) and contains an elaborate review of the rights of founders of charitable and religious trusts. The plaintiff is, consequently, *shebait* of the idols installed by him in the temple erected by means of his contribution for the worship and service. The Subordinate Judge has assumed in his judgment that the Anandamayi temple, founded by the plaintiff, is a public temple, and from this he has inferred that the plaintiff cannot be the *shebait*. He has overlooked, however, that there is weighty authority in support of the position that the *shebaitship* is vested in the founder and his heirs unless he has disposed of it otherwise, equal in the case of private and public endowments. No distinction between the two classes of cases, has been drawn in this respect in the judicial decisions. Thus, in *Sheoratan Kunwari* v. *Ram Pargash* (37), *Sital Das Babaji* v. *Pertap Chunder Sarma* (7), *Raj Krishna Dey* v. *Bipin Bihari Dey* (38) and *Hori Dasi Dabi* v. *Secretary of State for India in Council* (39), the contention was expressly overruled that the principle enunciated in *Bansi Kunwar* v. *Chattar Dhari Singh* (40) and approved by the Judicial Committee in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (3), is confined to private foundations and does not extend to public trusts. The same view has been recently adopted by a Full Bench of the Madras High Court in *Gauranga Sahu* v. *Sudevi Mata* (41), see however, *Sethuramaswamiar* v. *Meruswamiar* (42). Consequently, whether a foundation be public or private, the three-fold principle is applicable, namely, (*i*) the devolution of the trust, upon the death or default of each trustee, depends upon the terms on which it was created, or the usage of the particular institution where no express trust deed exists; (*ii*) the worship of the idol is vested in the founder and his heirs, in default of evidence to show that he has disposed of it otherwise, and (*iii*) where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the founder and his representatives, even though the endowment has assumed a public character. It is thus unnecessary to decide for the pruposes of this case whether the Anandamayi temple is or is not a public foundation. If and when the question arises, the indicia of a public foundation, as enunciated in *Thackersey Dewraj* v. *Hurbhum Nursey* (43); *Chintaman Bajaji Dev* v. *Dhondo Ganesh* (44),

(30) (1884) 10 A. C. 304; 56 L. J. P. C. 30; 51 L. T 305; 33 W. R. 756
(31) 7 M. 499; 2 Ind. Dec. (N. S.) 931.
(32) 24 M. 219; 11 M. L. J. 1.
(33) (1757) 1 Bur. 158 at p. 200; 97 E. R. 245.
(34) (1750) 1 Ves. Sen. 462 at pp. 468, 472; 27 E. R. 1144.
(35) (1690) 1 Ld. Raym. 5; 91 E. R. 900; Comb. 265; Holt 715; 4 Mod. 106; Skin. 447; Carth. 180; 1 Shower 360; 2 T. R. 346; 100 E. R. 186.
(36) (1694) Shower P. C. 351 1 E. R. 24.
(37) 18 A. 227; A. W. N. (1896) 37; 8 Ind. Dec. (N. S.) 858.
(38) 18 Ind. Cas. 961; 40 C. 251; 17 C.L. J. 189.
(39) 5 C. 228; 5 Ind. Jur. 30; 4 C. L.R. 77; 2 Ind. Dec. (N. S.) 756.
(40) 5 B. L. R. 181; 13 W. R. 396.
(41) 41 Ind. Cas. 589; 40 M. 612; 32 M.L.J. 597; (1917) M. W. N. 429 (F. B.).
(42) 43 Ind. Cas. 806; 45 I. A. 1; 41 M. 296; 7 L. W. 22; 4 P. L. W. 91; 34 M. L. J. 130; 16 A. L. J. 113; 27 C. L. J. 231; 22 C. W. N. 457; 20 Bom. L. R. 514 (P. C.).
(43) 8 B. 432; 4 Ind. Dec. (N. S.) 664.
(44) 15 B. 612; 8 Ind. Dec. (N. S.) 413.

Shri Dhundiraj Ganesh Dev v. *Ganesh* (45), *Raghubar Dial* v. *Kesho Ramanuj Das* (46), *Peesapati Sitaramanujachari* v. *Kanduri Vellamma* (47), *Muthiah Chetty* v. *Periannan Chetti* (48), *Subramania Aiyar* v. *Venkatachala Vadhyar* (49), *Subramania Aiyar* v. *Lakshmana Goundan* (50) must be carefully considered, and the existence or otherwise of obvious tests, such as user by the public, worship by the public and offerings by the public, must be investigated. It is sufficient to observe here that the fact that the site of the Anandamayi temple formed part of the land of the Bura Siva temple and Asthan, does not make it a public foundation. Much less does it justify the inference that the *mohant* of the Bura Siva temple became, by operation of law, the *shebait* of the new temple. There is also no room for the application of the principle, sometimes applied, when one *mutt* is an offshoot of a parent *mutt* and stands in the relation of a subordinate institution to a superior foundation; *Kashi Bashi Ramalinga Swamee* v. *Chitumber Nath Koomar* (51), *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (52), *Kailasam Pillay* v. *Nataraja Tambiran* (53), *Vithalbowa* v. *Narayan Daji* (54), *Mohunt Muhadeo* v. *Raj Bullubh* (55), *Prayad Das* v. *Mohunth Kriparam* (56) and *Gossain Dowlut Geer* v. *Bissessur Geer* (57). There is, further, no evidence in the case before us that the *shebaitship* of Rudra Nath and Mahamaya was expressly vested by the founder in the *mohunt* of the Bura Siva temple and his successors from generation to generation. Nor can the inference of such appointment, by implication, be drawn from the circumstance that the worship at the Bura Siva temple as also that at the Anandamayi temple was conducted by the same *pujari* or priest, namely, by Ramji Bhutananda, Sankarananda and Ram Nath successively; they all received, as the evidence indicates, extra perquisites for their services as *pujari* in the Anandamayi temple. This, indeed, might be expected to happen in the normal course of events; the *pujari* who carried on the worship in the Bura Siva temple would naturally be found the most convenient man to employ for the purpose of the worship in the Anandamayi temple and this arrangement might well continue till a dispute broke out as it did, when the fifth defendant Birendra Chandra was brought in by the first defendant as priest. It must not further be overlooked that the *pujari* or *archak* is not the *shebait*; he is appointed by the *shebait*, as the *purohit* to conduct the worship but that does not transfer the rights and obligations of the *shebait* to the *purohit*; *Maharanee Indurjeet Kooer* v. *Chundemun Misser* (58), *Nafar Chandra Chatterjee* v. *Kailash Chandra Mondal* (59); and he is not entitled to be continued as a matter of right in his office as *pujari*, *Nanabhai* v. *Trimbak* (60), *Narayana* v. *Ranga* (61), *Jaganna ha Chariar* v. *Seenu Bhattachariar* (62); *Seshadri Aiyangar* v. *Ranga Bhattar* (63). We may finally point out that, as in this case the first defendant claims to belong to the Dasnami Sampraday, it is difficult to appreciate, how he could become the *shebait* of a temple dedicated to Durga; Dasnami Mutts founded by the ten disciples of the four most favourite pupils of Sankara are Saiva Mutts. We need not, however, pursue

(45) 18 B. 721; 9 Ind. Dec. (N. S.) 990.
(46) 11 A. 18; A. W. N. (1888) 276; 13 Ind. Jur. 148; 6 Ind. Dec. (N. S.) 439.
(47) 30 Ind. Cas. 822; 18 M. L. T. 543; 2 L. W. 858; (1915) M. W. N. 842.
(48) 34 Ind. Cas. 551; 4 L. W. 228;
(49) 37 Ind. Cas. 688; 4 L. W. 444; (1916) 2 M. W. N. 351.
(50) 54 Ind. Cas. 177; 27 M. L. T. 11; (1919) M. W. N. 899.
(51) 20 W. R. 217; 2 Suth P. C. J. 886 (P. C.)
(52) 10 M. 375; 3 Ind. Dec. (N. S.) 1015.
(53) 5 Ind. Cas. 4; 33 M. 265; 7 M. L. T. 1; 19 M. L. J. 778.
(54) 18 B. 507; 9 Ind. Dec. (N. S.) 847.
(55) (1846) Beng S. D. A. 376; 9 Ind. Dec. (O. S.) 225.
(56) 8 C. L. J. 499.
(57) 19 W. R. 215.
(58) 16 W. R. 99.
(59) 62 Ind Cas. 510; 25 C. W. N. 201;
(60) (1878) P. J. 195.
(61) 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.) 477.
(62) 51 Ind Cas. 869; 42 M. 618; 36 M. L. J. 361; (1919) M. W. N. 240.
(63) 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 930; 10 M. L. T. 14.

this aspect of the case further. The Anandamayi temple, as we have seen, was erected during the years 1897-1900. The first defendant was admittedly not the *mohant* at the time. The evidence shows that on the 5th July 1901 he took admission into a secondary school and was described as a boy whose age was given as nine years, but who appeared to the Head Master to be eleven years old. His caste was given as Kshetriya, a son of Tripuran Nanda Giri, who, as we know, had died two years previously. He was represented as living under the guardianship of Tridandi Tripurlinga Swami, the second defendant in this litigation. It is manifest that when the Anandamayi temple was constructed by the plaintiff, the first defendant was of such immature age that he could not be expected to possess a personal knowledge of the relevant events of that period. His father died in 1899 before the temple was completed, and the second defendant, whom he has since repudiated, acted at the time as his protector. The evidence does not furnish a convincing account of his subsequent history, much less does it show how he developed into a *mohant*. This much is plain that the second defendant is reluctant to acknowledge him, while the plaintiff does not hesitate to treat him as an imposter, who has never attained the strict path of sanctity. On this state of the record, we need not investigate here his precise relation to the Bura Siva temple and Asthan, especially as there is a dispute on that very subject between him and the second defendant. To determine what relief should be granted to the plaintiff, it is sufficient to hold that the following positions are established on the evidence :—

(*i*) that the plaintiff has no personal right in the Anandamayi temple and is not entitled to maintain this suit in his personal capacity;

(*ii*) that the plaintiff is founder of the Anandamayi temple and has installed and consecrated the idols Rudra Nath and Mahamaya to whom the temple has been dedicated;

(*iii*) that the plaintiff is *shebait* of the two idols and is entitled to maintain this suit only in his character as *shebait*;

(*iv*) that as such *shebait* the plaintiff is entitled to free access to the temple for purposes of the daily and periodical worship;

(*v*) that, for the above purpose, the Anandamayi temple will be taken to comprise the block of three rooms and verandah together with the payment towards the east and north as shown in Exhibit 1 (map produced by defendant No. 1 on 5th February 1920 and admitted in evidence) as also the land covered by the deed of gift executed by the plaintiffs on the 20th February 1902;

(*vi*) that as *shebait*, the plaintiff is entitled to have the worship of the idols Rudra Nath and Mahamaya conducted by the *pujari* or *archak* and to use for that purpose the moveables which belong to the idols, and

(*vii*) that the contesting defendant is not entitled to interfere with the plaintiff in the discharge of his duties as *shebait*.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge set aside. A decree will be made in favour of the plaintiff containing the six declarations mentioned above and granting him an injunction to restrain the first defendant from interfering with him in the discharge of his duties as *shebait* in terms of the declaration. If any dispute arises as to the access to the Anandamayi temple, the Subordinate Judge will decide the matter in execution and give such directions as may be necessary to carry out the terms of this decree. Each party will pay his own costs both here and in the Court below.

B. N. & Z. K. *Appeal partly allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 11 OF 1923.

March 15, 1923.

Present:— Mr. Dalal A. J. C.

Musammat HUSAINI—OBJECTOR—APPELLANT

versus

MUHAMMAD ZAMIR ABEDI AND OTHERS—PURCHASERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 59,

HUSAINI v. MUHAMMAD ZAMIR ABEDI.

68—*Sale of insolvent's property—Application to Court—Procedure—Gift, deed of, executed by insolvent shortly before application for insolvency—Presumption.*

The provisions of the Code of Civil Procedure do not apply to a sale of an insolvent's property by the Receiver under section 59 of the Provincial Insolvency Act

Mool Chand v. *Murari Lal*, 21 Ind. Cas. 702; 36 A. 8; 11 A.L. J. 979, relied on.

A stranger to insolvency proceedings may at his option seek his redress in the ordinary Civil Courts when aggrieved by any act of the Official Receiver, or he may apply under section 68 of the Provincial Insolvency Act, but if he takes the latter course, he must comply with the terms of the section.

Bhairo Prasad v. S. P. C. *Dass*, 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R. (A) 118, relied on.

There is suspicion of fraud where an insolvent executes a deed of gift a few days before filing his application for adjudication, whatever the declaration in the deed of gift may be.

Appeal against an order, dated the 19th October 1922, of the District Judge, Fyzabad.

Mr. *Muhammad Ayub*, for the Appellant.

Mr. *K. N. Chak*, for Respondent No. 1.

Mr. *M. Wasim*, for Respondents Nos. 3, 4 and 5.

JUDGMENT.—This is an appeal under section 75 (3) of the Provincial Insolvency Act (V of 1920) with the permission of this Court. The application for insolvency was presented to the District Court of Fyzabad on 12th December 1919. An order of adjudication was passed, a Receiver was appointed, and proceedings taken in liquidation. On 14th June 1922 certain houses were proclaimed for sale and on 1st July 1922 the appellant, who is the wife of the insolvent, put in a claim that the properties belonged to her. In proof of her claim she referred to a deed of gift in her favour executed by her husband on the 9th of December 1919 declaring that an oral gift had been made in her favour 16 years earlier. The Insolvency Court referred the appellant to the Civil Court where a suit was filed by her on the 4th of July 1922. Before an injunction of the Civil Court restraining a sale could be served on the Receiver, the properties were sold by the Receiver on 5th July. On 3rd August the appellant applied to the District Judge for the cancellation of the sale. This application was dismissed on the 19th of October. This order of dismissal is the subject of appeal here.

The application of the appellant presented on 3rd August to the District Court was apparently one under section 68 of the Act. The provisions of the Code of Civil Procedure do not apply to a sale of an insolvent's property by the Receiver under section 59 of the Act. [See *Mool Chand* v. *Murari Lal* (1)]. There is a more recent ruling of the same High Court: *Bhairo Prasad* v. *S. P. C. Dass* (2) where a Judge of considerable experience in insolvency matters, Mr. Justice Walsh, has pointed out that a stranger to the insolvency proceedings may at his option seek his redress in the ordinary Civil Courts when aggrieved by any act of the Official Receiver or he may apply under section 22 of the Provincial Insolvency Act (corresponding to section 68 of the present Act), but, if he takes the latter course, he must comply with the terms of the section of the Insolvency Act. An application filed on 3rd August, more than 21 days after the date of sale on the 7th of July, was barred by time. A bar of limitation cannot be cured by this Court.

It was argued on reasons of equity that much injustice has been done to the appellant. I am not satisfied that such is the case. Obviously, there is suspicion of fraud where an insolvent executes a deed of gift three days before filing his application whatever the declaration in the deed of gift may be. There is also no satisfactory proof that the money deposited by the appellant on 3rd August was sufficient to pay off the scheduled creditors, the Receiver's fee and other expenses. In this connection, the attention of the Insolvency Court may be drawn to the absence of a schedule of creditors. I have not been able to find one on the file. Under section 33 (1) of the Act the Insolvency Court is enjoined to frame a schedule of creditors, who prove their debts.

I dismiss this appeal with costs which shall be divided between the Official Receiver and the purchasers.

Z. K. *Appeal dismissed.*

(1) 21 Ind. Cas. 702; 36 A. 8; 11 A. L. J. 979.
(2) 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R. (A) 118

RAMASWAMI AIYAR *v.* SUBRAMANIA AIYAR.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 40 OF 1919.

January 18, 1921.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

April 20, 1922.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Venkatasubba Rao.

T. RAMASWAMI AIYAR — PLAINTIFF—APPELLANT

versus

T. SUBRAMANIA AIYAR AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 396 —Civil Procedure Code (Act V of 1908), O. XX, rr. 12, 18, O. XXVI, rr. 13, 14—Partition suit —Preliminary and final decrees under the old and new Codes—Profits and mesne profits—Interest, whether payable.

Under the old Civil Procedure Code there was no such thing as a preliminary decree and no such thing as a final decree in a suit for partition. As a matter of practice, the order ascertaining the several parties interested in the properties to be divided and their several rights therein used to be treated as itself a decree subject to appeal, and as such an order does contain the adjudication as to rights and shares and persons interested, the description of such an order as a decree may not be considered inapt. But the description of such an order as a preliminary decree and the description of the decree passed after the report of the Commissioner making the actual division as a final decree are not authorised by the old Civil Procedure Code. [p. 805, col. 1.]

A member of a Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager or the persons in possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him. Such profits cannot be described as mesne profits received by a person in wrongful possession, but profits appurtenant to the plaintiff's right in his share of the lands. [p. 805, col 2; p. 806, col. 1.]

O. XX, r. 12 of the Civil Procedure Code relating to technical mesne profits does not apply to the claim of a plaintiff suing for partition of lands and the profits which are accruing on the lands which ultimately might fall to his share under the decree. [p. 806, col. 2.]

Unless a preliminary decree for partition refuses, or is deemed to have refused, to grant profits the Court is not precluded from granting profits in its final decree. [p. 806, col. 2.]

In all adjudications which are not intended to be final but only to be determinations of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation. [p. 807, col 1.]

In a partition suit the plaintiff is not entitled to claim profits before date of suit. As regards subsequent profits he is entitled to have an account taken of the profits of the properties proved to have been in the possession of the defendant, such profits being treated as appurtenances and accretions to the properties falling to his share. [p. 807, col. 1.]

A co-owner in possession of joint property is, ordinarily, not liable to pay interest on the share of the profits belonging to the other co-owners received by him. [p. 808, col. 1.]

(Case-law discussed.)

Appeal against the order of the District Court, Madura, dated the 3rd August 1917, in A. S. No. 24 of 1917, preferred against the order of the Court of the Subordinate Judge, Madura, in Interlocutory Appeals Nos. 287 of 1909, 187 of 1910, 122 and 123 of 1914 and 266 of 1916 in Original Suit No. 19 of 1895.

The Court (Sadasiva Aiyar and Napier, JJ.) delivered the following,

JUDGMENT.

Sadasiva Aiyar, J.—The 1st plaintiff is the appellant before us in this second appeal which is called an Appeal against Appellate Order.

This litigation has been going on for the last 26 years, the suit having been filed in 1895.

It was a suit for partition brought by the plaintiff against his father, brothers and other members of his family and alienees.

In 1899, when the old Civil Procedure Code was in force, the District Judge on appeal made a decree as follows:—"It is ordered that the items Nos. 1, 2, 14 and 15 mentioned in the Schedule C and the moveables in Schedule D (except items Nos. 5, 10 and 37) of the plaint be divided into five shares and that the plaintiff be given a one fifth share of the same, etc."

As pointed out by Bhashyam Aiyangar, J., in *Mallikarjunadu Setti* v. *Lingamurti Pantulu* (1), "in the case of a suit for partition there is to be but one decree" (under the old Civil Procedure Code) "but before making that decree the Court may appoint a Commissioner to submit a scheme for effecting the partition under section 396. There is in the section no reference made to a preliminary decree. All that the section enjoins is that the Court 'after ascertaining the several parties interested in the property of which a parti-

(1) 25 M. 244 at p. 277; 12 M. L. J. 279 (F.B.).

tion is sought and their several rights therein, may issue a commission, etc.'" Thus, it was only after the Commissioner or Commissioners sent the report or reports and after the actual division and allotment of shares to the parties (awarding sums, if necessary, for equalizing shares) and after hearing objections to the Commissioner's report or reports and deciding on those objections (if any) that the Court could pass the decree (and the only decree) in the suit under the old Code. There was no such thing as the preliminary decree under the old Civil Procedure Code in a suit for partition, and, of course, no such thing as a final decree. As a matter of practice, the order ascertaining the several parties interested in the property to be divided and their several rights therein used to be treated as itself a decree subject to appeal and as such an order does contain the adjudication as to rights and shares and persons interested, the description of that order as a decree may not be considered inapt. But, the description of that order as a preliminary decree and the description of the decree passed after the report of the Commissioners making the actual division as a final decree are not authorised by the old Civil Procedure Code.

The distinction between the old Civil Procedure Code (section 396) and the new Procedure Code (O. XXVI, rr. 13 and 14, and O. XX, r. 18, which contemplate the passing of a *preliminary* decree in place of the order ascertaining the parties and shares and contemplate a *final* decree after the Commissioner's report) has not been kept in mind by the lower Courts during the progress of the present partition suit which, as I said, was governed by the old Procedure Code for about 13 years after its institution and has been governed by the new Civil Procedure Code during the last 12 or 13 years.

The result has been that the order passed in 1899 under the old Code has been (by confusion and mistake) called a preliminary decree in the proceedings after the new Code came into force and what is called a 'final' decree has (after the report of the Commissioner appointed in this case in 1915) been passed in September 1916. Against this 'final' decree of September 1916, an appeal was preferred to the District Court which dismissed the appeal and against that dismissal the present second appeal has been brought. I think, for the reasons stated above, that the decree passed by the Subordinate Judge in September 1916 is the only decree passed in this case and that the so-called decree of 1899 is not a preliminary decree but an interlocutory order ascertaining the rights and shares with a view to pass the partition decree in the case after the lands are divided by (and other steps taken through) Commissioners, etc.

I now turn to the merits of the substantial questions in the suit. The plaintiff in his plaint prayed besides the division of the properties owned jointly, for the award to him of the profits of his share of the lands for the three years preceding the date of the plaint and of subsequent profits, (till possession was given of his shares) from defendants Nos. 1 and 2. (The 1st defendant died after suit). The order of 1899 was silent on the question of those profits. Here again, I have to point out that the Tamil word corresponding to 'profits' seems to have been translated into the technical phrase 'mesne profits' in the judgments and orders which we have to consider in the disposal of this case. "Mesne profits," according to the definition given in section 211 of the old Civil Procedure Code and in section 2, clause (12), of the new Code, mean those profits which "the person in *wrongful* possession actually received, etc." The observation of their Lordships of the Privy Council in *Pirthi Pal* v. *Jowahir Singh* (2) may be quoted in this connection: "The District Judge then proceeded, erroneously in their Lordships' opinion, to treat the claim for an account of the proceeds of the family estate as a claim for mesne profits, and quoted the provisions of the Code of Civil Procedure as to mesne profits. These provisions are intended for and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for partition where he has no specific interest until decree". As pointed

(2) 14 C. 493 at p. 509; 14 I. A. 37; 11 Ind. Jur. 232; 4 Sar. P. C. J. 758; Rafique & Jackson's P. C. No. 97; 7 Ind. Dec. (N.S.) 327 (P. C.).

out by their Lordships, a member of a Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager or the persons in possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him. As stated by their Lordships at page 512*, a sharer has a "clear right" to an account of the profits received by the person in possession of the whole, and to be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands.

The lower Courts have rejected the plaintiff's claim to his share of the profits received by the defendants from the divisible property for reasons which I shall set out in the words of the Subordinate Judge: "The objection of the first counter-petitioner" (the 2nd defendant) "that the petitioner is not entitled to ask for mesne profits seems to me well-founded. In the suits, mesne profits have been prayed for but none appears to have been granted. The preliminary decree does not make any mention of mesne profits nor is any provision made therefor therein." This opinion of the Subordinate Court was pronounced not in what is called the "final judgment" of 13th September 1916 in pursuance of which the Subordinate Judge passed what he called the "final decree" but in an order passed in November 1915 by his predecessor on three interlocutory applications made for appointment of a Commissioner and for the taking of other necessary steps in the suit. The District Judge on appeal from the final (or only) decree refused to consider whether an account should be taken of the profits alleged to have been received by the 2nd defendant and the reason is thus shortly stated by him: "It has already been decided that the preliminary decree did not provide for mesne profits, and I cannot go into that in this appeal." The reason so given is rather obscure. It is contended that what the District Judge meant was that the previous Subordinate Judge had decided in November 1915 that the preliminary decree did not provide for mesne profits and as that opinion of the Subordinate Judge (when deciding interlocutory applications) had become final by not having been appealed against, the plaintiff was not entitled to re-open that matter. If that is the meaning of the District Judge's observation, I think it is erroneous in law. Neither the order appointing the Commissioner nor any opinion expressed therein can be the subject of an appeal and, under section 105, clause (1), Civil Procedure Code, a party has a right to appeal from a decree and any error in any order affecting the decision of the case passed in unappealable interlocutory proceedings before the decree may be set forth as a ground of objection in the Memorandum of Appeal. This, of course, means that that ground is open to him when appealing from the decree and should be considered and disposed of in deciding the appeal if taken.

I might also refer to the judgment of Abdur Rahim, J., and Oldfield J., in A. S. No. 322 of 1919 explaining *Gulusam Bivi* v. *Ahmadsa Rowther* (3) and to the decision in *Ramnath Chhoturam* v. *Geturam Radhakisan* (4), and the other decision referred to in the latter case, in support of the following conclusions: (1) That O. XX, r. 12, Code of Civil Procedure, relating to "technical mesne profits" does not apply to the claim of a plaintiff suing for partition of lands and the profits which are accruing on the lands which ultimately might fall to his share under the decree; (2) that, unless a preliminary decree for partition refused or should be deemed to have refused to grant profits, the Court is not precluded from granting profits in its final decree. In the present case, O. XX, r. 12, does not apply; there was no such thing as a preliminary decree and there was no expression of opinion against the award of the profits before the decree or order of 1899 was passed and no refusal in the decree or order of 1899 to award such profits. On the other hand, the division directed by the order of

* Page of 14 C.—[*Ed.*].

(3) 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284.

(4) 54 Ind. Cas. 115; 44 B. 179; 21 Bom. L. R. 179.

1899 impliedly recognised the right in the plaintiff to the award of profits accruing on the plaintiff's share. In all adjudications which are not intended to be final but only to be determinations of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation.

If this view (which I hold to be the true legal view) be taken, the lower Courts were wrong in not going into and deciding on the clear right of the plaintiff to have an account taken of the profits of the properties in which he was awarded a share and in not giving him the appropriate relief in respect of such profits in the decree which was intended as the final stage in the d sposal of the suit.

I now come to the above real question in dispute, namely, whether the plaintiff is entitled to have an account of the profits as claimed in the plaint. As in a partition suit, the plaintiff is not entitled ordinarily to claim past mesne profits, his claim for profits before date of suit must be disallowed. As regards subsequent profits, he is clearly entitled to have an account taken of the profits of the properties proved to have been in the 2nd defendant's possession, such profits being treated as appurtenances and accretions to the properties, the right to a share in which has been declared in the plaintiff's favour in the order of 1899. I would, therefore, call for findings on the following issues :—

(1) What are the properties which have been in the 2nd defendant's possession since the date of the suit up to the date when the plaintiff's share according to the decree was divided off and placed in his possession ?

(2) What is the value of the net profits which have been so received by the 2nd defendant from the plaintiff's share of the lands ?

Time for submission of findings will be three months from the date of the receipt of records by the District Court and ten days will be allowed for objections.

Napier, J.—I. agree.

In compliance with the order contained in the above judgment the District Judge of Madura submitted findings on the said issues.

Messrs. *T. R. Venkatarama Sastri*, *M. S. Venkatarama Aiyar* and *M. S. Vaidyanatha Aiyar*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar*, *T. S. Narayana Aiyar*, *T. S. Anantarama Aiyar* and *T. L. Venkatarama Aiyar*, for the Respondents.

JUDGMENT.

Oldfield, J.—The first issue remanded relates to the properties in the possession of 2nd defendant. Some attempt has been made to argue that certain properties, to be referred to as mortgaged items, have, since their delivery to plaintiff, to which reference will be made, been re-gained by 2nd defendant, wholly or in part. But that rests only on references to allegations to that effect in the Subordinate Judge's order on Execution Petition No. 154 of 1919 and Execution Appeal No. 194 of 1920 on which no finding was reached, and is not supported by any evidence taken on the remand.

In fact, there is no indication that this matter was ever submitted to the lower Court at the remand hearing or had been mentioned to the learned Judges, by whom the remand was ordered. Similarly, as regards the suggestion that some properties were for a time in the possession of the father of plaintiff and 2nd defendant after the institution of the suit. No other objection to the finding on the first issue remanded has been made. We, therefore, accept it.

On the second issue remanded, relating to plaintiff's share of the net profits received by 2nd defendant and to be accounted for by him from plaintiff's share of the lands, or rather from the lands assigned to the latter, we have been unable to ascertain and the learned Vakils concerned cannot say how the total found payable to plaintiff has been reached. We, therefore, can only, with the assistance of the materials now available and accepted by the lower Court, indicate the lines, on which the

account must be taken. The 2nd defendant was in possession as manager of the family, until on the date of the plaint the joint family became divided and a tenancy-in-common replaced it; 2nd defendant continuing in possession as one of the co-tenants. It is, therefore, possible to say at once that he has from the date of plaint (22nd August 1895) been accountable for plaintiff's share of the produce of all the lands with the exception for the present of Survey Nos. 228-B (representing items Nos. 1 and 2), 233 (item No. 3) and items Nos. 4 to 6, because the special considerations applicable to these require separate treatment.

The question is, next, whether plaintiff is entitled to interest on his share of the profits for each year from the time when 2nd defendant received it. As a co-owner in possession of the co-ownership property, he was, it may be conceded, a constructive trustee with reference to section 94 of the Trusts Act and was subject to the same liabilities as a trustee with reference to section 95. But it does not follow that he is liable for interest on the profits. For it has not been shown how a trustee can ordinarily be so liable in the absence of any breach of trust established against him in the special circumstances enumerated in section 23. There is no imputation on 2nd defendant's realization of profits as fraudulent or inefficient; and, when the suit might at any moment during the long period of its suspension have been resumed and it might have been necessary for 2nd defendant to produce the funds in his hand, we are not prepared to hold that he was bound by section 20 to invest them. Authority is, as my learned brother has shown, against the duty of a trustee ordinarily to pay interest on profits. We accordingly cannot hold 2nd defendant liable for it, and, taking this view, we need not consider whether the learned Judges, in holding him liable for profits, not mesne profits, in the order of remand, intended, as has been argued before us, to deal with the matter.

Of the mortgaged properties, Survey No. 233 (item No. 3) was subject to a simple mortgage and was, it has been found, throughout in 2nd defendant's possession, Survey No. 228-B and item Nos. 4 to 6 were under usufructuary mortgage and returned to his possession only on his redeeming in 1908. The fact that he advanced the monies by which Survey No. 233 was retained under O. XXI, r. 89 and by which the other items just enumerated were regained for the family, cannot affect his right to profits after the payment. For it is clear from the lower Court's statements Nos. I and II, that the receipt of profits for previous years had placed sufficient family funds in his hands for these purposes and that no expenditure of his own money, in virtue of which he can claim any special right over the profits, took place. He must, therefore, account for the profits of these lands also, of Survey No. 233 from the date of plaint and of the others from the date of his regaining possession on redeeming; but on these profits also no interest will be payable.

As regards the properties last mentioned as having been subjected to usufructuary mortgage, and it would appear, since the order to be next referred to is not explicit also in respect of others, the matter is complicated by the fact that plaintiff and 7th defendant took delivery of their shares in execution of the 1st decree passed by the Subordinate Court without reimbursing 2nd defendant what he had spent on redemption. In appeal the District Judge held that they should have reimbursed him before doing so and on 20th February 1920, they deposited the amount and retained possession. Later, however, 2nd defendent in Execution Appeal No. 194 of 1920 obtained from the Subordinate Court an order directing payment by them of profits for the properties for the period, during which their possession was eventually held to have been unjustifiable before his reimbursement. It is argued that this order became final and that 2nd defendant must be allowed to retain the amount paid under it without reference to his liability in the general account which is now being taken. This is not sustainable. It is clear that the Sub-

ordinate Court was dealing in its order only with the matter immediately before it, the 2nd defendant's right to restitution of profits in connection with the lower Appellate Court's alteration in its decree, not with any general or final account. In fact, the right to such an account had been disallowed by the lower Appellate Court in paragraph 3 of its judgment and this disallowance was the subject of the appeal to this Court. Second defendant must, therefore, refund to plaintiff and 7th defendant what they paid him by credit in the account to be taken.

The remaining question is, whether 2nd defendant is entitled to interest on the amounts paid by him under O. XXI, r. 89 and for redemption. As the payment must be regarded as made from the family funds in his hands, the decision must be in the negative. His claim to interest at 9 per cent. on Rs. 271-0-6 paid under O. XXI, r. 89 would in any case be excessive, since the debt was outstanding at 6 per cent. only, having been merged in a decree.

The foregoing deals with the objections to the lower Appellate Court's findings so far as they have been pressed. In accordance with it plaintiff (and the same will apply to 7th defendant, when his claim is put forward) will be entitled to (1) his share of the profits as ascertained is statements, (i), (ii), and (iii) from the date of plaint on all the items assigned to him, except survey No. 228 B, and items Nos. 4, 5, 6 and on them from and including the crop season of October 1908, (2) credit for half the amount paid by him and 7th defendant under the order in Execution Appeal No. 194 of 1920. There will be no interest on (1) for the reasons already given or, on (2) because it represents profits which plaintiff took prematurely and which would not have carried interest, if they had been realised by 2nd defendant. Similarly, the amounts expended by 2nd defendant under O. XXI, r. 89, and on redemption carry no interest. They and their share of them repaid by plaintiff and 7th defendant can, therefore, be left out of the account, 2nd defendant retaining the amount of that repayment.

The appeal is adjourned for 7 days in order that the practitioners concerned may consider the preparation of an account on these lines.

Venkatasubba Rao, J.—I am of the same opinion, and I should like to state my reasons for holding that the 2nd defendant is not liable for interest.

On behalf of the plaintiff it is argued that the 2nd defendant stood in a fiduciary relation to him and would, therefore, be liable to pay interest upon the rents received from the lands.

In the first place, I am not satisfied that there is any fiduciary relation between the plaintiff and the 2nd defendant. After the interlocutory order of 1899 it is no doubt conceded that the parties became tenants-in-common with reference to the properties in question. But we have not been referred to any authority in support of the proposition that the 2nd defendant stood in any fiduciary relation to the plaintiff.

The decision in *Kennedy* v. *De Trafford* (5) is the other way. Action was brought against the mortgagees of some property to set aside a sale made by them under the power of sale contained in their mortgage-deed. The propety mortgaged was held by two persons tenants-in-common. They were co-owners, each possessing an undivided moiety. The mortgagees gave notice that unless the parties paid off the mortgage the former would be prepared to sell the property at a price which would realise principal, interest and costs, and finally one of the mortgagors became the purchaser. The sale was impeached by the representative of the other mortgagor on the ground that it was made to a person who was incapable of buying the property because he was in a fiduciary relation. Lord Herschell observed: "But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such relationship between them that the one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled on equitable grounds to have it declared that the benefit of one half of that purchase should be his. My

(5) (1897) A. C. 180; 66 L. J. Ch. 413; 76 L. T. 427; 45 W. R. 671.

Lords, no authority has been cited in support of such a proposition."

In the Court of Appeal* Lindley, L. J., made the following observation in regard to this contention by the plaintiff, the co-tenant:—"We are asked to say, and the point is an important one, that one of several tenants-in-common cannot get in for his own benefit an outstanding encumbrance, or an outstanding estate, or cannot be treated as otherwise than as a fiduciary owner standing in some fiduciary relation to his co-tenant. As a general proposition that appears to me not to be the law of England."

Even assuming that there was a fiduciary relation, is the 2nd defendant liable for interest upon the rents of the lands in his possession? In *Blogg* v. *Johnson* (6) Lord Chelmsford, L. C., stated that generally interest cannot be recovered upon the arrears of income. Several cases are referred to in the judgment and the rule is said to be the established rule of the Court which, however, is only general not inflexible.

In *Silkstone and Haigh Moore Coal Co.* v. *Edey* (7) it was held that upon the setting aside of a sale by a trustee of a trust property to himself and the reconveyance of the property to the beneficiaries it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale.

Lewin states the law thus relating to the right of the beneficiary to have the property reconveyed to him: "The *cestique trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee or where the trustee has sold it with notice, by the parties who purchased the *cestique trust* on the one hand paying the price at which the trustee bought with interest at 4 per cent. and the trustee or purchaser on the other accounting for the profits of the estate but not with interest."

Stirling, J., in the case referred to above, *Silkstone & Haigh Moore Coal Co.* v. *Edey* (7) approves of the statement of the law in "Lewin on Trusts."

(6) (1867) 2 Ch. 225; 36 L. J. Ch. 859; 16 L. T. 306; 15 W. R. 626.

(7) (1900) 1 Ch. 167; 69 L. J. Ch. 73; 48 W. R. 137.

*See (1896) 1 Ch. 762 [*Ed.*].

Macartney v. *Blackwood* (8), which is referred to in the judgment of Stirling, J., is also an authority for the proposition that when the sale is set aside interest on the rents is not allowed.

In Halsburry's Laws of England, Vol. 23 at page 191 a statement of law is made to the same effect.

Interest was, no doubt, charged on arrears in some cases as *Melland* v. *Gray* (9) and *Gilroy* v. *Stephen* (10) but it seems to me that the cases fall, in the words of Lord Chelmsford, L. C., in *Blogg* v. *Johnson* (6), within the range of another principle of equity that where an executor or a trustee unnecessarily detains money in his hand which he ought either to have invested or to have paid over to the person entitled to it, he will have to pay interest for it. The Lord Chancellor observes: "Where money is thus improperly retained, it appears to me to be immaterial how the sum has arisen, whether from a legacy or a distributive share, or a residue, or the arrears of income. In the latter case the claim for interest is not made on account of arrears, but for the improper keeping back of a sum of money, from whatever source derived, which the executor or the trustee ought to have paid over."

As my learned brother has pointed out, it cannot be said in this case that the 2nd defendant was bound to invest the profits. The plaintiff had the conduct of the suit and it is quite open to him at any moment to ask for possession of the properties for an account of the profits and for payment to him of the sum ascertained to be due. The delay is not attributable solely to the 2nd defendant, and the plaintiff has failed to show any ground for making the 2nd defendant liable for interest.

The appeal coming on for final hearing the Court delivered the following

JUDGMENT.—The account called for at the previous hearing has now been filed by the learned Vakil on behalf of the plaintiff (appellant).

(8) (1795) Ridg. Lapp. & Sch. 602.

(9) (1845) 2 Collyer 295; 63 E. R. 741; 70 R. R. 229.

(10) (1882) 46 L. T. 761; 51 L. J. Ch. 834; 30 W. R. 743.

One objection made to it is that he has wrongly included Rs. 107-4-8 as interest at 6 per cent. on Rs. 858-5-2 from 20th February 1920 to 23rd February 1922. This, he concedes, is not justified by anything in our judgment. The item of Rs. 107-4-8 must, therefore, be omitted. The learned Vakils on both sides have now agreed that on the account Rs. 2,976-5-2 should be taken as the amount due. The decree in Second Appeal will, therefore, be drawn up in accordance with the foregoing. Further terms of the decree, in so far as they involve modification of the decree of the Subordinate Judge as modified by the District Judge, will be in accordance with the statement which has been filed by the appellant's Vakil and agreed to in open Court by the Vakils for the respondents, including the 7th defendant.

The appellant will have his costs from the 1st respondent on Rs. 2,976-5-2 the amount in respect of which he has succeeded in this Court as well as in the lower Courts.

V. N. V.

Z. K. *Decree modified.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 29 OF 1923.
March 16, 1923.

Present :— Mr. Dalal, A. J. C.

BINDESHRI PANDE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHEO RATAN PANDE—PLAINTIFF—RESPONDENTS.

Appeal, second—Finding based on inferences from documents, whether one of fact.

A finding based on inferences to be derived from documentary evidence is a finding of fact and cannot be disturbed in second appeal. [p. 811, col. 2.]

Lachman Lal v. *Kanhaya Lal*, 22 C. 609; 22 I. A. 51; 6 Sar. P. C. J. 558; 11 Ind. Dec. (N. S.) 405 (P. C.), followed.

Appeal against the decree of the District Judge, Fyzabad, dated the 20th November 1922, upholding the decree of the Munsif, Fyzabad, dated the 17th August 1922.

Mr. *Wasi Hasan*, for the Appellants.

JUDGMENT.— In my opinion no point of law arises in this appeal. The question at issue in both the lower courts was, whether one Ram Dayal was joint with his two brothers at the time of his death or separate from them. In case of separation his widow, *Musamma* Radha, would be a life holder and the plaintiff would be entitled to the reversion of Ram Dayal's estate from the date of the widow's death: in the other case of jointness there will be adverse possession of *Musammat* Radha with full ownership after the period of limitation. In these circumstances, the gift by her to the defendants would be valid.

After very careful consideration of both oral and documentary evidence, the two lower Courts decided that Ram Dayal was separate from his brothers. In arriving at that conclusion they had to consider the effect of documentary evidence. On the mere ground that documents had to be examined to arrive at a conclusion, it is argued here that the issues in the lower Court necessitated consideration of documents and were, therefore, issues of law. I refuse to accept this position. The guiding principle has been very clearly laid down by their Lordships of the Privy Council in *Lachman Lal* v. *Kanhaya Lal* (1). They observed: "It was argued for the appellant that, as this evidence to an important extent consists of writings, the ordinary rule that this Board will not disturb the judgment of both Courts on facts does not apply. Their Lordships cannot accept this view. The question is not one of construction of one or more deeds, which would be a question of law, but is a question as to the effect to be given to decrees, leases, and other documents as evidence of the fact of adoption, and all its consequences." A finding based on inferences to be derived from documentary evidence is a finding of fact. This Court cannot disturb the concurrent finding of the two lower Courts that Ram Dayal was separate from his brother at the time of his death. The other finding of fact was that *Musammat* Radha was not full owner of the property by virtue

(1) 22 C. 609; 22 I. A. 51; 6 Sar. P. C. J. 558; 11 Ind. Dec. (N. S.) 405 (P. C.).

of a family settlement. Those two findings of fact were sufficient to entitle the plaintiff to a decree. The ground of appeal, No. 5 is not correct, the learned Judge of the lower Appellate Court has not ignored the positive evidence and not proceeded on surmises.

It is true that the lower Court has overlooked the defence contention that the plaintiff consented to the gift by *Musammat* Radha. This allegation is so devoid of foundation that very likely it was not pressed during arguments before the learned District Judge. The Court is so fully justified in refusing to accept the testimony of an attesting witness that plaintiff was present at the time of the execution of the deed.

I dimiss the appeal under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 861 OF 1920.
March 27, 1922.
Present:—Mr. Justice Spencer.
HUSSAIN SAHIB—PETITIONER
versus
HAMMAD SAHEB AND OTHERS—RESPONDENTS.

Mesne profits—Preliminary decree—Negation or omission of profits—Commissioner appointed to ascertain profits—Remedy—Revision—Appeal—Appointment of Commissioner—Method of challenging correctness of order—Appeal against final decree—Revision against interlocutory order.

If the right to mesne profits is negatived in the preliminary decree and no appeal is preferred against the order disallowing them the question cannot be raised again at the stage of passing the final decree, but if the omission to provide for the mesne profits in the preliminary decree is due to inadvertence, the question cannot be treated to be finally concluded up till the passing of the final decree.

Gulusam Bivi v. *Ahmadsa Rowther*, 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284, doubted.

Where a preliminary decree omits by inadvertence to provide for mesne profits and later on a Commissioner is appointed to ascertain the same, whether the order of his appointment is correct, or incorrect, the proper method of challenging it is not a revision but an appeal against the final decree.

Gulusam Bivi v. *Ahmadsa Rowther*, 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284, doubted.

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Judge, South Canara, dated the 23rd July 1920, in I. A. No. 12 of 1920 in O. S. No. 6 of 1910.

Mr. *Sitarama Rao*, for the Petitioner.
Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—The appellant relies on *Gulusam Bivi* v. *Ahmadsa Rowther* (1) as an authority for saying that mesne profits cannot be awarded in the final decree if there has been no direction in the preliminary decree either setting mesne profits or ordering an enquiry into mesne profits.

If the plaintiff's right to mesne profits is negatived in the preliminary decree and no appeal is preferred against the order disallowing them, it is obvious that he cannot raise the question again at the stage of passing the final decree; but if there is a prayer in the plaint (as here) for mesne profits and the omission to provide for them in the preliminary decree is due to inadvertence (as appears to be the case here), I cannot see why up till the passing of the final decree the matter of mesne profits should be deemed to be finally concluded. There is a decision in Civil Miscellaneous Second Appeal No. 40 of 1919 [*Ramaswami Aiyar* v. *Subramania Aiyar* (2)] of another Bench which seems to hold differently from *Gulusam Bivi* v. *Ahmadsa Rowther* (1) and if that was the only point before me I should feel inclined to refer this civil revision petition to a Bench with a view to the correctness of the decision in *Gulusam Bivi* v. *Ahmadsa Rowther* (1) being considered by a Full Bench.

In this case the decree, as amended by the High Court in appeal, directed the taking of accounts and respondent's Vakil

(1) 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284.
(2) 74 Ind. Cas. 804; 16 L. W. 297; 43 M. L. J. 406.

states that the accounts will show the profits arising from immoveable properties belonging to the joint family as well as the profits derived from the family trade, and that if it turns out that the profits on the lands are kept apart and are not ascertainable from an examination of the accounts he will be content with what is found to be due to him on the basis of the accounts.

Be this as it may, I can find no reason to interfere at this stage in revision with the lower Court's order directing the Commissioner to ascertain mesne profits also, as the final decree (if it is found to include a sum for mesne profits apart from the sum due upon taking of accounts) will be open to regular appeal, and that will be the appropriate method of challenging the correctness of interlocutory orders made in the course of trial. The civil revision petition is dismissed with costs.

V. N. V.
S. D. *Petition dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 22 OF 1923.
March 29, 1923.
Present:—Mr. Dalal, A. J. C.
DWARKA—PLAINTIFF—APPLICANT
versus
IDU—DEFENDANT—OPPOSITE PARTY.

Promissory-note, suit based on—Promissory-note inadmissible in evidence—Plaintiff, whether can prove loan.

Where a loan is evidenced by a promissory-note and the creditor sues the debtor on the basis of the promissory-note but the promissory-note is held to be inadmissible in evidence, the plaintiff should be allowed an opportunity to prove the loan by other evidence.

Bachu Lal v. *Kandhai Lal*, 6 O. C. 16, *Ram Sarup* v. *Jasoda Kunwar*, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72, relied on

Appeal against a decree of the Subordinate Judge, Bahraich, dated the 14th November 1922.

Mr. *Girja Saran Lal*, for the Applicant.
Mr. *H. Husain*, for the Opposite Party.

JUDGMENT.—The Small Cause Court of Bahraich dismissed a suit for a loan based on a promissory-note because the document was not stamped and in consequence inadmissible in evidence. The learned Judge observed: "As the basis of this suit is the promissory-note which has been impounded the plaintiff's suit fails and is dismissed with costs."

The plaintiff has come here in revision on two grounds: (1) that the document was not a promissory-note but a cash memo. which did not require to be stamped, and (2) that the Judge of the lower Court ought to have given him an opportunity of proving the debt independently of the promissory-note.

There is no substance in the first ground of appeal. It is true that the document is not before this Court as it has been impounded and sent to the Collector of Bahraich for necessary action. The plaintiff himself, however, calls it a promissory-note (*ruqqa indul talab*) and the defence of a cash note is obviously an after-thought. The application must, however, succeed on the second ground. The suit was, no doubt, based on the promissory-note but it was not stated in the plaint that the promissory-note was the only evidence of the loan. The main allegation was that the defendant borrowed Rs. 110 in cash from the plaintiff. It was stated that the loan was evidenced by a promissory-note (*zarie tahrir ruqqa indul talab*). There were two distinct actions though contemporaneous, one of the loan and the other of a promissory-note. There is a ruling of this Court in *Bachu Lal* v. *Kandhai Lal* (1) in favour of the plaintiff. There the plaintiff failed to prove the execution of the promissory-note but this Court held that a decree may be passed in such a case for the amount which is proved to have been lent. A Bench of the Allahabad High Court consisting of the Chief Justice and Judge Banerji entered into an elaborate examination of the case-law on the subject in *Ram Sarup* v. *Jasoda Kunwar* (2). That was a case similar to the present where when the promissory-note was produced it was found to be inadmissible in evidence for want of proper cancellation of the stamp. The learned Judge held that even where the loan and the pro-note were contemporaneous the plaintiff should be allowed an opportunity to

(1) 6 O. C. 16.
(2) 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72.

prove the loan where the pro-note is not admissible in evidence. Cases of the Calcutta and Bombay Courts are cited in that ruling in support of the proposition that in a case like the present the plaintiff may be allowed to sue for money lent independently of the promissory-note.

In the present case it appears from the pleadings that the plaintiff has evidence other than the promissory-note in support of the loan. He is entitled to produce such evidence. I set aside the decree of the lower Court and remand the suit to it for trial and decision after determination of the issues whether the loan of Rs. 110 was or was not made by the plaintiff to the defendant and what the rate of interest was. Costs here and heretofore shall abide the result.

Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 34 OF 1923.
April 27, 1923.
Present:—Mr. Justice Gokul Prasad.
EAST INDIAN RAILWAY—DEFENDANT—APPLICANT
versus
FIRM MAKHANLAL-BINDESRI PRASAD—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 77—Short delivery—Risk Note, Form B—"Loss", proof of.

In a suit for compensation for short delivery the Railway are not entitled to set up the Risk Note, Form B, unless it is shown that the loss was due to a theft from a running train or some such cause. The plaintiff cannot be asked to prove that the loss was due to any fault on the part of the Railway Company, unless and until the Railway have set up and proved that the loss has occurred.

Secretary of State for India in Council v. *Jiwan and Abdullah*, 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380: (1923) A. I. R. (A) 426 and *East Indian Railway Co.* v. *Kishen Lal-Tirkhamal*, 73 Ind. Cas. 986; 21 A. L. J. 438; 9 O. & A. L. R. 531; 45 A. 530, relied on.

Civil revision against an order of the Judge of the Court of Small Causes at Allahabad, dated the 15th January 1923.

Mr. *Ladli Prasad Zutshi*, for the Applicant.

Messrs. *Damodar Das* and *Sri Krishna Mehra*, for the Opposite Party.

JUDGMENT.—This is an application in revision, arising out of a suit for damages for non-delivery of part of a consignment made over to the Railway at Howrah for transport to Allahabad. Three casks of cocoanut oil were alleged to have been sent. Out of these only two were delivered at Allahabad and one cask was not delivered. Hence the present suit.

The defence pleaded by the Railway Company was that section 77 of the Railways Act, IX of 1890, and the Risk Note which was in Form B barred the suit.

In two cases of this Court it has been held that in cases of short deliveries like this the Railway are not entitled to set up the Risk Note unless it was shown that the loss of the cask was due to a theft from a running train or some such cause. This case was tried in the Small Cause Court, and the view taken by the learned Judge of the Court below was that the plaintiffs had distinctly stated that their case was one of non-delivery. The defendant Railway Company did not in the present case even attempt to prove that the goods had been lost as aforesaid, and it is only after they had done so that the plaintiffs could be asked to prove that the loss was due to any fault of the Railway Company which would make them liable. The learned Judge has referred to several cases. This view, however, was taken in the case of *Secretary of State for India in Council* v. *Jiwan and Abdullah* (1) and in the unreported case in Civil Revision No. 23 of 1923* decided so recently as the 13th of April 1923 by Mr. Justice Daniels. I am in full accord with these two decisions. It is not necessary to go into the cases decided by other Courts. I dismiss this application in revision with costs.

M. A. A. *Application dismissed.*

(1) 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380; (1923) A. I. R. (A.) 426.

*Now published as *East Indian Railway Co.* v. *Kishen Lal-Tikhamal*, 73 Ind. Cas. 986; 21 A. L. J. 438; 9 O. & A. L. R. 531; 45 A. 530—[*Ed.*].

PALTI v. NIRDHAN GOPE.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 783 OF 1921.

July 13, 1923.

Present:—Mr. Justice Dass and Mr. Justice Ross.

Musamma PALTI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NIRDHAN GOPE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Widow's Re-marriage Act (XV of 1856), s. 5—Re-marriage, effect of—Widow, whether loses right of succession to son's property.

A Hindu widow does not, by her re-marriage, lose her right of succession to the property of her son.

Akora Suth v. *Boreani*, 11 W. R. 82; 2 B. L. R. (A. C. J.) 199; 4 Mad. Jur. 286; 1 Ind. Dec, (N. S.) 781, followed.

Sheobaran Mahto v. *Bhogea*, 46 Ind. Cas. 884; 3 P. L. J. 639, distinguished.

Basappa v. *Rayava*, 29 B. 91; 6 Bom. L. R. 779 (F. B.), *Chamar Haru Dalmel* v. *Kashi*, 26 B. 388; 4 Bom. L. R. 73, *Lakshmana Sasamallo* v. *Siva Sasamallayani*, 28 M. 425; 15 M. L. J. 245, referred to.

Appeal from a decision of the District Judge Darbhanga, dated the 12th January 1921, reversing a decision of the Munsif, Second Court, Darbhanga.

Mr. *S. C. Mitter*, for the Appellants.

Mr. *J. P. Singh* for Mr. *L. K. Jha*, for the Respondents.

JUDGMENT.

Das, J.— This appeal arises out of a suit instituted by the respondents for recovery of certain lands specified in the plaint.

The plaintiffs are the sons of one Bhatu and grandsons of one Khartar. The defendant No. 1 was the widow of Paltu, the other son of Khartar. The case of the plaintiffs is that the family was joint and that, upon the death of Bhatu and Paltu, the plaintiffs and Sarjug, who was the son of Paltu, were in joint possession of the disputed properties as members of a joint Mitakhshara family. Sarjug is now dead and the plaintiffs claim that they are entitled to succeed to the properties by right of survivorship. The defendant No. 1 is the mother of Sarjug. Her case is that her husband, Paltu, was separated from Bhatu and that Sarjug, her son, was at no time joint with the plaintiffs. Her case accordingly is that she is entitled to succeed to the properties which were of her son Sarjug as the mother and heiress of Sarjug.

The Court of first instance found that Bhatu separated from his father Khartar, that Sarjug was separate from the plaintiffs; that the properties in dispute belonged to Sarjug, and that, accordingly, defendant No. 1 as the mother of Sarjug was entitled to succeed to the properties which were of Sarjug.

The learned District Judge in appeal has not gone into the question whether the family was joint or separate, but he has allowed the appeal on another ground, that ground being that defendant No. 1 having re-married defendant No. 2 was excluded from succession by operation of section 2 of the Hindu Widow's Re-marriage Act. The learned Judge relied upon a decision of this Court in *Sheobaran Mahto* v. *Bhogea* (1).

The case upon which the learned Judge relies does not apply to the facts of the present case. That was a case where the re-marriage took place after the property had vested in the mother. In the present case the question is not whether the defendant No. 1 should be divested of property which had already vested in her but whether she loses the right of succession to the property of her son by her re-marriage. The exact point was decided by the Calcutta High Court in the case of *Akora Suth* v. *Boreani* (2). Sir Barnes Peacock delivering the judgment of the Court said as follows:—

"The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of section 2, I am of opinion that it was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage." After quoting the words of the section the learned Chief Justice proceeds to say as follows. "In the present case, at the time of her re-marriage, the property belonged to her son, and she had no right or interest in that property. It came to her by inheritance

(1) 46 Ind. Cas. 884; 3 P. L. J. 639.

(2) 11 W. R. 82; 2 B. L. R. (A. C. J.) 199; 4 Mad. Jur. 286; 1 Ind. Dec. (N. S.) 781.

MATHURA SINGH v. KANDHAI PATHAK.

from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother, notwithstanding her re-marriage. At the time of her re-marriage, she had no interest in her deceased husband's property, by inheritance to her husband, or to his lineal successors. It could not, therefore, cease or determine upon her re-marriage; and if she had died at the time when she re-married, the property would never have descended to her." The learned Chief Justice thought that the case fell wit in the rule laid down in section 5 of the Act and not within the exceptions in the three preceding sections. This case was decided in 1868 and the decision has stood unquestioned for over fifty years. The decision has been repeatedly followed in the different High Courts. It was followed in 1902 in the case of *Chamar Haru Dalmel* v. *Kashi* (3). It was again followed by the Full Bench of the Bombay High Court in *Basappa* v. *Rayava* (4). Sir Lawrence Jenkins delivering the judgment of the Full Bench said as follows:— "Whatever might have been my view had the matter been uncovered by authority, it would, in my opinion, be wrong to disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in *Akora Suth* v. *Boreani* (2)." It was again followed by the Madras High Court in the case of *Lakshmana Sasamallo* v. *Siva Sasamallayani* (5).

In my view it is quite impossible for us to disregard the decision of the Calcutta High Court in *Akora Suth* v. *Boreani* (2) especially as the authority of that decision has never been questioned in any Court. I would accordingly allow this appeal, set aside the judgment and decree of the learned District Judge and remand the case to that Court for disposal of the other points which are raised in the case.

The appellants are entitled to the costs of this appeal. The costs incurred in the Courts below will abide the result and will be disposed of by the learned Judge.

Ross, J.—I agree.

K. S. D. *Appeal allowed.*

(3) 26 B. 388; 4 Bom. L. R. 73.
(4) 29 B. 91; 6 Bom. L. R. 779 (F. B.).
(5) 28 M. 425; 15 M. L. J. 245.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 8 OF 1923.

April 11, 1923.

Present:—Mr. Dalal, A. J. C.

MATHURA SINGH—DECREE-HOLDER—APPELLANT

versus

KANDHAI PATHAK—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Application to summon necessary witness, whether step-in-aid of execution.

A written application by a decree-holder for the summoning of a necessary witness in execution proceedings has the effect to further the proceedings, and is, therefore, an application to take a step-in-aid of execution within the meaning of clause (5) of Article 182 of Schedule I to the Limitation Act. [p. 817, col. 2.]

Juggi Lal v. *Ganga Prasad*, 10 Ind. Cas. 182; 14 O. C. 124, *Manna Lal* v. *Sardar Singh*, 43 Ind. Cas. 342; 20 O. C. 332, distinguished.

Muhammad Siddiq Khan v. *Misri Lal*, 64 Ind. Cas. 524; 19 A. L. J. 843; (1922) A. I. R. (A.) 432, relied on.

Appeal against the decree of the District Judge, Fyzabad, dated the 30th October 1922, upholding the order of the Subordinate Judge, Fyzabad, dated the 12th August 1922.

Mr. *Rudra Datta Sinha*, for the Appellant.

JUDGMENT.—The decree-holder, who is now represented by the appellant, his successor-in-interest, applied for execution of his decree on 6th May 1922. The decree was passed on 16th February 1915 and the last previous application for execution was made on 19th June 1917, that is five years prior to the date of the present application. The decree-holder, however, sought to bring his present application within time on the ground, that on 2nd July 1919, during the previous execution proceedings he put in an application to summon the *Patwari*. The property being ancestral, execution proceedings were transferred to the Collector for sale of ancestral property and he returned the record to the Civil Court for rectification of the area of the property to be sold. For this purpose the decree-holder had to summon the *Patwari*. It was a written application put in by the decree-holder. In a case like the present, the period of limitation for

the execution of a decree is three years from the date of applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree. It is clear from the wording of Art. 182 of Schedule I of the Limitation Act, that it is not the application for execution alone which saves limitation. Any other application which may be taken to be a step-in-aid of execution will also start a fresh period of limitation so long as the execution is not barred under section 48 of the Code of Civil Procedure. The decree sought to be executed was passed in 1915, so the present application was made within 12 years of its date. Both the lower Courts relied upon two decisions of this Court in coming to the conclusion that the application to summon the *Patwari* was not a step-in-aid of execution. In my opinion both those rulings are distinguishable [*Juggi Lal* v. *Ganga Prasad* (1) and *Manna Lal* v. *Sardar Singh* (2).] In both those cases the decree-holder had only orally asked the Court to do something for which he had applied by petition before. In such a case it was held by this Court that the oral application did not amount to a fresh application in aid of execution. As an instance, this Court refused to agree with the opinion of the Calcutta High Court that even a deposit of process-fee to summon a witness amounted to a step-in-aid of execution. This is a reasonable view to take, because the deposit of process-fee is merely to help an application for summoning of the witness and cannot start a fresh period of limitation. As rightly observed by the learned Judge (now, Mr. Justice Lindsay): "I am unable to see why a fresh application or request made to the Court by way of jogging the Court's memory or repeating a prayer which had already been made should be held to be an application to the Court to take steps-in-aid of execution." In the case before that Judge, the Trial Court when orally addressed by the decree-holder was not asked to do anything more than it had been asked to do in a previous petition lodged three months earlier. These circumstances are totally distinct from the circumstances of the present case where the decree-holder relies on a written application for the summoning of a necessary witness, the *Patwari*. Without such an application the Court would not have summoned the *Patwari* and there would have been no means to rectify the area of the property to be sold as required by the Collector. On facts similar to those of the present case, Mr. Justice Banerji, in delivering the judgment of the Court in *Muhammad Siddiq Khan* v. *Misri Lal* (3), held that such an application had the effect to further execution proceedings and was, therefore, an application to take a step-in-aid of execution. It is the opinion of a Judge of great experience and is in accord with the language of Art. 182. In my opinion the decree-holder's application of 6th May 1922 was within time.

I set aside the orders of the two lower Courts and direct that the application for execution shall be proceeded with by the Executing Court according to law. The appellant shall receive costs of this Court and of the lower Appellate Court.

This decree is passed *ex parte* as the respondent did not appear though he was duly served twice.

Z. K. *Orders set aside.*

(1) 10 Ind. Cas. 182; 14 O. C. 124.
(2) 43 Ind. Cas. 342; 20 O. C. 332.
(3) 64 Ind. Cas. 524; 19 A. L. J. 843; (1922) A. I. R. (A.) 432.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 255 OF 1922.

May 14, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

HAR PRASAD AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

RAGHUBAR DAYAL—DECREE HOLDER—RESPONDENT.

Arbitration —Award —Decree on award—Amendment of award—Executing Court, jurisdiction of.

NANHU *v.* RAM DAYAL.

Where there has been a valid reference to arbitration, the decision of the arbitrator is final; where, however, there is, on the face of the award, a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. An execution Court has no such jurisdiction.

Execution first appeal from a decree of the Subordinate Judge, Pilibhit.

Mr. *G. W. Dillon*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—In this case, in the course of an application in execution to enforce a decree passed in terms of an award, the learned Judge has gone into the merits, and finding on the evidence that a mistake had been made in the demarcation of a dividing line as shown upon a map which became a part of the decree, he has endeavoured to amend the mistake by giving effect, to what he considers, the real intention of the arbitrators. It is quite clear that no Execution Court has any jurisdiction to do anything of the kind. It may be that by an unfortunate chapter of accidents the decree-holder has suffered loss by reason of the decree not in fact representing the true intention of the arbitrators, and at first sight it may seem illogical for a Court of Justice to refuse to remedy a mistake of that kind, but when the matter is carefully considered, it is clear that no such criticism can really be made. The decision of arbitrators is final. If there is, on the face of the award, a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings and there is, therefore, a preliminary objection to the order of the learned Judge in any case. In this case a description of the dividing line is to be found in the language of the award itself and a further demonstration of the dividing line has been shown upon a map accepted by the arbitrators and made part of the award; therefore, it is extremely doubtful whether a Court would have jurisdiction to go into the question whether the line as shown by the map was correct. That would mean really rehearing the arbitration on the merits so far as this particular point is concerned. The view of the Court taking upon itself the decision of such a question as that is illustrated in this case by the learned Judge having taken the evidence of what is called the head arbitrator, who says, looking at the map, that he accepted it in a hurry and that, in his opinion, now looking at the terms of the award, the map is incorrect. But whatever his opinion may be to-day, it by no means follows that that opinion so expressed by him, looking at the document afterwards, was the unanimous opinion of the arbitrators, and, therefore, in any case, it would appear that the only course open to a Court, under such circumstances, would have been to set aisde the award and to send it back to the arbitrators to re-hear and to re-decide the question of this dividing line. However, it is not really necessary to express a final opinion on that point, because this award including the map was filed by the judicial act of a competent Court after all the parties had been heard A decree was passed and the map now in question became a part of the decree. It is quite clear that such a decree including the map cannot be altered by the Court excercising jurisdiction in execution. The appeal, therefore, must be allowed and the order set aside with costs.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 177 OF 1922.

March 16, 1923.

Present:—Mr. Dalal, A. J. C.

NANHU—PLAINTIFF—APPELLANT

versus

RAM DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact Wrong in-

NANHU v. RAM DAYA.

ference from facts—Gift, incomplete for want of acceptance.

In second appeal it is not the business of the High Court to assess the value of evidence relied upon by the lower Appellate Court. Nor does a wrong inference from facts entitle the Court to interfere with a finding of fact in second appeal.

A finding that a gift was incomplete for want of acceptance by the donee before revocation is a finding of fact and cannot be disturbed in second appeal.

Second appeal against the decree of the Subordinate Judge, Kheri, dated the 20th February 1922, setting aside the decree of the Munsif, Kheri, dated the 22nd June 1921.

Messrs. *M. Wasim* and *Wasi Hasan*, for the Appellant.

Messrs. *A. P. Sen* and *Mohan Lal*, for Respondent No. 1.

JUDGMENT.—I do not think I shall be justified in interfering with the lower Appellate Court's finding on the one matter in issue here. Two persons, Nain and Dina, who were heirs to half the property, once in the possession of *Musammat* Bhauna for life, made a gift of the property to the plaintiff Nanhu on 1st October 1918. Subsequently, on 11th October 1919, they revoked it. One Ram Dayal was in possession of the entire property. On 16th August 1920 the plaintiff Nanhu sued for the recovery of possession of half the property in suit from Ram Dayal. Nain and Dina were also made parties defendants to the suit. The First Court of the Munsif of Kheri held that the gift had been complete and could not be revoked. The plaintiff's suit was decreed in consequence.

In appeal to the Court of the Subordinate Judge of Kheri this finding was dissented from. The learned Judge was of opinion that the donee had not accepted the gift, that it was incompelete in consequence and it could, therefore, be revoked. As the donors had revoked it prior to the institution of the suit the plaintiff had no title to possession.

The plaintiff has come here in second appeal. It was argued that acceptance was complete because the property was in the possession of Ram Dayal and all that the donee had to do, to show acceptance, was to receive the deed of gift from the donors. Admittedly, Nanhu accompanied the donors to the Registration Office and received the deed of gift from them. Reference was made to the ruling in the case of *Balmakund* v. *Bhagwan Das* (1). There was, however, other evidence on which it was possible to base a finding of want of acceptance. There had been no mutation in favour of the donee and the donee had taken no steps to oust Ram Dayal. The donee made no enquiry as regards the rights of the donors in the property. In second appeal it is not the business of this Court to assess the value of evidence relied upon by the lower Appellate Court. A wrong inference from facts does not entitle this Court to interfere. In my opinion the finding of the lower Appellate Court as to the gift being incomplete for want of acceptance at the time of its revocation is one of fact and binding on this Court.

It was argued that want of acceptance was not a plea taken by the defence in the First Court. Possibly this was not done in clear words, but on 15th September 1920 the defence Pleader gave four reasons for the gift being invalid and one of these was that it was never given effect to. Such a plea can very well include one of want of acceptance by the donee.

It is not necessary now to examine, as the lower Appellate Court has done, certain tenets of the Hindu Law,—enunciated on the authority of Dr. Gour.

The respondents were entitled to raise the plea in the lower Appellate Court of the revocation of the gift. To avoid ejectment, they can question the plaintiff's title to the property.

The appeal fails and I dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 16 A. 185; A. W. N. (1894) 21; 8 Ind. Dec. (N. S.) 119.

WAZIRI BEGAM *v.* SASHI BHUSAN RAI.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 173 OF 1920.
July 2, 1923.

Present :—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

Nawaba WAZIRI BEGAM —APPELLANT

versus

Babu SASHI BHUSAN RAI—RESPONDENT.

Mortgage—Prior mortgagee, whether can sue without impleading subsequent mortgagee—Mortgagee holding two different mortgages on same property—Suit to enforce mortgage—Cause of action—Mortgages, whether separate subjects—Court-Fees Act (VII of 1870), s. 17.

There is nothing in law to prevent a prior mortgagee from bringing a suit to enforce his mortgage without impleading a subsequent mortgagee.

A person holding two mortgages from the same mortgagor hypothecating the same property and even when the due date in both is the same can bring suits separately on both bonds; in other words, he may sue on the first mortgage without joining the second mortgage and *vice versa*.

Nilu Roy v. *Asirbad Mandal*, 60 Ind. Cas. 809; 33 C. L. J. 232; 25 C. W. N. 129, followed.

The causes of action on both the bonds are separate and the mortgages are separate subjects within the meaning of section 17 of the Court-Fees Act.

ORDER.—We have heard the learned Assistant Government Advocate and Mr. Mitra at great length and we have considered the authorities cited by them namely, *Subramania Aiyar* v. *Balasubramania Aiyar* (1), *Nattu Krishnama Chariar* v. *Annangara Chariar* (2), *Keshavram Dulavram* v. *Ranchhod Fakira* (3), *Sundar Singh* v. *Bholu* (4), *Nilu Roy* v. *Asirbad Mandal* (5), *Gobind Prasad* v. *Tek Narain* (6) and *Jagernath Singh* v. *Mohra Kuvar* (7), besides the cases referred to in our earlier order of the 20th June 1923, namely, *Thakur Jawahir Singh* v. *Thakur Balwant Singh* (8), *Jawahir Singh* v. *Baldeo Prasad* (9) and the Madras High Court unreported Appeal No. 70 of 1902. The Oudh cases and the Madras unreported case are not available. They have, however, been referred to in Desai's Annotated Edition of the Court-Fees Act. The trend of the decisions in Madras, Allahabad and Calcutta seems to be that a person holding two mortgages from the same mortgagor hypothecating the same properties and even when the due date in both is the same can bring suits separately on both bonds. In other words, there is nothing to prevent a mortgagee from suing on the first mortgage without joining the second mortgage and *vice versa*. In *Nilu Roy* v. *Asirbad Mandal* (5) Mookerjee, J., elaborately went into the case, considered all the authorities on the subject and came to the conclusion that the causes of action on both the bonds were separate. If that is so, there can be no question that the mortgages were separate subjects and not one under section 17 of the Court-Fees Act. True, these cases relied upon by the learned Assistant Government Advocate are not under section 17 of the Court-Fees Act, but the principles laid down therein are helpful in coming to a conclusion as to whether the two mortgages, in the circumstances stated above, are two subjects or one subject. The ordinary meaning of the word "subject" when used in law is a thing or matter over which a right is exercised, and the two mortgages were certainly two distinct matters. They could only be deemed to be one either by a covenant in the mortgage consolidating the two together, or by some provision in law. It is conceded by Mr. Mitra that there is no clause in either of the bonds consolidating the two into one. His argument, therefore, mainly was upon the legal aspect of the question and upon analogy. It was said that there could be only one cause of action inasmuch as the mortgagee was precluded from suing on only one of the bonds and had to include the two mortgages in the suit under the statutory provisions contained in the Transfer of Property Act. O. XXXIV, r. 1, Civil Procedure Code,

(1) 30 Ind. Cas. 317; 38 M. 927; 29 M. L. J. 195 (F. B.).
(2) 30 M. 353; 2 M. L. T. 330; 17 M. L. J. 301.
(3) 30 B. 156; 7 Bom. L. R. 811.
(4) 20 A. 322; A. W. N. (1898) 58; 9 Ind. Dec. (N. S.) 566.
(5) 60 Ind. Cas. 809; 33 C. L. J. 232; 25 C. W. N. 129.
(6) 7 Ind. Cas. 330; 14 C. W. N. 1053; 13 C. L. J. 21; 38 C. 60.
(7) 39 Ind. Cas. 76; 2 P. L. J. 118; 1 P. L. W. 553; (1917) Pat. 194.
(8) 7 O. C. 152.
(9) 11 O. C. 173.

and the authoritative decisions of Courts. O. XXXIV, r. 1 has considerably amended and modified the law on the subject as it was set forth in section 85 of the Transfer of Property Act (IV of 1882). Under the present law, particularly under the explanation to r. 1 of O. XXXIV, a puisne mortgagee is not required to implead the prior mortgagee as a party in a suit for foreclosure or sale. The principle will be the same when the subsequent mortgagee and the prior mortgagee happen to be one and the same person. There is nothing in law to prevent the prior mortgagee from bringing a suit to enforce his mortgage without impleading the subsequent mortgagee. There is, however, some risk, and probably the curtailment of some of the rights of the mortgagee who chooses to sue separately upon his two mortgages, he may not be allowed to sell the properties in the subsequent decree when they were already sold in the prior decree. With these considerations we have no concern. The question is simply as to whether there was any bar to the mortgagee (plaintiff in the present case) in bringing his action separately. There was no such bar and, therefore, there were two causes of action arising out of two transactions which were not merged into one and remained as distinct as before. Therefore, the two mortgages in the suit were two different subjects. Hence the suit to enforce the two motgages is covered by section 17 of the Court-Fees Act, and the report of the Stamp Reporter is correct, and the plaintiff mortgagee (respondent No. 4) must, therefore, deposit the deficit Court-fee on the plaint.

K. S. D. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 235 OF 1922.

April 12, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

DARSHAN SINGH—PLANTIFF—APPELLANT

versus

P. RATAN LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Minor defendant—Guardian ad litem, failure to appoint—Suit defended by person named in plaint as guardian—Decree, whether binding on minor.

A Court ought to appoint a proper person to act as g ardian *ad litem* of a minor defendant in the conduct of a suit, but where it has by its action given its implicit sanction to the appearance of a person as such a guardian the absence of a formal order of appointment is not necessarily fatal to the proceedings. [p. 822, col. 1.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), followed.

In a suit in which one of the defendants was a minor, the latter's father was described as his guardian in the plaint. The minor's father appeared on the date fixed for the hearing of the suit and filed a written statement on behalf of the minor denying the minor's liability and stating that he was not the guardian of the minor, and that the actual guardian of the minor was one of the other defendants. The Court made no order appointing a guardian *ad litem* of the minor. It proceeded to record evidence in the case and decreed the claim. In a suit by the minor to avoid the decree:

Held, that the proceeding of the Court was not regular but in the absence of any proof that the minor was prejudiced thereby the decree could not be set aside. [p. 822, col. 1.]

Second appeal against the judgment and decree of the Additional Subordinate Judge, Hardoi, dated the 26th April 1922, reversing the decree of the Munsif, Sandila.

Mr. *Ali-ud-din Ahmad*, for the Appellant.

Mr. *Manni Lal*, for the Respondent.

JUDGMENT.—The question for consideration in this case is whether the present plaintiff was entitled to avoid a decree passed against him under the guardianship of his father, Tikam Singh, by the Revenue Court in favour of a co-sharer for his share of the profits for the years 1321 to 1324 *Fasli*. The minor had become a co-sharer by virtue of a gift made in his favour by his father. No application was made in that suit for the appointment of Tikam Singh as the guardian *ad litem* of the minor

ABDULLAH KHAN *v.* MUHAMMAD MAQBUL HUSSAIN.

but Tikam Singh was described as his guardian in the plaint.

Tikam Singh appeared on the date fixed for the hearing of that suit and filed a written statement on behalf of the minor, denying that the minor had realized any rent and stating *inter alia* that he was not the guardian of the minor and that the actual guardian of the minor was Lokpal Singh, who was also a defendant to that suit. It was also stated that the rents had been realized by Lokpal Singh and the other defendants. The Court below took no steps to have the minor represented by Lokpal Singh or some other person. It proceeded to record the evidence of the *Patwari* and decreed the claim against the minor.

It is difficult to say that the minor was prejudiced by the manner in which the trial was conducted. His father, Tikam Singh, had pretended to suggest that Lokpal Singh was his guardian and to plead at the same time that Lokpal Singh was one of the persons who realized the rents. As their Lordships of the Privy Council say in *Wallan* v. *Banke Behari Pershad Singh* (1) a Court ought to appoint a proper person to act as a guardian *ad litem* of the minor in the conduct of a suit, but where it has by its action given its implicit sanction to the appearance of a person as such a guardian the absence of a formal order of appointment is not necessarily fatal to such a suit. Here Tikam Singh did not say that he was unwilling to act as a guardian of his minor son. All that he suggested was that another person who was already a party was his guardian. He proceeded, notwithstanding, to prosecute the defence on behalf of the minor who does not appear to have been in any way prejudiced by the procedure adopted. The proceedings were not quite regular, but in the absence of any proof that the minor was prejudiced thereby, the decree cannot be set aside. It is not necessary to go into the question of jurisdiction.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 17 OF 1923.

April 24, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

ABDULLAH KHAN—DEFENDANT—APPELLANT

versus

MUHAMMAD MAQBUL HUSSAIN—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25, 33—Suit for possession and damages, dismissal of—Appeal—Decision on question of possession and title in favour of plaintiff—Procedure—Remand—Appeal, second—High Court, power of, to pass proper order.

A suit for possession of a house and damages was dismissed by the Trial Court. On appeal, the Appellate Court decided the questions of title and possession in favour of the plaintiff and instead of deciding the question of damages itself or of remitting an issue on the point to the lower Court, it remanded the whole case to the Trial Court under O. XLI, r. 23 of the Code. On appeal to the High Court:

Held, (1) that the order of the lower Appellate Court was illegal; [p. 823, col. 2.]

(2) that the High Court had power, under O. XLI, r. 33 of the Civil Procedure Code to pass the order which the lower Appellate Court should have passed and to determine the question of damages. [p. 823, col. 2.]

First appeal from an order of the Subordinate Judge, Bijnor, at Moradabad, dated the 23rd October 1922.

Mr. *M. L. Sandal*, for the Appellant.

JUDGMENT.—In the suit out of which this appeal arises the plaintiff came into Court claiming to be the owner of a residential house, fully described in the plaint, and sued for recovery of possession and damages against certain defendants alleged to be in possession as trespassers. The plaintiff asserted that the defendants were the heirs and representatives of two persons whom he had let into possession of the premises in the month of April 1917 on a three years' lease. He pleaded that in a subsequent suit, brought to enforce the terms of the alleged covenant of lease, the defendants had denied his title. He, therefore, sued for ejectment of the defendants as trespassers and for a sum of Rs. 46 by way of damages on account of their use and occupation of the house. The defendants put the plaintiff to proof of his title and pleaded further that they and their prede-

cessors had held possession of the house in suit adversely to the plaintiff for a period of 40 years. The Trial Court fixed two issues, one on the question of title and one on the question of possession, but decided the two issues together in a somewhat confused judgment which we can only interpret as being a finding in favour of the defendants on the question of adverse possession only. The suit having been dismissed on this ground the plaintiff appealed. The lower Appellate Court has definitely found in favour of the plaintiff on the question of title and on the question of possession. There having been no finding by the Trial Court on the question of damages, the learned Subordinate Judge, instead of going into the question himself of remitting an issue to the Trial Court, has exercised his powers under O. XLI, r. 23, Civil Procedure Code, to remand the whole case to the Court of first instance. The appeal before us is by one of the defendants. In substance, two points are taken. The first of these is that the finding of the lower Appellate Court on the question of possession is based in part upon inadmissible evidence, namely, upon a certain rent agreement of the 15th of April 1917, which was inadmissible in evidence by reason of the provisions of section 49 of the Indian Registration Act, XVI of 1908. We do not find that this objection was taken in the Trial Court. The document was denounced by the defendants as a forgery and there was much controversy in both the Courts below as to whether or not its execution was proved. But there is not a word in the judgment of the Trial Court as to the admissibility of the document in evidence. We doubt, under the circumstances, whether the learned Subordinate Judge should have allowed the point to be taken; in any case, we are not prepared to dissent from his view, which is that he has not received the document in evidence of any contract of lease, or other transaction affecting the immoveable property in suit, but has merely treated it as an item of evidence bearing on the question of the date on which certain persons, the predecessors-in-title of the defendants, entered into possession of certain premises. The other point urged in appeal is that the lower Appellate Court has abused its powers of remand under O. XLI, r. 23, Civil Procedure Code. We certainly consider that the order in question was an improper one and unfair to the parties, who were clearly entitled to a final decision from the Court of first appeal and to be spared the necessity of further proceedings in the Trial Court and the possiblity of another first appeal from any decree which that Court might finally pass. It would be obviously competent for us to substitute for the order under appeal an order remitting an issue under O. XLI, r. 25, Civil Procedure Code; but in view more particularly of the fact that the plaintiff-respondent is not represented at the hearing of this appeal, we think the most suitable course for us to adopt is to pass an order disposing of the suit finally at this stage. The lower Appellate Court might undoubtedly have taken upon itself the determination of the question of the amount of damages, on the evidence available upon the record without remitting any issue at all and we have the same power under r. 33 of O. XLI, Civil Procedure Code. So far as we are able to ascertain from the record, the plaintiff failed to produce admissible evidence on which the Court could come to any satisfactory finding as to the amount of damages to which he was entitled. If we are right in this view, then the lower Appellate Court should not, by remanding the whole case, have virtually offered the plaintiff an opportunity of producing further evidence on this point. The result is, that we substitute for the order under appeal the decree which, in our opinion the lower Appellate Court ought to have passed. That is, we set aside the order and decree of the first Court and in lieu thereof we give the plaintiff a decree for recovery of possession and dismiss his claim for damages. The plaintiff is entitled to two-thirds of his costs throughout, as against all the defendants. The defendant who has appealed to this Court may recover one-third of his costs in all three Courts from the plaintiff.

Z. K. *Decree modified.*

NATHU RAM *v.* GHANSHYAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1264 OF 1921.
February 9, 1923.
Present:—Mr. Justice Rafique and Mr. Justice Lindsay.
Pandit NATHU RAM—DEFENDANT—APPELLANT
versus
GHANSHYAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Custom—Pre-emption—*Wajib-ul-arz, *entry in, construction of.*

A clause in the *wajib-ul-arz* of a village laid down that a co-sharer was at liberty to sell his share but he must first offer it to co-sharers in his own *patti*, and if none of them was willing to take the property, he was at liberty to sell the property to co-sharers in any other *thok* or *patti* "of whom he approved," and if none of these was willing to take the property and no person in the village was willing to take a sale, he could offer the property for sale to an outsider:

Held, that the clause did not amount to a valid record of an existing custom of pre-emption.

Second appeal from a decree of the District Judge, Jhansi, dated the 14th April 1921.

Messrs *D. C. Banerji* and *B. K. Mookerji*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—The judgment of the lower Appellate Court is attacked in this appeal on the ground that the learned Judge was wrong in holding that the *wajib-ul-arz* of the village in question contains a record of custom.

There can be no doubt that the record is couched in most unusual language. The clause relating to pre-emption begins with the statement that a co-sharer is at liberty to sell his share but that he must first offer it to co-sharers in his own *patti*, preference being given to near relations. It then goes on to provide that if none of the persons just mentioned are willing to take the property then he is at liberty to sell to co-sharers in any other *thok* or *patti*. These words, however, are qualified by the addition of the words "*jis se razi ho*," indicating that the person who wishes to sell has some right of selecting the person to whom he will make the offer. After this, it is provided that if no one in the second category is willing to take the property and if no person in the village is willing to take a sale then a co-sharer can offer the property for sale to an outsider.

The learned Judge of the Court below, we think interpreted the words "*jis se razi ho*" in the correct sense. It is argued, however, before us that, inasmuch as on the interpretation of these words the person who wishes to sell has the option of offering the property to any person he likes, the record cannot properly be a record of custom. It is argued that in the terms of the clause we have just referred to it is open to the seller of property to pass over entirely the persons who are mentioned in the second category. Then, again, it is pointed out that according to this record if after the first and second category are exhausted and no person *in the village* is willing to take the property the seller can offer it to an outsider. These are certainly strange words and as the learned Counsel for the appellant contends they mean that any person in the village, whoever he may be, would be entitled to an offer of the property sought to be sold. These words might include the village washerman, the sweeper or any other menial attached to the village. This certainly would be a most unusual provision to find in a record of a custom of pre-emption. It has further been pointed out by the learned Counsel for the appellant that the plaintiff cannot maintain the suit for, if he relies on the record of custom as set out in the *wajib-ul-arz*, he must show that he is a person whom the vendor approved of as a purchaser of the property. There was no allegation in the plaint to show that he was a person so approved of and that the vendor afterwards refuse to sell to him.

Bearing in mind the unusual language of this document, we feel constrained to hold that it is not proper to treat it as a valid record of an existing custom and in this view we differ from the judgment of the Court below. We, therefore, allow the appeal, set aside the decree of the Court below and direct that the suit do stand dismissed with costs in all three Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

RAMRUP GHOSHAIN v. MAHABIR SHAH.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1173 OF 1921.

June 27, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Justice Sir John Bucknill, Kt.

Mahanth RAMRUP GHOSHAIN—DEFENDANT—APPELLANT

versus

MAHABIR SHAH—PLAINTIFF, AND ANOTHER—DEFENDANTS-RESPONDENTS.

Fraud—Ex parte decree—Application to set aside decree on ground of fraud—Subsequent suit on same ground, whether maintainable—Invalid claim, whether fraud.

When an application to set aside an *ex parte* decree has been dismissed, a subsequent suit for a declaration that the decree is null and void as against the plaintiff can only be maintained if the plaintiff can prove that, apart from the fraud alleged in the previous proceedings, there are other grounds of fraud which remain to be investigated. [p. 826, col. 1.]

Khirode Chandra Roy v *Srimati Astulla Bee*, 35 Ind Cas. 557; 20 C. W. N. 845, *Puran Chand* v. *Shea Dat Roy*, 29 A. 212; 4 A. L. J. 51; A. W. N. (1907) 31, *Yogamba Boi Ammani* v. *Arunuga Mudaliar*, 36 Ind. Cas. 128; 3 L. W. 572; 20 M. L. T. 126; (1916) 2 M. W. N, 63 and *Manindra Nath Mittra* v *Hari Mondal*, 54 Ind. Cas. 626; 24 C. W. N. 133, referred to.

Plaintiff purchased a house from defendant No. 2; defendant No. 1 sued for a declaration that the sale was invalid and obtained a decree against both plaintiff and defendant No. 2. Plaintiff applied to have the decree set aside on the ground that the service of process in the suit was fraudulently suppressed by defendant No. 1 in collusion with defendant No. 2. The application having been dismissed, he brought this suit for a declaration that the decree was null and void as against him:

Held, that inasmuch as the plaint was not founded on any other ground of fraud than that in the matter of service of processes, the suit was not maintainable. [p. 826, col. 2.]

Every invalid claim is not necessarily a fraud upon the Court. [p. 827, col. 1.]

Appeal from a decision of the Subordinate Judge, Saran, dated the 27th May 1921, reversing that of the Munsif, First Court, Chapra, dated the 23rd August 1920.

Messrs. *L. N. Singh* and *Rai Bipin Bihari Saran*, for the Appellant.

Mr. *H. P. Sinha* for Mr. *Jadubans Sahay*, for the Respondents.

JUDGMENT.

Mullick, J.—This second appeal arises out of a suit brought by the plaintiff on the 10th May 1919 in the Court of the Munsif of Chapra for a declaration that a decree obtained by defendant No. 1 in Suit No. 231 of 1910 against defendant No. 2 and against the plaintiff was null and void as against the plaintiff on the ground of fraud. It appears that the plaintiff purchased from defendant No. 2 a house for Rs. 725 on the 22nd March 1916 of which defendant No. 2 is alleged by the plaintiff to have been the ostensible owner. On the 16th January 1919, defendant No. 1, who claimed to be the proprietor of a certain religious endowment, nstituted Suit No. 231 of 1916, against defendant No. 2 and the plaintiff and others for a declaration that the transfers made by defendant No. 2 on the footing that he was the real Mahant of the endowment were invalid and for confirmation of possession of the properties so transferred. The result of that litigation was that the defendant No. 1 succeeded in getting his declaration both in respect of his title and his possession. It is alleged that the service of processes in that suit were fraudulently suppressed by the defendant No. 1 in colllusion with defendant No. 2 and the decree of the 4th August 1918 is wholly void on the ground of fraud. The plaintiff states in his plaint that on the 14th April 1919 he became aware of the *ex parte* decree against him and that he applied thereafter to the Trial Court for the restoration of the case. That application was dismissed and the present suit is brought on the ground that notwithstanding such dismissal a suit to set aside the decree is maintainable.

The Munsif dismissed the suit holding that the finding on the question of service of processes was *res judicata* and that the plaintiff could not maintain the suit.

In appeal the Subordinate Judge was of a contrary opinion and he has set aside the Munsif's decree and remanded the suit for trial.

The learned Subordinate Judge's judgment is certainly very summary and scanty. He does not particularize the grounds upon which he holds that the scope of the present suit is different from the proceeding to set aside the *ex parte* decree in Suit No. 231 of 1916. We have, however, had the advantage of reading the pleadings in the

suit and we think that the learned Munsif took a correct view of the case.

There is no difficulty as to the law. The plaintiff relies upon the decision of their Lordships of the Privy Council in *Radha Raman Shaha* v. *Pran Nath Roy* (1). The facts of that case are not fully reported and it would seem from the judgment of their Lordships that the scope of the subsequent suit was different from the scope of the proceedings in the matter of setting aside the *ex parte* decree. The other case upon which the plaintiff relies is *Khagendra Nath Mahata* v. *Pran Nath Roy* (2) and our attention has been drawn to the words of Lord Robertson, where he says that "sections 108 and 311 of the Civil Procedure Code limit the attention of the Tribunal to specific matters, and, instead of subjecting to enquiry the radical question....involved, they assume the existence of a real suit." His Lordship then proceeds: "But here the suit itself is attacked as a fraud; and the fraudulent and violent incidents of its progress as, for instance, at the stage of service and in the abduction of the respondent, while they may individually have founded an application under sections 108 and 311, are here treated as parts and *indicia* of a whole." It is clear that upon the facts narrated in the plaint before the learned Judges there were matters of fraud involved independent of and outside the scope of the proceedings for setting aside the *ex parte* decree. One of these matters evidently was the allegation that service of notice was made in respect of a minor defendant upon a person who was not his guardian at all. It is clear that a subsequent suit can only be maintained if the plaintiff proves that, apart from the fraud alleged in the previous proceedings, there are other grounds of fraud which remain to be investigated; that is the purport also of the rulings upon which the defendant-appellant before us relies, namely, *Khirode Chandra Roy* v. *Srimati Ashtulla Bee* (3), *Puran Chand* v. *Sheo Dat Rai* (4), *Niadar Mal* v. *Raunak Husain* (5), *Yogamba Bol Ammani* v. *Arumuga Mudaliar* (6) and *Monindra Nath Mittra* v. *Hari Mandal* (7).

The question, therefore, is what is the fraud that is alleged in the present suit? Giving the fullest margin to the learned Vakil for the respondent, it does not appear to me that the plaint is founded on any other ground of fraud than that in the matter of the service of processes, and that being so the suit, in my opinion, cannot lie.

The matter may be tested in another way. Supposing the suit is permitted to proceed, what will be the effect of the previous finding as to the service of the processes? It is contended on behalf of the respondent that the finding will not be *res judicata* although it may be strong evidence. Whether it is *res judicata* or not will depend upon the question whether a proceeding under O. IX, r. 13, Civil Procedure Code, is a suit within the meaning of section 11 of the Civil Procedure Code. If it be held that the proceeding being a summary proceeding is not a suit, then the rule of *res judicata* will not apply. In that case evidence will be adduced by the parties upon the question of service. What will be the effect of a finding in favour of the defendants that service was in fact made as found in the previous proceedings? In my opinion the finding will be a complete answer to the suit which will then have to be dismissed on the ground that the plaintiff having been duly served with summons and not having appeared to contest the claim of the defendant No. 1 cannot now be heard to urge that the decree was improper unless he can show that by some contrivance on the part of the defendant he was prevented from placing his case fully before the Court. In other words, he must show that owing to some subsequent over reaching on the part of the plaintiff he was prevented from showing that the claim was fraudulent. It

(1) 28 C. 475; 5 C. W. N. 757 (P. C.).
(2) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).
(3) 35 Ind. Cas. 557; 20 C. W. N. 845.
(4) 29 A. 212; 4 A. L. J. 51; A. W. N. (1907) 31.
(5) 29 A. 608; 4 A. L. J. 668; A. W. N. (1907) 191.
(6) 36 Ind. Cas. 128; 3 L. W. 572; 20 M. L. T. 126; (1916) 2 M. W. N. 63.
(7) 54 Ind. Cas. 626; 24 C. W. N. 133.

will not be sufficient to say that the claim was unfounded because every invalid claim is not necessarily a fraud upon the Court. A somewhat similar view was expressed by a Division Bench of this Court in *Ram Narain Lal* v. *Tooki Sao* (8). It is true that in that case the point was whether obtaining a decree by perjured evidence, was fraud which vitiated the decree, but the principle upon which the Court proceeded was that the fraud necessary to the success of the plaintiff must be a fraud practised upon the Court by a contrivance such as I have referred to above.

Therefore, unless the plaintiff can show that there were other grounds of fraud, apart from the service of processes, I think the suit cannot be allowed to proceed. Now upon this point the plaint is entirely silent and we have not been shown by the learned Vakil for the respondent anything which would justify us in supporting the order of remand passed by the Subordinate Judge and in thus protracting the litigation.

It is, however, urged by the learned Vakil for the respondent that leaving aside the prayer on the ground of fraud, he is entitled to maintain the suit on the ground that the decree does not in fact give any relief against the plaintiff. That is not one of the declarations asked for in the prayer portion of the plaint and having regard to the fact that the decree was one for declaration of title and confirmation of possession against all the defendants in the suit it is difficult to see how the plaintiff can say that he is not in any way touched by the decree and that it is of no effect against him. It is quite clear that his suit is a suit to set aside a decree on the ground of fraud and it was accepted as such in the Courts below. It is too late now to assert that a different relief was asked for.

The result is that the appeal is decreed with costs.

Bucknill, J.—I agree.

K. S. D. *Appeal allowed.*

(8) 58 Ind. Cas. 182; 5 P. L. J. 259; 1 P. L. T. 119 (1920); Pat. 98; 2 U. P. L. R. (Pat.) 51.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 209 OF 1922.

May 9, 1923.

Present:—Mr. Justice Gokul Prasad.

GUPTA NAND—DEFENDANT—APPELLANT

versus

BEHARI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31, scope of—Appellate Court—Contents of judgment—Court, duty of.

The provisions of O. XLI, r. 31 are mandatory. A Judge of the lower Appellate Court is bound to give the points for decision and the reasons for the decision thereon in order to enable the Court of second appeal to see that the Judge whose findings on facts are binding on it has put properly before him the points at issue and has decided them. [p. 827, col. 2; p. 828, col. 1.]

Sohawan v. *Babu Nand*, 9 A. 26 at p. 27; A. W. N. (1886) 284; 5 Ind. Dec. (N. S.) 446 and *Babban Singh* v. *Jaimangal Singh*, A. W. N. (1906) 86, followed.

Second appeal against a decree of the First Additional District Judge, Aligarh, dated the 30th June 1921.

Messrs. *G. Agarwala* and *B. K. Mukerji*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—The facts of this case need not be detailed at length. They are rather long and would only encumber this judgment. The suit was for recovery of possession of the site of a certain house on the ground of auction-purchase. The Munsif framed six issues and having dealt with them in sufficient detail gave a decree in the plaintiff's favour. The chief defendant, Gupta Nand, went up in appeal and contested almost all the findings of the first Court. The learned judge of the lower Appellate Court has disposed of the appeal which raised so many questions by the following judgment:—"The learned Munsif has dealt with the matter exhaustively and I can see no reason to differ from any of his conclusions. The appeal is dismissed with costs." The defendant comes here in second appeal and the first contention raised by his learned Vakil is that the lower Appellate Court has not disposed of the case as it has written no judgment as is required by law. Reliance is placed on O. XLI, r. 31 of the Code of Civil Procedure. This ground of appeal must prevail. The provisions of the law are mandatory and the reason is obvious. A Judge

is bound to give the points for decision and the reason for the decision thereon in order to enable the Court of Appeal to see that the Judge whose findings on facts are binding on this Court has put properly before him the points at issue and has decided them. This view has been consistently taken by this Court for more than a quarter of a century. Mr. Justice Straight, then Officiating Chief Justice, observed in the case of *Sohawan* v. *Babu Nand* (1):—"I am of opinion that the so-called judgment of the lower Appellate Court to which exception is taken was, in law, no judgment at all, because it does not satisfy the requirements of section 574 of the Code of Civil Procedure, in not stating the points for determination raised by the pleas in appeal, the decision upon them, and the reasons for that decision." In the same case Mr. Justice Mahmood observed at page 31 as follows: "I cannot but hold that section 574 of the Code contains one of the most salutary provisions of the law, and that considering that this Court in second appeal is bound to accept the findings of fact arrived at by the lower Appellate Courts, we must insist upon a due obedience by those Courts of the mandate of the Legislature contained in that section." The judgment pronounced in the present case might be typed and stitched to any case from a simple money suit to a suit for determination of most complicated questions of the law of mortgage. The latest case of this Court which I have been able to find in this connection is the case of *Babban Singh* v. *Jalmangal Singh* (2).

Having regard to the authorities cited above, I have come to the conclusion that there has been no proper determination of the appeal by the lower Appellate Court. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court under O. XLI, r. 23 to decide the points raised therein and to write a judgment according to law. Costs here and hitherto will abide the event.

M. A. A. & Z. K. *Appeal allowed; Case remanded.*

(1) 9 A. 26 at p. 27; A. W. N. (1886) 284; 5 Ind. Dec. (N. S.) 446.

(2) A. W. N. (1906) 86.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1265 OF 1921.

July 16, 1923.

Present:—Justice Sir John Bucknill, Kt., and Mr. Justice Kulwant Sahay.

Musammat MAHABALI DASIN—PLAINTIFF—APPELLANT

versus

MANU MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Adjacent lands—Tree standing on one falling down on the other—Owner of adjacent property, right of.

If a tree standing on one person's land falls down, and part of it when fallen lies on another person's property that person is entitled to call upon the owner of the property where the tree stands to remove that portion of the tree which has fallen on his (the latter's) property and if he does not do so, he can remove it himself. [p. 829, cols. 1 & 2.]

Appeal from a decision of the District Judge, Purnea, dated the 5th May 1921, affirming a decision of the Munsif, Araria, dated the 31st May 1920.

(Mr. *Satyadeo Sahay*, for Mr. *S. Dyal*, for the Appellants.

Mr. *S. N. Sahay*, for the Respondents.

JUDGMENT.

Bucknill, J.—This is a second appeal from a judgment of the District Judge of Purnea, dated the 5th May 1921, by which he affirmed the decision of the Munsif of Araria, dated the 31st May 1920.

The matter in connection with which this litigation has taken place is a very petty one and relates really to one jack fruit tree and one mango tree. The plaintiff, who is a widowed lady, apparently holds a tenure of some 37 acres of land at a place called *Mauza* Dak in *Thana* Forbesganj. In her plaint she claims that on certain parts of her property there were (1) a jack fruit tree and (2) a mango tree and that the defendants had wrongfully taken possession of these trees and had harvested and taken to themselves the fruit. Her suit, therefore, was brought for the following reliefs: (*a*) that it might be adjudicated that the land upon which these two trees were situated belonged to her and that the defendants who had dispossessed her had no right or title thereto and that she might be placed in possession thereof after ousting the defendants therefrom; and (*b*)

certain claims of a monetary character in connection with the value of the fruit of these trees of which she maintained she had been deprived. The possession with regard to the jack fruit tree was, as a matter of fact, extremely interesting and unusual. It seemed quite clear that the plaintiff and the defendants were interested in adjoining plots of land and that on the plaintiff's land there had grown up a jack fruit tree some thirty or forty cubits in length, and that some time or other this jack fruit tree had fallen down; it had fallen across and on to the defendants' adjoining land; its roots do not, however, seem to have been destroyed by the fall; after it lay partially on the plaintiff's and largely on the defendants' land, its growth appears to have continued luxuriant fresh roots seem to have thrown themselves down from that part of the tree which lay on the defendants' land, and, as was to be expected from the fact that the top of the tree, that is to say, that part where the foliage was, lay upon the defendants' land, the fruit was also to be found at the proper season on that part of the property which belonged to the defendants.

Now, it may well be asked, what is the legal position of the parties with regard to this fallen tree? No doubt the fruit of the foliage derives substantial nourishment from the main trunk and the main roots which are on the plaintiff's property. No doubt, too, they derive considerable nourishment from the new roots which have sprung down from the upper part of the tree lying as it does on the defendants' land. But the apportionment of any claim as between the two joint owners to the fruit of the tree is, as was well exemplified in the case of *Holder* v. *Coates* (1), a matter neither of practical nor of legal possibility and must substantially be purely a matter of arrangement.

On the other hand, the legal position is perfectly simple. If a tree standing on one person's land falls down and part of it when fallen lies on another person's property that person is entitled to call upon the owner of the property where the tree stands to remove that portion of the tree which has fallen on his (the latter's) property, and if he does not do so he can remove it himself. Here, at all material times, there is no doubt that the defendants could have, had they so wished, cut the tree at the point where it crossed the boundary line. No doubt, they would not have any right to appropriate to themselves the timber which had thus fallen on their land, as, in law, that timber would still belong to the owner of the property; but there is no reason for doubting that, in ordinary circumstances, the owner of the tree would be responsible for any damage which has been occasioned to the owner of the adjacent property upon which the tree fell unless it could be shown that the fall was occasioned by circumstances which were entirely outside the owner's control. Now, it has been suggested, and I think with a certain amount of plausibility, that as the defendants must have, from the circumstances in which we hear of these tap roots descending on the ground from the upper part of the tree which lay upon the defendants' land, allowed the plaintiff's tree to remain so long on their land and to have continued there to grow and bear fruit, in equity the two parties might possibly be regarded as being strictly entitled to share in the fruit. I do not think that it is necessary to enter upon this aspect of the question because it does not here really arise. I venture, however, to doubt whether, under circumstances such as these, the Court would contemplate putting into operation any theory of equity with regard to a division of the fruit, such being, in my opinion, a matter purely for private arrangement.

The Munsif and the Subordinate Judge both held that the plaintiff had failed to show that she had land upon which at any rate the major part of this jack fruit tree was actually lying, and the suit was on that ground dismissed.

I have so far hitherto dealt with the jack fruit tree. With regard to the mango tree the position was in no way complicated. Both Courts came to the conclusion that the only mango tree about which there is any evidence stood not upon the plot which the plaintiff said it stood upon but upon another plot No. 279 which was

(1) (1827) Moo. & Mal. 112 at p. 114; 31 R. R. 724.

included in the *gairmazrua khata* of the *zemindar*. They both came to the conclusion that the plaintiff had made out no sort of claim to proprietorship, possessory right or right of any kind over this mango tree.

Lastly, it was suggested that as the Commissioner who was appointed by the Munsif to try and ascertain with accuracy where this jack fruit tree really stood or, as it turned out, lay and where this mango tree really stood, signally failed in his task, the District Judge should have followed his first intention and should have appointed another person as Commissioner clearly to place on record exactly how matters stood with regard to these two trees relative to the plots of the plaintiff and the defendants and the surrounding country. The District Judge, I think, however, very wisely came to the conclusion that in view of the evidence which was before him he was able to deal with the matter without putting the parties to the expense which would be incurred by the appointment of and investigation by a new Commissioner; and I have no doubt he was here right.

I think, therefore, that in this appeal there is really nothing which would justify interference on our part. There are findings of fact and whatever the law may be, those findings of fact would not be affected by any law which might exist with regard in particular to this fallen jack fruit tree. If the law is with regard to this fallen jack fruit tree, as I apprehend it to be, in no case could the plaintiff have recovered the fruit. But her claim was not based on any question of rights over the tree fallen on the adjacent land but a claim to the land itself upon which that tree had fallen. In this she completely failed.

The appeal must, therefore, be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal allowed.

K. S. D.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1233 OF 1920.

May 21, 1923.

Present:—Mr. Justice Kanhaiya Lal.

RAGHUNATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JETTO SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 144, 148, applicability of—Mortgage—Suit for redemption—Denial of mortgage by mortgagee, whether curtails period of limitation.

A mortgagee cannot by denying the existence of the mortgage curtail the period of limitation provided for a suit for redemption.

Article 144 of the Limitation Act is only a residuary Article and does not apply so long as Art. 148 of that Act is applicable.

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 28th June 1920.

Mr. *Harnandan Prasad*, for the Appellants.

Mr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage said to have been effected by Bodha Singh and Ganga Singh, the predecessors-in-title of the plaintiffs, in favour of certain persons now represented by the defendants-appellants. The allegation of the plaintiffs was that a mortgage was effected in 1266 *Fasli* for Rs. 99. In 1894 an attempt was made to redeem that mortgage but the defendants denied the existence of that mortgage as they do now and that suit was dismissed on a preliminary ground which did not bar the institution of a fresh suit. In the present suit the defendant have reiterated what they said in the previous suit. In substance, they asserted that there was no mortgage on the date mentioned by the plaintiffs and that the disputed property was held by them under another mortgage effected by Bodha Singh and Ganga Singh in favour of Daljit Singh, their predecessor, for Rs. 478, in July 1861. They did not, however, produce the original mortgage-deed. The Courts below, relying on the oral and documentary evidence adduced in the case, came to the conclusion that the mortgage set up by the plaintiffs was proved. The correctness of that finding cannot be challenged in second appeal. It is urged on

behalf of the defendants-appellants that the denial of the existence of that mortgage made by the present defendants had the effect of curtailing the period of limitation or, at all events, of rendering the institution of a suit for redemption within 12 years from the date of such denial, necessary. It is not open, however, to a mortgagee by denying the evidence of a mortgage to curtail the period of limitation provided for a suit for redemption. Once a mortgage comes into existence it continues to subsist as a mortgage until the period for its redemption expires despite any attempt made by the mortgagee to deny the existence of that mortgage or to set up an adverse title in himself. Article 144 of the Limitation Act, IX of 1908, is only a residuary Article and does not apply so long as Art. 148 of that Act is applicable. The right of the plaintiffs to redeem the mortgage must, therefore, be deemed to have subsisted on the date of the suit.

The appeal, therefore, fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1332 OF 1921.

July 18, 1923.

Present:—Mr. Justice Kulwant Sahay and Mr. Justice Foster.

FYZABAD BANK, LIMITED, ARRAH BRANCH—PLAINTIFF—APPELLANT

versus

RAMDYAL MARWARI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual accounts, meaning of—Test of mutuality—Suit by Bank on floating account.

Mutual accounts are such as consist in reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits. [p. 833, col. 2.]

Ram Pershad v. *Harbans Singh*, 6 C. L. J. 158, followed.

Although a shifting balance is a test of mutuality, its absence is not a conclusive proof against mutuality. [p. 834, col. 1.]

In a suit for the recovery of a sum of money found due to the plaintiff Bank upon what was described in the plaint as a "floating, open, current and mutual account" it appeared that there were dealings between the parties which amounted to mutual debits and credits on both sides so that sometimes the balance was in favour of one party and sometimes of the other:

Held, that this was a mutual, open and current account within the meaning of Art. 85 of Schedule I to the Limitation Act and the suit having been brought within 3 years from the close of the year when the last item was entered in the account was not barred. [p. 834, col. 1.]

Narrandas Hemraj v. *Vissandas Hemraj*, 6 B. 134; 3 Ind. Dec. (N. S.) 547, *Velu Pillai* v. *Ghose Mahomed*, 17 M. 293; 4 M. L. J. 140; 6 Ind. Dec. (N. S.) 203, referred to.

Mr. *Harnarayan Porsad*, for the Appellant.

Messrs. *L. N. Singh* and *Ragho Prosad*, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the plaintiff, the Fyazabad Bank, Limited, against the decree of the Subordinate Judge of Shahabad, reversing the decree of the Munsif, and dismissing the suit on the ground of limitation. The suit was for recovery of a sum of money found due to the plaintiff Bank upon what is described in the plaint as a "floating, open, current and mutual account" between the parties. The transaction between the parties commenced with a deposit of a sum of Rs. 530 by the defendant on the 12th of November 1912. According to the plaintiff the last transaction between the parties was on the 8th of August 1919 when the defendant is alleged to have made a payment of Rs. 15 to the Bank.

The plaintiff's case is that the account between the parties is a mutual, open and current account where there have been reciprocal demands between the parties and that, therefore, the case falls under Art. 85 of the First Schedule to the Limitation Act, and the period of limitation is three years from the close of the year in which the last item admitted or proved is entered in the account such year to be computed as in the account. The defence of the defendant was that the account between the parties was merely that of loans advanced by the plaintiff to the defendant and payments made by the defendant, in part or full satisfaction of the loans; and the Article applicable to the case was

Art. 57 of the First Schedule to the Limitation Act, and the period of limitation was three years from the date of each advance and that as none of the items of advance was made within three years of the suit, the claim was barred by limitation. The defendant further pleaded payment of the full amount due in the year 1916 and denied the item of payment of a sum of Rs. 15 entered in the plaintiff's account under date the 8th of August 1919.

The learned Munsif before whom the case came for trial held that the defendant had failed to prove the plea of payment in the year 1916, that the item of payment of the 8th of August 1919 was true and correct, and that the account between the parties was a mutual, open and current account where there had been reciprocal demands between the parties, and that the case was governed by Art. 85 of the Limitation Act and was not barred by limitation. He accordingly made a decree in favour of the plaintiff for the amount claimed with costs and future interest. Against this decree the defendant went on appeal before the learned Subordinate Judge, and the only points urged before him in appeal were, firstly, that the plaintiff's allegation of payment of Rs. 15 by the defendant in August 1919 was not true and even if true, it was not a payment which could save limitation, and, secondly, that the Article applicable to the case was Art. 57 of the Limitation Act and that the suit was barred under that Article. The plea of payment urged by the defendant in the year 1916 was not taken before the learned Subordinate Judge. The learned Subordinate Judge found that the payment of Rs. 15 alleged by the plaintiff to have been made by the defendant in August 1919 had not been proved, and that even if it be accepted that such a payment was made, he came to the conclusion that the payment could only be treated as a payment in part satisfaction of the principal, and as it did not appear in the defendant's handwriting, it did not save limitation under section 20 of the Limitation Act. He, moreover, found that the account between the parties was not a mutual, open and current account as contemplated by Art. 85 of the First Schedule of the Indian Limitation Act. He apparently held that the dealings between the parties was merely a transaction of loans advanced by the Bank to the defendant and that the case fell under Art. 57 of the Limitation Act and that the suit was barred by limitation. He has accordingly dismissed the suit with costs. Against this decree the plaintiff Bank prefers this second appeal to this Court, and the only point for consideration in this appeal is as to whether the dealings between the parties amounted to a mutual, open and current account where there have been reciprocal demands between the parties so as to bring the case within Art. 85 of Schedule I of the Limitation Act.

The copy of the account filed by the plaintiff Bank is accepted by the defendant to be correct up to the 24th of August 1916. After that date the defendant does not accept the correctness of the account but after the 24th of August 1916 the account consists merely in adding interest on the sums found due every six months with the exception of the item of Rs. 15 under date the 8th of August 1919 which is shown in the plaintiff's account as a payment made by the defendant but which has been found to be not proved by the learned Subordinate Judge. Therefore, with the exception of this item of Rs. 15 under date the 8th of August 1919 the account as produced by the plaintiff must be taken to be correct. Now this account began, as I have said, on the 12th of November 1912 by a deposit of a sum of Rs. 530 by the defendant in the Bank. The accounts appear to have been made up every six months, on the 30th of June and 31st of December every year, and interest is added at the end of every six months and the balance carried forward to the next six-monthly account. The accounts for 1912 and 1913 clearly show that the balance was sometimes in favour of the plaintiff and sometimes in favour of the defendant and it is admitted by the learned Vakil for the defendant that, in the beginning, the account was a mutual, open and current account creating reciprocal demands between the parties; but he argues that from February 1913 onwards the balance is always in favour of the plaintiff and although payments were made on several dates in each month from February 1913 to August

1916, these payments were only in discharge of the debt of the Bank and cannot be treated to be mutual accounts creating reciprocal demands between the parties. I have carefully looked into the accounts produced by the plaintiff and, to my mind, it seems to be clear that the account which was admittedly a mutual, open and current account creating reciprocal demands in the beginning continued to be so up to August 1916. The deposits made by the defendant in each period of six months from 1913 to 1916 amount to large sums and in the years 1914 and 1915 I find that the deposits for the period of July to December in 1914 and July to December 1915 amount to more than the sums withdrawn in those periods and, to my mind, it is clear that from time to time each party could say to the other "I have an account against you."

Several authorities have been cited by the learned Vakil for the defendant to show that the account between the parties in the present case does not amount to a mutual, current and open account within the meaning of Art. 85 of the First Schedule to the Limitation Act. Reliance has been particularly placed upon the cases of *Hajee Syud Mahomed* v. *Ashrufoonnissa* (1) and *Ram Pershad* v. *Harbans Singh* (2). In the case of *Hajee Syud Mahomed* v. *Ashrufoonnissa* (1) the suit was by a banker to recover a sum of money in respect of sums advanced to the defendant through her agent Mr. Wilson, the manager of her Indigo Factory. The dealings between the parties in that case commenced by a payment of Rs. 1,200 into the Bank by Mr. Wilson on behalf of the defendant. Between 20th of December 1869 to 31st December 1869 the defendant withdrew a sum of Rs. 413 leaving a balance of Rs. 787. On the 31st of January 1870 the balance was overdrawn and a sum of Rs. 867-6-2 was found due to the plaintiff. From this date onwards the balance was always against the defendant, except on six occasions when the balance was in favour of the defendant, and the last date on which there was a balance due to the defendant was the 2nd of July 1872. After this date the balance was always against the defendant and sums paid by the defendant went in part payment of the debt due from the defendant to the plaintiff. The last payment was made by the defendant on the 12th of June 1873. The suit was brought on the 23rd of December 1876 and their Lordships held that the period began to run from the 12th of June 1873, *i.e.*, the date of last payment by the defendant but under Art. 87 of Act IX of 1871 the suit was barred, as under that Article the time began to run not from the close of the year in which the last item is entered in the account but from the date of the last item. Their Lordships treated the account as a mutual, open and current account within the meaning of Art. 87 of Act IX of 1871, which corresponds with the present Art. 85 of the Act of 1908, with the difference that, whereas in the Act of 1871 limitation began to run from the date of the last item, under the Act of 1908 the period begins to run from the close of the year in which the last item is entered in the accounts. No doubt their Lordships at one place in the judgment throw out a doubt as to whether the account was a mutual account in which there had been reciprocal demands between the parties but their Lordships did not decide the point but proceeded on the assumption that the account was a mutual, open and current account creating reciprocal demands between the parties. Similarly in the case of *Ram Pershad* v. v. *Harbans Singh* (2) Sir Ashutosh Mookerjee, J., held that where the accounts can be called mutual, they can at the latest be mutual down to the date when the defendant made his last payment to the plaintiff, the banker. His Lordships examined the law on the subject very exhaustively and considered all the important cases on the subject and came to the conclusion that mutual accounts are such as consist in reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits. On examining the account in the present case I am of opinion that the account between the parties is such as to consist in reciprocity of dealings

(1) 5 C. 759; 6 C. L. R. 112; 2 Ind. Dec. (N. S.) 1091.
(2) 6 C. L. J. 158.

between them and it does not consist merely of items on one side though made up of debits and credits. On several occasions during the period from 1913 to 1916 the defendant could have said to the plaintiff "I have an account against you." It is true that after February 1913 the balance was always against the defendant, but although a shifting balance is a test of mutuality, its absence is not a conclusive proof against mutuality. The account in this case shows dealings between the parties which amounted to mutual debits and credits on both sides so that sometimes the balance is in favour of one party and sometimes of the other, as was the case in *Narrandas Hemraj* v. *Vissandas Hemraj* (3), which has been explained in the case of *Velu Pillai* v. *Ghose Mahomed* (4) to mean not that there must have been a shifting balance but that such was a possible and likely incident of the mutual transactions with regard to which the account was kept.

In my opinion the present case falls under Art. 85 of the First Schedule of the Limitation Act of 1908, and the period of limitation began to run from the close of the year 1916 when the last item admitted by the defendant is entered in the account, and as the suit was brought within three years from that date, it is not barred by limitation. I would, therefore, set aside the decree of the Subordinate Judge and restore the decree of the Munsif.

The result is that the appeal is allowed and the suit is decreed for the full amount claimed with costs in all the Courts and future interest at the rate of 6 per cent. per annum.

Foster, J.—I agree.

K. S. D. & Z. K.

Appeal allowed.

(3) 6 B. 134; 3 Ind. Dec. (N. S.) 547.
(4) 17 M. 293; 4 M. L. J. 140; 6 Ind. Dec. (N. S.) 203.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 391 OF 1920.
February 27, 1923.
Present:— Mr. Justice Rafique and Mr. Justice Lindsay.
Pandit HARI SHANKAR— PLAINTIFF — APPELLANT
versus
Musammat RAM PYARI AND OTHERS— DEFENDANTS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 15, 16—Arbitration—Reference through Court—Award, decree on—Appeal, whether lies.

Objections, if any, to the validity of an award made on a reference to arbitration through Court, must be taken by the parties in the Court in which the award is filed; and in case the objections taken are disallowed or any objections are omitted or none are taken, no appeal can lie against the decree passed on the award on the ground that the award was invalid. The only ground upon which an appeal would lie against the decree in such a case, would be a case where the decree is either not in accordance with the award or is in excess of the award. [p. 835, col. 1.]

Lutawan v. *Lachiya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 (F. B.), followed.

First appeal against a decree of the Subordinate Judge, Meerut, dated the 15th September 1920.

Mr. *Ajudhia Nath*, for the Appellant.

Dr. *K. N. Katju* and Mr. *Kailas Chandra Mital*, for the Respondents.

JUDGMENT.—The two Appeals Nos. 391 and 392 of 1920 are connected, inasmuch as they arise out of a suit brought by Hari Shankar on the 11th December 1918 in the Court of the Subordinate Judge of Meerut for partition. Hari Shankar alleged in his plaint that he and Shankar Lal were the sons of Pandit Ram Chandar who was the brother of Pandit Chajju Mall. The family was joint and no partition of the family property had taken place. Hari Shankar did not propose to remain joint with his uncle Chajju Mal and, therefore, claimed partition. Among the array of defendants was Shankar Lal, the brother of the plaintiff. Shankar Lal put in no written statement. The other defendants resisted the suit by filing written statements and raising various pleas. As Shankar Lal had failed to file the written statement within the time allowed by the First Court a *rubkar* dated the 1st February 1919 was drawn up by the presiding officer

of the Court directing that the proceedings against Shankar Lal be *ex parte*. Subsequently, on the 10th of June 1920, all the parties to the litigation, with the exception of Shankar Lal, signed an agreement referring the dispute to the arbitration of Chaubey Radhey Lal. Shankar Lal declined to sign the agreement and wanted the Court to decide the case itself. The matter was referred to Chaubey Radhey Lal who gave his award on the 2nd September 1920. The plaintiff and Shankar Lal filed objections on the 11th September 1920 objecting to the award. Shankar Lal objected on the ground that he was no party to the reference and, therefore, the award was invalid. Hari Shankar, the plaintiff, took the same objection as aslo others. The learned Subordinate Judge disallowed the objections of the two brothers and passed a decree in terms of the award. The two brothers, Hari Shankar, the plaintiff, and Shankar Lal, one of the defendants, have preferred two appeals before us.

The learned Counsel for the respondents takes a preliminary objection to the appeals to the effect that no appeals lie in view of the provisions of sections 15 and 16 of the Second Schedule of the Code of Civil Procedure. In support of his contention he cites the case of *Lutawan* v. *Lachiya* (1), a Full Bench ruling of this Court. It is contended on behalf of the respondents that under the law objections if any, should be taken by the parties objecting to the validity of the award in the Court in which the award is filed; and in case those objections are disallowed or any objections are omitted or none taken, no appeal can lie on the ground that the award was invalid. The only ground upon which an appeal would lie from a decree passed upon the award would be a case where the decree is either not in accordance with the award or is in excess of the award. In the present case the objection that is urged now before the Court was urged in the Court below and was rejected. The two appellants do not challenge the decree of the lower Court on the ground that the decree is in excess of the award or is not in accordance with it. For the two appellants, Hari Shankar and Shankar Lal, it is contended that as Shankar Lal was no party to the reference and as the dismissal of the claim of Hari Shankar affects the question of the character of the family, *i.e.*, whether it was joint or divided and hence affects the rights of Shankar Lal also, the decree should not be considered to be binding upon Shankar Lal. And if the award is vitiated because of the fact of Shankar Lal not joining in the reference, the entire decree of the Court below is bad and should be set aside. The contention for the two appellants is not sustainable in view of the Full Bench ruling of this Court cited above. The learned Counsel for the appellants wishes to cite the case law of other High Courts which is not in consonance with the view taken in the Full Bench case of this Court. We think we are bound by the case of our own Court and we should follow it. We must, therefore, give effect to the preliminary objection on behalf of the respondent and hold that the two appeals are not maintainable. We, therefore, dismiss them with costs including fees on this Court in the higher scale.

Z. K. *Appeal dismissed*

(1) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 (F. B.).

RANGOON HIGH COURT.

CIVIL REGULAR No. 139 OF 1921.
January 24, 1923.
Present:—Mr. Justice Young.
SOOK LAL—PLAINTIFF
versus
DAL CHAND AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 149

KESHO SARAN v. KHAIRATI LAL.

—*Extension of time for payment of Court-fees—Application for leave to sue* in forma pauperis, *withdrawal of—Court-fees paid after limitation—Discretion of Court.*

Plaintiff applied for leave to sue *in forma pauperis*. A similar application made by him in another suit had already been rejected. He subsequently applied to withdraw his application and paid in the requisite Court-fee on the plaint after the expiry of the period of limitation for the suit and prayed that time may be extended under section 149 of the Civil Procedure Code:

Held, (1) that the application made by the plaintiff for leave to sue *in forma pauperis* after the rejection of a similar application in another suit was fraudulent;

(2) that, therefore, this was not a fit case for the exercise of the discretion vested in the Court under section 149 of the Civil Procedure Code.

Stuart Skinner v. *Orde*, 2 A. 241 at p. 249; 4 C. L. R. 331; 6 I. A. 126; 4 Sar. P. C. J. 31, 3 Suth. P. C. J. 627, 1 Ind. Dec. (N. S.) 685 (P. C.), distinguished.

Mr. *Campagnac*, for the Plaintiff.

Mr. *Vertannes*, for the Defendants.

JUDGMENT.—The question for consideration is whether the suit is barred by limitation? The plaintiff had filed a petition *in forma pauperis* on the 3rd January 1921 which would, if that petition can be held to be the plaint in the suit, be just in time. On the 28th February 1921 he put in a petition for leave to withdraw his application to sue as a pauper on the ground that he had attempted to sue as such in another suit and that petition had been rejected. Normally speaking, his plaint was instituted on the 12th March 1921 when he paid the Court-fees stamp, which would, of course, be out of date, as a suit for accounts must be filed within three years of dissolution. He relies, however, upon section 149 of the Code which empowers the Court to treat a subsequent payment of Court-fees as relating back to the period when it ought to have been paid and claims that his plaint shall be considered to have been filed at the time when he presented his application for leave to sue as a pauper.

The case of *Stuart Skinner* v. *Orde* (1) lends some countenance to his prayer. There a pauper borrowed money to pay the Court-fees and applied that he should be allowed to sue in the ordinary course and that his plaint should date from the time that he had filed his application to sue as a pauper. But there, as was mentioned by their Lordships of the Privy Council, all question of fraud was negatived. Here, having regard to the fact that Sook Lal's application for leave to sue as a pauper had been rejected in a former suit, I must hold that both applications to sue *in forma pauperis* were fraudulent. Section 149 gives the Court discretion in the matter and, in my opinion, this is not a case in which that discretion should be exercised.

I must, therefore, reject the application to allow the payment to relate back and the suit to be taken as instituted on the day that he has filed his pettion for leave to sue as a pauper, and hold that his suit was instituted on the 12th March 1921. It is, therefore, out of time and the suit must be dismissed with costs.

Z. K.

Suit dismissed.

(1) 2 A. 241 at p. 249; 4 C. L. R. 331; 6 I. A. 126; 4 Sar. P. C. J. 31; 3 Suth. P. C. J. 627; 1 Ind. Dec. (N. S.) 685 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 539 OF 1921.

January 30, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Daniels.

Lala KESHO SARAN—DEFENDANT—APPELLANT

versus

Lala KHAIRATI LAL—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 2, 25—Civil Procedure Code (Act V of 1908), s. 102—Execution of decree—

KESHO SARAN *v.* KHAIRATI LAL.

Permission to decree-holder to bid at auction conditional on paying off another decree-holder—Sale set aside—Suit to recover payment, nature of—Appeal, second, whether lies.

Plaintiff, who was decree-holder in certain execution proceedings, applied for leave to bid at the auction-sale. Leave was granted on condition that he paid off the defendant, who was another decree-holder against the same judgment-debtor and who had applied for rateable distribution. Plaintiff complied with the condition and purchased the property put up for sale. Subsequently, a third person was declared the owner of the property sold, which was, consequently, lost to the plaintiff. The latter then sued the defendant for recovery of the amount paid to him together with interest, the total claim being less than Rs. 500:

Held, (1) that the suit did not fall under clause (2) or clause (25) of Schedule II to the Priovincial Small Cause Courts Act, and was, therefore, cognisable by a Small Cause Court;

(2) and that consequently a second appeal was not competent in the case.

Article 2 of Schedule II to the Provincial Small Cause Courts Act refers to suits for damages in respect of acts done under the orders of a Court.

Second appeal from a decree of the Additional Judge, Moradabad, dated the 2nd February 1921.

Mr. *G. Banerji* for Mr. *P. L. Banerji*, for the Appellant.

Mr. *Panna Lal*, for Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—A preliminary objection is raised to the entertainment of this appeal based upon the provisions of section 102 of the Code of Civil Procedure; in other words, it is argued that the suit out of which the appeal was arisen was a suit of the nature cognizable by a Court of Small Causes and as the subject-matter of the suit was under Rs. 500, therefore, no second appeal lies.

The facts are as follows:—

The plaintiff in the suit was one Khairati Lal. This man had a decree against one Abdul Aziz which he was executing by sale of certain immoveable property supposed to belong to Abdul Aziz.

At the time when these execution proceedings were pending it seems that the other party to this suit, namely, Lala Kesho Saran, held two decrees against the same judgment-debtor Abdul Aziz. Kesho had applied in the execution proceedings taken by Khairati Lal for rateable distribution of assets.

When the time came for sale of the property Khairati Lal, the decree-holder, applied to the Court for permission to bid. The Court gave him the permission on the condition that before bidding for the property he was to satisfy the two decrees which Kesho Saran held against the judgment-debtor Abdul Aziz. Khairati availed himself of this condition, paid off the decretal money owing to Kesho Saran and thereafter bid for and purchased the property.

Afterwards, there was a suit by a third party, one Muhammad Jan, to have the sale set aside on the ground that the property which was sold and purchased by Khairati Lal was not the property of Abdul Aziz at all but was Muhammad Jan's own property. This suit succeeded and the result, therefore, so far as Khairati Lal was concerned, was that he was deprived of his purchase. Khairati Lal then brought this suit to recover from Kesho Saran the money which he had paid in satisfaction of Kesho Saran's two decrees. The amount in suit was Rs. 198-15-8 and there was added a claim for Rs. 70 by way of interest so that the total came to somewhere under Rs. 270.

It is clear, therefore, that having regard to the value of the subject-matter of the suit no second appeal will lie unless it can be shown that the suit was exempted from the cognizance of the Small Causes Court.

Mr. Banerji who has argued the case on behalf of the appellant contends, in the first place, that the suit may be treated as a suit under clause (2) of the Second Schedule to the Provincial Small Cause Courts Act. That clause relates to suits concerning acts purporting to be done by any person in pursuance of a judgment or order of a Court or of a Judicial Officer acting in the execution of his office. We cannot see that this clause has any application to the claim now before us for consideration. The clause clearly refers to suits for damages in respect of acts done under the orders of a Court, and it cannot be pretended that Khairati Lal paid over the money to Kesho Ram under any such order. The Court merely gave him the option of paying the money as a condition of his being allowed to bid at the auction. Failing this clause, the learned Counsel for the

appellant would rely upon clause (26) of the Second Shedule which relates to suits to compel a refund of assets improperly distributed under section 73 of the Code of Civil Procedure. Here, again, we are unable to accept the argument for it appears to us to be perfectly clear that the suit was not a suit of the kind described in this clause. It follows, therefore, that the learned Counsel not being able to bring his suit under any of the heads referred to in the Second Schedule to the Provincial Small Cause Courts Act, it must be taken that the suit was of a nature cognizable by a Court of Small Causes and consequently under section 102 of the Civil Procedure Code no appeal lies. We allow the preliminary objection and dismiss the appeal with costs to the respondent including in this Court fees on the higher scale.

Z. K. & W. C. A. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER
No. 62 OF 1923.
July 10, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

MAHADEO SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

DHOBI SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22, 66—Execution of decree—Notice to judgment-debtor, object of—Subsequent applications for execution—Fresh notice, whether necessary—Sale in execution—Objection on ground of illegality in conducting sale—Valuation of property in notice—Judgment-debtor, whether can contest valuation—Order refusing to set aside sale—Second appeal.

No second appeal lies against an order refusing to set aside a sale in execution of a decree where the sale is attacked on the ground of irregularity in publishing and conducting the sale.

The object of r. 22, O. XXI of the Civil Procedure Code is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree-holder's delay in executing his decree, but once the original decree has been put into execution and a notice has been served under the rule indicating his intention to proceed to execution, the rule does not contemplate that a first notice must be served for every execution application made more than one year after the last order against the judgment-debtor. [p. 839, cols. 1 & 2.]

In a previous execution petition notice was duly served on the surviving judgment-debtor himself and the legal representatives of the deceased judgment-debtor. A sale took place but was eventually set aside on the 20th January 1919. The last application for execution was made on the 22nd December 1920 and the property was re-sold on the 16th March 1921. An application to set aside the sale was dismissed by the Munsif and the order was confirmed on appeal. A second appeal was preferred to the High Court:

Held, (1) that the order of the Court could not be regarded as one made under section 47 of the Civil Procedure Code and, therefore, no second appeal lay: [p. 839, col. 1.]

(2) that the notice under O. XXI, r. 66, having been duly served the judgment-debtor was estopped from contending that the notice gave an inadequate valuation of the property. [p. 839, col 2.]

Macnaghten v. *Mahabir Pershad Singh*, 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N.S.) 1086 (P.C.) and *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, 21 Ind. Cas. 389; 38 M. 387; 14 M. L. T. 320; 25 M. L. J. 198, followed.

Appeal from an order of the Subordinate Judge, Monghyr, dated the 19th January 1923, confirming an order of the Munsif, Janui, dated the 10th July 1922.

Mr. *S. N. Bose*, for the Appellants.

Mr. *H. P. Sinha*, for the Respondents.

JUDGMENT.

Mullick, J.—It is quite clear that there is no second appeal in this case.

It appears that a previous application for execution was made one year after the decree and notice under O. XXI, r. 22, Civil Procedure Code, was duly served upon the surviving judgment-debtor. It further appears that one of the judgment-debtors was dead and notice was also served under O. XXI, r. 22, upon his legal representatives. In that execution a sale took place which was confirmed on the 15th June 1921.

There was an appeal and the sale was set aside by the Appellate Court on the 20th January 1919. The last application for execution was made on the 22nd December 1920 and the property was re-sold on the 16th March 1921;

An application was then made to set aside the sale. The Munsif dismissed the application and the Subordinate Judge in appeal affirmed his order on the 19th January 1923.

The present second appeal is preferred against the order of the Subordinate Judge.

It is clear that, in so far as the application for setting aside the sale attacks the sale on the ground of irregularity in publishing and conducting the sale, no second appeal lies. The learned Vakil for the appellant, however, urges that where a question as to the jurisdiction of the Court in consequence of failure to issue a notice under O. XXI, r. 22 arises, the order of the Execution Court is one under section 47 of the Civil Procedure Code against which there is a second appeal. Now the question in this case is whether it was at all necessary for the Execution Court to issue a notice under r. 22 of O. XXI. In my opinion it was not. The rule in question requires the decree-holder to issue only one notice upon the judgment-debtor or his legal representative, as the case may be; the proviso to the rule makes this quite clear. The object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree-holder's delay in executing his decree; but once the original decree has been put into execution and a notice has been served under r. 22 indicating his intention to proceed to execution, it does not seem to me that it is contemplated by r. 22 that a fresh notice must be served for every execution application made more than one year after the last order against the judgment-debtor. This point, therefore, fails and the order of the Executing Court cannot be regarded as one made under section 47 of the Code. Therefore, no second appeal lies.

On the merits also the appellants have no case. The lower Court has found as a fact that the sale-proclamation was duly served. It has also found that the notice under r. 66 of O. XXI was duly served. It is objected that this notice gave the value of the property at the same figure as that which had been found to be inadequate in the proceedings in which the sale had been previously set aside. But the judgment-debtor, as has been pointed out by the Munsif, had notice of the valuation and it was his duty to appear before the Court and assist the Court in arriving at a true and proper valuation. Not having done so, the principle of estoppel operates against him. The learned Munsif has relied on *Macnaghten* v. *Mahabir Pershad Singh* (1) and *Raja of Kalahasti* v. *Maharaja of Venkatagiri* (2). Both these are cases in point and in my opinion the judgment-debtor is estopped from disputing the valuation.

The result is that the appeal is dismissed with costs.

Bucknill, J.—I agree.

Appeal dismissed.

K. S. D. & Z. K.

(1) 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.).

(2) 21 Ind. Cas. 389; 38 M. 387; 14 M. L. T. 320; 25 M. L. J. 198.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 475 OF 1922.

May 28, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

LALTA PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

DARSHAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law — Alienation by widow — Necessity— Existence of arrears of revenue—Presumption—Execution of document, proof of — Attestation, proof of, whether necessary—Second appeal—Point not raised in memorandum, whether can be argued.

The existence of arrears of revenue for which an estate is liable to be sold is at least presumptive evidence of necessity, even though when a debt is incurred, measures have not been taken to enforce the liability. This presumption of necessity can, however, be rebutted by showing that a widow had sufficient income to enable her to pay the revenue without borrowing. [p. 840, col. 2.]

Where the attesting witnesses of a document deny its execution, all that is necessary to be proved by other evidence is the execution of the document; it is not necessary further to prove execution before the attesting witnesses. [p. 840, col. 2.]

LALTA PRASHAD v. DARSHAN SINGH.

Narain Das v. *Dilawar*, 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250, and *Laksman Sahu* v. *Gokhul Maharana*, 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat.) 415, relied upon.

A point not specifically raised in the grounds of appeal cannot be allowed to be urged at the hearing. [p. 840, col. 2.]

Second appeal against the decree of the District Judge, Cawnpore, dated the 8th of February 1922.

Mr. *Narain Prasad Asthana*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—The issue in this case is whether the mortgages executed in 1907 and 1908 by a Hindu widow, *Musammat* Kailasha, were executed for legal necessity.

The suit out of which the appeal arises was brought by the mortgagees for sale of the mortgaged property. The defendants-appellants are the reversioners of *Musammat* Kailasha's husband, Radha Kishan. There are some parts of the judgment of the lower Appellate Court which are not very clear, but there is no doubt as to what its findings are. It finds that the consideration for these mortgages was actually advanced for payment of revenue, and it is not disputed that it was applied in payment of revenue. The appellants contend that there was no legal necessity; first, because it was not shown that the estate was actually threatened with sale when the mortgages were executed, and, secondly, because *Musammat* Kailasha received from the estate an income sufficient to enable her to pay the revenue. As to the latter point the learned Judge finds that she had an income which would ordinarily be sufficient to enable her to pay revenue, but at the time when these mortgages were executed, she had been obliged to incur unusual expenditure by reason of a litigation in which she had been involved for the protection of the estate. The learned Judge, therefore, finds that there was at the time a pressure on the estate. He also finds, though he has not attached to the circumstance the weight to which we think it is justly entitled, that the reversioners themselves paid off, as if it were a valid debt, another mortgage executed by *Musammat* Kailasha for payment of revenue, shortly after the mortgages in suit. These mortgages were actually recited in that deed. On these findings the question of legal necessity cannot be seriously disputed. The existence of arrears of revenue for which the estate is liable to be sold up is at least presumptive evidence of necessity, even though when the loan is incurred, the Government may not have taken measures to enforce the liability. This presumed necessity may no doubt be rebutted by showing that the widow had sufficient income to enable her to pay the revenue without the necessity of borrowing. The learned Judge in this case, though he finds that she had a substantial income, has also found, that there were special circumstances which made it necessary for her to borrow money at this particular time.

Three other points have been urged by the appellants. The first is, that the interest under the deed was excessive. This point is nowhere specifically raised in the grounds of appeal, though the memorandum of appeal is divided into seven paragraphs, and we do not think that the appellants are entitled to urge it. Nor do we think that 15 per cent. interest with yearly rests is an extraordinarily high rate. The second point is that instead of passing a mortgage decree in the usual form the Court below has given a personal decree against the reversioners. This is no doubt due to an oversight on the part of the office in drawing up the decree. The learned Judge merely says in his judgment that he allows the appeal and decrees the sum claimed. Reference to the plaint shows clearly that the claim was for a decree for the amount claimed by sale of the mortgaged property. This plea is, therefore, allowed and the decree will be amended and the decree in the form of O. XXXIV, r. 4, will be prepared. Accounts will be prepared up to a date six months from now. Interest will run at the contractual rate up to that date, and thereafter, simple interest will be allowed at 6 per cent. per annum till payment. We notice that the decree of the Court below was signed by the appellant's learned Pleader who is, therefore, responsible for not pointing out the oversight.

The last point was that the second mortgage was not proved, and this point is taken in paragraph 7 of the grounds of appeal

but it does not appear to have been pressed in the Court below. In any case we are satisfied that there is no substance in it. There were three attesting witnesses to the deed. Two of them were dead and the third denied attestation. A witness has proved execution under section 71 of the Evidence Act. The appellant's argument was that he should also have proved execution in the presence of the attesting witnesses. Section 71 does not require this and there is authority both of this Court in *Narain Das* v. *Dilawar* (1), and that of the Patna High Court in *Laksman Sahu* v. *Gokhul Maharana* (2), that proof of execution is sufficient.

Except to the extent stated above, we dismiss the appeal. As the appellant has substantially failed the respondents will get their costs including in this Court fees on the higher scale.

K. S. D. & Z. K. *Decree modified.*

(1) 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250.

(2) 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat.) 415.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 172 OF 1920.

April 17, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Maharaja ISHWARI PRASAD NARAYAN DEO—DEFENDANT—APPELLANT

versus

THE CHOTA NAGPUR BANKING ASSOCIATION, LIMITED AT HAZARIBAGH—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation—Attesting witness.

A witness stated that the defendant executed a mortgage-bond in his presence and in the presence of certain other persons, and that the witness himself attested the mortgage-bond:

Held, that the evidence was sufficient to establish that the witness signed the document as an attesting witness.

Appeal from a decision of the Subordinate Judge, Hazaribagh, dated the 9th April 1920.

Messrs. *Sultan Ahmad* and *S. N. Bose* for the Appellant.

Messrs. *S. M. Mullick* and *B. C. De*, for the Respondent.

JUDGMENT.

Das, J.—A very short point arises in this appeal. It was urged before us that the plaintiff Bank has not proved that the mortgage document was attested in the manner required by law. Prafulla Kumar Mullick, the sole witness examined on behalf of the plaintiff, stated in his evidence that he attested the mortgage bond and that the defendant signed the mortgage bond in his presence and in the presence of certain other persons. It was argued before us that the evidence, does not establish that the witness actually saw the document being executed by the mortgagor and that he subscribed as a witness after seeing that the document was executed by the mortgagor; but it seems to me that the evidence is sufficient to establish that the witness signed the document as an attesting witness. He says very clearly that he attested the document. We must assume that he meant that he subscribed as a witness after he saw that the document was actually executed. If it were the case of the defendant that the witness was not in fact an attesting witness, he should have been cross examined on the point; but the case was tried as an *ex parte* case and there was, of course, no cross-examination.

This appeal fails and must be dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal dismissed.*

BISHUN NARAIN *v.* BIBI RAMJI.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 79 OF 1923.

May 25, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

Babu BISHUN NARAIN—APPLICANT

versus

Musammat BIBI RAMJI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 152—Redemption suit—Memorandum about surplus profits—Failure to calculate profits up to date of possession—Decree—Appeal—Mistake, whether can be rectified.

A decree was passed giving the right of redemption to the mortgagor and stating that Rs. 3,812 were the surplus profits in the hands of the mortgagee. For arriving at this figure calculation had only been made up to the 25th June 1920. Possession was given on the 2nd February 1922. When the preliminary decree was passed on the 18th November 1921 the Judge noted in the order sheet that when the decree is prepared the account will be made up to date. This note was however, overlooked and the profits were fixed at Rs. 3,812 only:

Held, that the failure to calculate surplus profits from the 25th June 1920 to 2nd February 1922 was a mistake, error or omission within the meaning of section 152, Civil Procedure Code, and could be rectified even during the pendency of an appeal against the decree.

Civil revision against the order of the Subordinate Judge, Allahabad, dated the 2nd October 1922.

Mr. *D. C. Banerji*, for the Applicant.

Mr. *Haribans Sahai*, for the Opposite Party.

JUDGMENT.—In this case, as the result of a redemption suit, a decree was passed giving the right of redemption to the mortgagor, and stating that Rs. 3,812 were surplus profits in the hands of the mortgagee under the terms of the usufructuary mortgage. That sum was arrived at after investigation by a Commissioner but he only took the calculation down to the 25th of June 1920. Possession was given on the 2nd of February 1922. A preliminary decree was passed on the 18th of November 1921, on which date the Commissioner had satisfied himself that there was a sum of money due from the mortgagee to the mortgagor; but he appears on that day to have been given directions by the Judge with regard to the ascertainment of certain sums. On that very date the learned Judge's attention was called to the terms of O. XXXIV, probably rr. 7 and 8 and passibly 9 and thereupon on the order-sheet he made a statement that "when the decree is prepared the account will have to be made up to date." From the moment of making that memorandum on the 18th of November 1921 the matter was overlooked, with the result that the figure of Rs. 3,812 was ultimately decided by him to be the amount of surplus profits which the mortgagee should pay to the mortgagor. The mortgagor now comes before the Court and, having quite properly laid emphasis upon the memorandum of the 18th of November 1921, says that the failure to calculate the surplus profits from the 25th of June 1920 to the 2nd of February 1922 can fairly and properly be described as one of those mistakes, errors or omissions which are referred to in section 152 of the Code of Civil Procedure, and which can be cured even through the parties have a pending appeal to this High Court. We think that this is right, and, on a review of the whole circumstances, it being obvious, as the matter stands at present, that the Subordinate Judge was of opinion that surplus profits were due from the mortgagee to the mortgagor, that we ought to order an enquiry so that the sum of money which is finally found due from the mortgagee to the mortgagor may be such as is contemplated by the terms of O. XXXIV. We, therefore, direct an enquiry as to the surplus profits, if any, which the mortgagee should pay the mortgagor for the period from the 25th of June 1920 to the 2nd of February 1922 during which time the mortgagee was in possession. That enquiry should proceed in the lower Court with due expedition and if it happens that the decretal amount which at present stands at Rs. 3,812 undergoes any alteration, either party may without further application amend within 28 days of the decision of the Subordinate Court their present Memorandum of Appeal to this Court in any way they think fit, provided such amendment relates solely to this matter which we are deciding to-day. If necessary an application should be made in this Court to stay the hearing of the appeals if it should happen that the enquiry as to the amount of surplus profits, if any, is not concluded before the appeals came to this Court—the object being that when the

appeals do come to this Court the matters in controversy right down to the 2nd of February 1922 can be settle once and for all between the parties. The costs of this application will be costs in the cause.

As regards the second application the above order supersedes the order of stay passed on the 2nd of November 1922.

K. S. D.

Order accordingly.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1076 OF 1921.
June 28, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

MR. R. S. BION—PLAINTIFF—APPELLANT

versus

SHEOGULAM LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Inference drawn from facts—Contract Act (IX of 1872), s. 23—Public policy—Bond executed in lieu of compromise of non-compoundable case.

Where a Court of first appeal draws an inference from the facts of a case that the consideration for a bond sued on was the withdrawal of a non-compoundable case, the High Court cannot, in second appeal, question the correctness of the inference. [p. 844, col. 2.]

A bond the consideration for which is the withdrawal of a non-compoundable case is void under the provisions of section 23 of the Contract Act and is unenforceable. [p. 844, cols. 1 & 2.]

Second appeal from a decision of the Officiating Sub-Judge, Muzaffarpur, dated the 9th March, 1921, reversing that of the Munsif, Motihari, dated the 30th April 1920.

Messrs. *L. N. Singh* and *H. Prasad*, for the Appellant.

Mr. *P. Dayal* for Mr. *B. Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from a decision of the Officiating Subordinate Judge of Muzaffarpur, reversing a decree of the Munsif of Motihari.

The plaintiff, who is the appellant before us, instituted the suit claiming to recover a sum of Rs. 1,000 and interest amounting to Rs. 492-13-0 from the defendants under a bond dated the 20th September 1916 signed by Sheogulam, the first defendant, and Ramji Lal, his cousin, since deceased. The other defendants in the suit are Satnarain Lal, the brother of Ramji Lal, and Sadhsaran Lal, the father of Ramji and Satnarain. These four defendants formed a joint family, Ramji Lal having died since the suit was instituted. The circumstances under which the bond was executed were shortly as follows:—

The plaintiff is the lessee of certain property of which the defendants were tenants under him. Ramji Lal, one of the tenants, acted as the *patwari* of the plaintiff and collected the rent from the other defendants. In the year 1916 a sum of rent was due and a further sum amounting to something like Rs. 1,000 was also due from Ramji Lal, that sum having been collected by him but not accounted for to the plaintiff. As the plaintiff could not get this sum out of Ramji Lal he took criminal proceedings against him and prosecuted him, the charge being one under section 408 of the Indian Penal Code which relates to criminal breach of trust by a clerk or servant. Whilst that prosecution was pending in the Magistrate's Court the plaintiff entered into the bond in question with Ramji Lal and Sheogulam who purported to act on behalf of themselves and the other members of the joint family. The bond in question admitted the liability of the defendants for the sum of Rs. 1,400 and recited that Rs. 400 was paid in cash and as to the balance they agreed to pay it back within one year and if it should not be paid within one year then certain interest was to run upon the amount due. At the time, when this bond was executed Ramji Lal had been arrested and was in prison. There is no mention in the bond itself that the consider-

ation for executing the bond was that the prosecutoin against Ramji Lal should be withdrawn. The offence of which he was charged was a non-compoundable offence but on the same day on which the bond was executed, namely, the 20th September 1916, the complainant Anup Lal, who was acting in this matter as the agent of the plaintiff, filed an application before the Magistrate in these terms: 'In the above case the accused having appeared is ready to render account and whatever amount is found due on account has been paid in cash and through bond. Therefore, on filing this petition your petitioner prays that the case may be struck off the file." Amongst other defences to the suit a plea was raised that the bond was illegal by reason of the provisions of section 23 of the Indian Contract Act, which provides that 'The consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or involves or implies injury to the person or property of another; or the Courts regards it as immoral or opposed to public policy." It was contended that under that section the agreement entered into in the bond was unlawful, and, therefore, unenforceable because a part of the consideration was that the prosecution against Ramji Lal should be dropped. If this could be made out it seems to me, that there can be no question about the matter. If in fact the whole or part of the consideration for the bond was the dropping of the prosecution against Ramji Lal then, clearly, the whole agreement was unlawful. The illustrations given to that section of the Indian Contract Act seem clearly to establish this contention. Illustration (*h*) is as folllows:—"*A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful." If for the word "robbery" we substitute "embezzlement" then the case comes exactly within the illustration (*h*) appended to the section.

The question whether or not the dropping of the prosecution was a part of the consideration of the bond is, to my mind, purely a question of fact. There were several facts in the case from which it might be inferred that the plaintiff in taking this bond from the defendants had agreed to drop the prosecution against Ramji Lal. The learned Munsif before whom the case came for trial apparently was much influenced by the fact that the defendants undoubtedly owed the money and that I think, can hardly be disputed. They owed the money for rent and Ramji Lal owed to the plaintiff undoubtedly a sum of money, something like Rs. 1,000 for money already collected. He accordingly came to the conclusion that the agreement come to by the bond of the 20th September 1916 was a valid agreement and the fact that the prosecution had on the same day been dropped was not a matter which ought to be connected with that agreement. I am not saying that the learned Munsif was not entitled as a judge of fact to refuse to draw the inference which he was asked to draw from the facts proved before the Court, but when the matter went to the learned Subordinate Judge on appeal he took a clear view that upon the facts proved it had been established that the withdrawal of the prosecution did form an essential part of the consideration of the bond. He was influenced in this view by the wording of the petition of withdrawal, as he states in his judgment, and he thought that the other facts and circumstances of the case also justified his view. I have stated what the main facts were in the case and the question, to my mind, was purely one of the inferences to be drawn from those facts. The learned Subordinate Judge drew the inference that the withdrawal of the prosecutoin was an essential part of the consideration for the bond and it is impossible to my mind for us sitting here as a Court of second appeal to say, that he was not justified in drawing that inference from the facts in the case. The matter was one purely for the learned Judge and having arrived at the conclusion at which he did it seems to me that the case is concluded by the findings. In these circumstances, much as I regret that the liability of the defendants cannot be established in this suit, nevertheless I am constrained to dismiss this appeal affirming the decision arrived at by the learned

Subordinate Judge. The respondents are entitled to their costs of this appeal.

Kunwant Sahay, J.—I agree.

Z. K. & W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 81 OF 1921.

May 2, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

Rai Sahib KRISHNA DASS—DEFENDANT—APPELLANT

versus

RAM UGRAH SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 6—Defendant, absence of—Application for adjournment by Pleader, refusal of—Pleader retiring from case—Proceedings, whether ex parte—*Medical certificate not believed by Court—Procedure.*

On the date fixed for the hearing of a suit defendant was absent and his Counsel appl ed for an adjournment which was refused. Counsel thereupon retired from the case. Plaintiff's evidence was then recorded and the suit was decreed but the decree stated that the suit had been heard in the presence of Counsel for both parties:

Held, (1) that the decree actually passed was not an *ex parte* decree; [p. 846, col. 2.]

(2) that from the moment when the application for adjournment was refused the defendant should have been treated as both absent and unrepresented and the subsequent proceedings should have been *ex parte.* [p. 846, col. 2.]

If a Court sees good reason to distrust a medical certificate tendered on behalf of a party, its proper course is to summon the Doctor, or Medical Officer who gave the certificate, and to insist upon his attendance. But it is not 'air to penalise a party on mere suspicion engendered in the mind of the Court by the fact that a number of certificates have been tendered in support of successive applicat ons for adjournment. [p. 845, col. 2.]

First appeal from a decree of the Subordinate Judge, Mirzapur, dated the 24th November 1920.

Dr. *K. N. Katju* and Mr. *R. K. Malaviya,* for the Appellant.

Dr. *S. N. Sen,* for the Respondents.

JUDGMENT.—This is an unfortunate case but after hearing both parties we find ourselves altogether dissatisfied with the procedure adopted by the Court below. The suit was one for specific performance of a contract and the pleadings are sufficient to show that the parties were at issue, not so much on the question whether there had or had not been a contract betweenh them, but as to the terms of the said contract. There were several important matters on which the defendant was contradicting the plaintiffs, as to the terms of the contract of lease which the plaintiff was seeking to set up and to enforce. It appears that there was considerable delay about the hearing of the suit and that adjournments were granted in the month of June 1920, in the month of July 1920 and again on the 8th of August 1920 by reason of the alleged illness of the defendant. The applications for adjournment made on behalf of the defendant were supported in each case by a medical certificate, but the judgment on which the decree under appeal is based and out of which the order, challenged in the connected First Appeal from Order No. 89 of 1921, also arises shows that the Trial Court entertained a definite suspicion as to the genuineness of these medical certificates. We desire to say distinctly for the guidance of subordinate Courts in these matters, that if a Court sees good reason to distrust a medical certificate presented on behalf of a party, its proper course is to summon the doctor, or medical officer, who has given the medical certificate, and to insist upon his attendance. It is not fair to penalise a party on mere suspicion engendered in the mind of the Court by the fact that a number of certificates have been tendered in support of successive applications for adjournment. After all, in the present case we can only infer from the record that the defendant was too ill to undertake a journey to Mirzapur, for personal appearance in Court for a period which extended to something under two months. An illness of that duration is not in itself an extraordinary circumstance. At any rate, if the learned Subordinate Judge felt any suspicions on that ground, he ought, on the 8th of August 1920, to have summoned the officer who

had signed the medical certificate. Instead of this, he gave the defendant an adjournment and fixed the 10th of September 1920 for the final disposal of the suit. For ought that appears on the record, the defendant, as well as the plaintiffs, may have been perfectly ready with evidence, and prepared to do everything necessary for a final and satisfactory disposal of the suit on that date. It so happened, however, that the Court found its hands full of other work on the 10th of September 1920 and on this ground alone—and not at the request of either party, adjourned the hearing to the 24th of November 1920. On that day the plaintiffs were present and represented by Counsel and were in a position to produce witnessess. The defendant was absent and no witnesses were in attendance on his behalf The Counsel who represented him asked the Court for an adjournment and this application was refused. From the record it appears to us that the Counsel concerned thereupon retired from the case—and, whether or not they remained physically present in Court, they took on further part in the proceedings and did not continue to represent or to act for the absent defendant. They certainly did not cross-examine the two witnesses whom the plaintiffs produced. On this state of facts we think, the duty of the Trial Court was to treat the defendant as not merely absent in person, but as both absent and unrepresented—that is to say as entering no appearance in the suit from the moment that the application for adjournment made on his behalf by Counsel was refused. At the same time, we are bound to admit that this was not the position which the Trial Court elected to take up. It proceeded to hear the plaintiffs' evidence and to deliver a judgment, in which findings, in favour of the plaintiffs are recorded on the two issues set down for determination. In the decree which followed upon this judgment it is recorded, that the suit came on for hearing in the presence of certain Counsel appearing for the plaintiffs and two Counsel appearing for the defendant. For reasons already stated, we are of opinion, that this is an inaccurate statement, which ought not to have appeared in the decree—at any rate in the unqualified form in which it is there set down, Our technical objection to the proceedings in the Court below is, that the decree as passed does not purport to be an *ex parte* decree, whereas in our opinion, on the facts before the Court the decree passed should have been an *ex parte* one and should have been described as such. The defendant came before the Court on the following day, namely, the 25th of November 1920 when he put in an application, supported by affidavit, in which he asked the Court to treat the decree passed on the previous day as an *ex parte* decree, and to set it aside on the ground that the defendant had been prevented by sufficient cause from entering an appearance on that day. The sufficient cause alleged was that there had been a confusion between the Courts in neighbouring districts as to the proper date for the observance of a certain Muhammadan holdiay, which might have fallen either on the 23rd of November or on the 24th of November 1920 according to the date on which the new moon became visible. The affidavit put in on behalf of the defendant has not been contradicted and, as a matter of fact, we know that the holiday in question was observed on different dates in different districts in the year 1920. However, the Court which entertained this application decided that the decree of the 24th of November 1920, was not an *ex parte* decree and could not be dealt with as such. The defendant has, therefore, as a matter of precaution presented two appeals in this Court. First Appeal No. 81 of 1921, is a regular first appeal against the decree, treated as a regular decree, passed not merely after contest, but in the presence of both parties. First Appeal from Order No. 89 of 1921 is an appeal against the order refusing to treat the aforesaid decree as an *ex parte* decree and to set it aside as such. We have came to the conclusion, first, that the decree actualy passed was not an *ex parte* decree and that the first appeal from order must, therefore, fail. Secondly, we are of opinion, that the Trial Court ought to have passed an *ex parte* decree and that the course which it actually adopted was not fair to the defendant, and was calculated to put him in a difficulty in the event of his

being in a poisition to offer some really good and sufficient explanation for his failure to enter an appearance on the 24th of November 1920. We are prepared under the circumstances to alllow the regular first appeal, substantially on this ground. We set aside the decree on the ground that the Court ought to have dealt with the defendant as absent and unrepresented from the moment when it rejected the application for an adjournment made on his behalf. We are of opinion also that the defendant has shown *prima facie* sufficient cause why he should have been allowed further indulgence and an opportunity of being heard in the case, and of having the questions in issue determined after a regular contest, and not merely upon the production of such evidence as a plaintiff ordinarily tenders in an *ex parte* proceeding. On these grounds we allow the Appeal No. 81 of 1921, set aside the decree in question and remand the case to the Trial Court, to be re-admitted to the file of pending suits and dealt with accordingly. The costs of this appeal, which will include fees on the higher scale, will be costs in the cause, to be dealt with by the Trial Court in its discretion when it comes to pass its final order in the case. We dismiss the first appeal from order, without any order as to costs.

Z. K. & W. C. A.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION No. 59 OF 1923.

June 5, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

RAMBHANJAN SINGH AND OTHERS—PETITIONERS

versus

PASHUPAT RAI AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. VII, r. 11, O. IX, r. 9—Dismissal of suit for default—Restoration—Illness of brother, whether sufficient cause.

Plaintiff's suit was dismissed for default of appearance under O. IX, r. 8, Civil Procedure Code. In an application under rule 9 of that Order he asked for restoration of the case alleging the illness of his brother as the reason for his non-appearance on the day fixed for the hearing of the suit;

Held, that there was no sufficient cause for the plaintiff's non-appearance when the suit was called on for hearing, or for the restoration of the case. [p. 847, col. 1.]

Civil revision from an order of the District Judge, Shahabad, dated the 11th November 1922, affirming an order of the Subordinate Judge, First Court, Shahabad, Arrah, dated the 22nd July 1922.

Mr. *Bhubeneswari Prasad*, for the Petitioners.

Mr. *Harihar Prasad Sinha*, for the Opposite Party.

JUDGMENT.

Miller, C. J.—This is an application in revision from an order of the District Judge of Shahabad affirming an order of the Subordinate Judge dismissing an application of the petitioner for restitution of his suit under O. IX, r. 9, Civil Procedure Code.

The suit in question was ordered to be heard on the 9th March 1922. Upon that day the petitioner apparently arrived at Court but he went away again and although he had instructed a Pleader on his behalf in other proceedings in the suit nobody appeared on his behalf when the case

was called on for hearing on that day. His case was accordingly dismissed under O. IX, r. 8 for default of appearance. The petitioner thereupon took proceedings under O. IX, r. 9 before the Subordinate Judge, asking that the case should be restored and giving as a ground for his non-appearance at the hearing the fact that his brother had been taken ill, which he was informed of on the day, he went to Court, and that he had gone away to look after his brother. No sort of reason was given apparently why his Pleader should not have been instructed to appear on his behalf on that day. The Pleader, however, when called upon said, that, he had no instructions in the matter. The learned Subordinate Judge refused to accept the explanation given by the plaintiff as sufficient within the meaning of O. IX, r. 9 and he dismissed the application for restitution. The matter then came before the learned District Judge on appeal and he too refused to restore the case.

The only grounds which were open to the plaintiff for obtaining an order under O. IX, r. 9 were those which are mentioned in the order, itself, namely, that there was sufficient cause for the plaintiff's non-appearance when the suit was called on for hearing. If the plaintiff showed sufficient cause then the Court could make an order setting aside the dismissal of the suit and appoint a day for proceeding with it. When the matter came before the learned District Judge it appears that a further point was argued before him in support of the application. The point put forward then and the point which has been argued before us in this application was that the Trial Court instead of dismissing the suit ought to have rejected the plaint under the provisions of O. VII, r. 11. It seems to me that, in the circumstances which have arisen, it was not open to the plaintiff to put forward that matter as a ground for having his case restored under O. IX, r. 9. The order made or the decree passed dismissing his suit on the 9th March 1922 may or may not have been a proper order to make but there was no appeal from that order if the order was an improper one on the ground that the Court ought not to have passed it at that stage before considering the question which arose under O. VII, r. 11; then that was a matter of appeal, but there was no appeal from that order and it was accepted by the plaintiff as a proper order. The only step which the plaintiff did take was an attempt under O. IX, r. 9 to get the case reinstated on the ground that there was good cause for his not appearing on the day in question. In the circumstances, it appears to me to have been unnecessary to consider whether or not the Court ought in the circumstances to have acted under O. VII, r. 11. If it ought, then that was a matter, as I have already said, on which the plaintiff could appeal but no appeal was made from that order. In any case after hearing the learned Vakil for the petitioner, it seems to me that the circumstances contemplated in O. VII, r. 11 (c) did not arise because no order had been made upon the plaintiff to pay a deficit Court-fee at all, and, therefore it was not a case in which he had failed to comply with an order made by the Court, and the Court was under no obligation under O. VII, r. 11 to reject the plaint. That was the only ground which was put before us in this application but it does not seem to me, that the point really arises. No ground has been made out why we should interfere in revision with the order made by the learned District Judge an order which, in our opinion, he had absolute jurisdiction to pass.

The application is rejected with costs.

Kulwant Sahay, J.—I agree.

K. S. D. & W. C. A.

Application rejected.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 159 OF 1923.
May 21, 1923.

Present :—Mr. Justice Lindsay, Mr. Justice Daniels and Mr. Justice Walsh.

ABDUL WAHID KHAN—APPLICANT
versus
ABDULLAH KHAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 135, 137, 439—Obstruction to right of way —Bona fide dispute—Procedure—Jurisdiction—Revision—Interference by High Court—Public way —Dedication.

Per *Lindsay, J.*—The discretion vested in the High Court to interfere in revision ought to be exercised in all cases where an attempt is made to abuse the process of the Court so as to prevent parties from resorting to the Criminal Courts to compel a decision regarding matters which properly lie within the cognisance of the Civil Courts. [p. 849, col. 2.]

Disputes relating to a private right of way should not be decided in the Criminal Courts. [p. 851, col. 1.]

In order to show that a way is a public way it must be proved that it has been dedicated to the public generally. A dedication to a limited section of the public is void and of no avail. A general dedication has to be inferred from the conduct of the owners of the soil and from uninterrupted user of the way by the general public. [p. 850, col. 1.]

Per *Daniels, J.*—It is not correct to say that a Magistrate has no jurisdiction to proceed under Chapter X of the Criminal Procedure Code in a case where a *bona fide* dispute as to title is raised. On objection being taken by the defendant to the proceeding, under section 135 (*b*) of the Code, all that the Magistrate has to decide is whether his conditional order is reasonable and proper or not. [p. 851, col. 2.]

Emperor v. *Dost Muhammad*, 28 A. 98; A. W. N. (1905) 202; 2 A. L. J. 599; 2 Cr. L. J. 517, dissented from.

Ram Sagar Mondal v. *Alek Naskar*, 67 Ind. Cas. 177; 49 C. 682; 26 C. W. N. 442; 35 C. L. J. 247; 23 Cr. L. J. 353, relied on.

The High Court will only entertain a revision on facts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced. [p. 852, col. 1.]

Ahsanullah Khan v. *Mansukh Ram*, 25 Ind. Cas. 350; 36 A. 403 at p. 405; 12 A. L. J. 511; 15 Cr. L. J. 598, followed.

Per *Walsh, J.*—One co-sharer of an undivided share cannot dedicate to the public a way over the common estate without the consent of his co-owners. The act must be the concerted act, at one given moment, of all the joint owners. [p. 854, cols. 1 & 1.]

A Magistrate must deal with an alleged public way under section 133 of the Criminal Procedure Code, even though the public character of the way is disputed. [p. 855 col. 1.]

The summary powers conferred upon Magistrates under Chapter X of the Criminal Procedure Code are primarily intended to be exercised in cases where there is no question that the way is one vested in the public, and when that question is seriously disputed and its decision becomes a difficult matter of mixed fact and law, a Magistrate has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. [p. 855, col. 1.]

Reference made by the Sessions Judge, Azamgarh.

Messrs. *J. M. Banerji* and *Iqbal Ahmad*, for the Applicant.

Mr. *Peary Lal Banerji*, for the Opposite Party.

JUDGMENT.

Lindsay, J.—(*March* 29, 1923.)—The facts which have led up to this Reference are set out in the order of my learned colleague and I need not repeat them.

The recommendation of the Sessions Judge is based upon two grounds:—(1) that the Magistrate should have stayed his hand and should have referred the parties to the Civil Court when he found that a *bona fide* and substantial dispute as to title had been raised between the parties, and (2) that on the merits the order of the Magistrate was not a proper order inasmuch as it had not been proved that the way in question was a public way. As to the first of these grounds we are both agreed that the Magistrate's order cannot be discharged because he failed to send the parties to the Civil Court. The ruling in *Emperor* v. *Dost Muhammad* (1) cannot be accepted as a correct exposition of the law.

On the merits, however, I am of opinion that the Magistrate's order is not proper and I would, therefore, accept the recommendation of the learned Sessions Judge.

With regard to the argument that this is not a case for the excercise of our revisional jurisdiction, all I desire to say is that the discretion we have to interfere ought to be exercised in all cases where an attempt is made to abuse the process of the Court so as to prevent parties from resorting to the Criminal Courts to compel a decision regarding matters which properly lie within the cognizance of the Civil Courts.

(1) 28 A. 98; A. W. N. (1905) 202; 2 A. L. J. 599; 2 Cr. L. J. 517.

The present case constitutes, to my mind, an attempt of this nature, and I, therefore, feel at liberty to scrutinise the evidence so as to ascertain whether the complainant has proved that the way in question is a public way.

We are not concerned here with any road made under statutory powers or vested in any public or local authority. We are dealing with an unmetalled path or track which skirts two sides of a village situated in the environs of the town of Azamgarh. The parties to the case are co-sharers in the village whose shares have been divided by partition. Their houses are adjacent and abut on the disputed way. In order to show that this way is a public way it must be proved that it has been dedicated to the public generally. A dedication to a limited section of the public is void and of no avail.

Such general dedication has to be inferred from the conduct of the owners of the soil and from uninterrupted user of the way by the general public.

So far as the conduct of the owner is concerned, we have the admitted fact that when partition of the village was carried out, the soil over which this way passes was divided between the co-sharers without any reservation of a right of pasage for the public. The complainant himself was allotted one of the portions of this land (plot No. 320) and it is difficult, in the circumstances, to see how he can be heard to say that he has dedicated a right of passage to the general public. Nor, indeed, did he make any such allegation in the complaint which he lodged in the Magistrate's Court. In this he described the way as follows:—

"A *kachcha* road by which all the tenants (*riaya*) and we ourselves (meaning, I presume, the *zemindars*) has always been passing on foot or mounted and which is used for passing to and fro by the *parda* ladies (*masturat*) belonging to families which live in that quarter."

That, in my opinion, is not a description of a road used by the public, but of one which is used by the tenants and residents of the village.

In his deposition before the Court the complainant improved on this description and said that the road had been used by the public for 30 or 35 years. In answer to the Court he spoke of it as being used by people of the town and people from outside when they come to visit him at his house.

The oral evidence in the case is, in my opinion, vague and unconvincing and does not establish user of this road by the general public. Some of the evidence is clearly that of partisan witnesses and may be disregarded.

The *patwari*, who speaks of the way being public, has been in that office for only four or five years, though he speaks of having known the locality for a longer period. He admits that in the Settlement Record the land is recorded as fallow or waste land (*banjar*) and that there is no village map or record showing the existence of a public right of way.

I place no reliance on the testimony of the two tenants, Naresh and Sadaphal.

Then, there is the evidence of Roshan Khan, a Veterinary Surgeon, who has been in practice in Azamgarh for 11 years. This evidence is very cautious and the sum and substance of it is that he uses the road when he goes to visit the "Babus" (*i.e.*, the *zemindars*). He speaks of it as being the main way to go to the complainant's house. He also speaks of visiting the house of one Muhammad Idris and using this road for the purpose. We are told that this gentleman is or was a Deputy Collector who occupied a house in the village.

The last witness is the Secretary to the Municipality, who says he has visited Sidhari and driven over the road in an *ekka* or four wheeled carriage. His cross-examination suggests that he has little occasion to visit the village and that he only goes there to visit the Babus (*i. e.* the *zemindars*).

Such is the evidence produced for the complainant. The evidence for the opposite party is of little value with the exception of that of a partition *amin*, who carried out the partition of the village. He had before him at the time of giving his evidence the partition map and record and he proves that the land in dispute (No. 320) was divided among the co-sharers as "*banjar*" and that there was no record of its being used as a public way. He states definitely that there were only two

roads (*rastas*), *viz.*, Nos. 79 and 152. He speaks of a path existing over No. 320 but he does not speak of that being treated by the parties as a public path.

On this review of the evidence I am definitely of opinion that there was no reliable proof before the Magistrate that any public right of way had arisen over the land in question by dedication to the general public. Indeed, the Magistrate seems to have had doubts in the matter to judge from the following naive remark which occurs in his judgment. Dealing with the fact that the land (No. 320) was recorded as "*banjar*" at the time of partition he says:—

"This may be no wonder as every one might have thought of utilizing his share of the village paths in other ways when opportunity arose, so they were better shown as '*banjar*' lands."

It appears to me that the fact that there is no record in the Settlement of village papers of any public right of way over this land and the further fact that the land was dealt with at partition in a manner quite inconsistent with the existence of any such right definitely refute the case put forward on behalf of the complainant and dispose of the evidence which was led in support of it.

We have here no case of a complaint made by one of the general public alleging the violation of a public right of way. The complainant is a *zemindar*; the opposite party is also a co-sharer in the village and the complainant's neighbour, and everything about the case suggests the conclusion that what was brought before the Court was nothing more than a squabble about a private right of way. Disputes of this nature are not to be decided in the Criminal Courts.

For the above reasons, I hold that the Sessions Judge's recommendation should be accepted and the order of the Magistrate discharged.

Daniels, J.—(*March* 29, 1923.)—This is a Reference by the learned Sessions Judge of Azamgarh on an application by Abdul Wahid Khan asking this Court to set aside in revison an order passed against the applicant under section 137, Criminal Procedure Code. The order relates to an alleged *kachcha* road in the village of Sidhari, close to Azamgarh; connecting the Muhammadabad and the Ghazipur roads and passing close to the houses of the parties.

On a conditional order being made against the applicant under section 133, Criminal Procedure Code, he appeared to show cause against it and pleaded:

Firstly, that the drain in question was fifteen or sixteen years old and did not cause any inconvenience to anybody; and secondly, that the portion of the alleged road over which it had been built was his private property (it was undoubtedly assigned to him at a partition in 1912) and that there was no public right of way over it. The learned Sessions Judge was of opinion that the moment a *bona fide* dispute as to title was raised by the defendant, the jurisdiction of the Magistrate was ousted and the Magistrate was bound to stop the proceedings and to refer the parties to a civil suit. That view is supported by a ruling of a Judge of this Court in *Emperor* v. *Dost Muhammad* (1). That ruling has recently been dissented from by a Full Bench of the Calcutta High Court in *Ram Sagar Mondal* v. *Alek Naskar* (2) and in our opinion it is incorrect. No such limitation on the jurisdiction of the Magistrate is to be found in the language of the Code. On objection being taken by the defendant under section 135 (*b*), the Magistrate was entitled to decide, whether his conditional order was reasonable and proper or not, that is to say, he had to decide whether the defendant had unlawfully obstructed a way which is or may be lawfully used by the public.

Although he considered that the learned Magistrate had no jurisdiction to decide the point, the learned Sessions Judge went on to consider the case on the merits and has held that the Magistrate came to a wrong conclusion on the evidence and that there was no public right of way over the land in dispute. The principles by which the Court is guided in cases of revision are well established and it would not be necessary to refer to them but they have been to some extent questioned in the course of the argument. A High Court undoubt-

(2) 67 Ind. Cas. 177; 49 C. 682; 26 C. W. N. 442; 35 C. L. J. 247; 23 Cr. L. J. 353.

edly has jurisdiction to entertain a revision on grounds of fact, but it is equally well established that this power should be very sparingly excercised. There is a well marked distinction between an application in revision and an appeal. It would be futile for the Legislature to grant the right of appeal in some cases and to withhold it in others if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked on the footing of an appeal. Broadly speaking, the rule is that the High Court will only entertain a revision on facts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced. The case law on the subject is collected in Sohoni's Criminal Procedure Code, but the gist of the matter was admirably put by Piggott, J., in *Ahsanullah Khan* v. *Mansukh Ram* (3).

"The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice. At the same time, it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case were this Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure."

In this respect there is no difference between a reference and a revision. A person invoking the revisional jurisdiction of the Court is bound, according to the practice of the Court, to apply first to the Sessions Judge or District Magistrate. If the latter considers that a case for revision is made out, he reports the matter to the High Court, under section 438, Criminal Procedure Code, with a view to the High Court exercising its revisionsl powers under section 439. If the Sessions Judge or District Magistrate considers that the application should not be entertained, he rejects it, leaving the aggrieved party to apply to the High Court direct. Section 439 makes no distinction between the two cases.

The Magistrate has used, in the course of his order, some loose expressions which are criticised by the learned Sessions Judge, but his substantial finding is that, "It cannot but be concluded that these *banjar* portions of No. 320 (the plot in dispute) were recorded all through as public passages and not private and reserved."

Naturally, a village by-road of this kind would only be used by persons living in the village or by persons having occasion to visit the village, but the Magistrate does distinctly find that there is a public right of way over the road in question which has been obstructed by the defendant. The defendant's plea that the drain had been in existence for twelve or fifteen years has been found to be, and undoubtedly was, false. The parties, who are next door neighbours and near relations, have fallen out, and the drain has been recently dug for the express purpose of blocking the right of way which previously existed. The oral evidence strongly supports the conclusion at which the Magistrate has arrived. Apart from the complainant himself, and witness Sadaphal Singh, who may be attacked as having had some litigation with the defendant's mother, who state respectively that the road in question is used by people carrying dead bodies to the buring *ghat* and by *ekkas*, tumtums and carts, the complainant has called the *patwari* of the village, the Secretary of the Municipal Board, and a Veterinary Assistant. The *patwari* distinctly deposes that the road is a public way used by people generally and by *ekkas* and carriages and that he has seen it so used during the last thirty or thirty-five years.

The Secretary of the Municipal Board describes it as a *kachcha* road connecting Ghazipur and the Muhammadabad *pucka* roads, and states that he has often passed over it in an *ekka* or hackney carriage either to go to the house of the complainant or the house of another man named Abdul Aziz Khan, these being the only houses in the village which he happens to have occasion to visit. This witness is a man of position who is not likely have given false evidence, and the mere fact that he visited

(3) 25 Ind. Cas. 350; 36 A. 403 at p. 405; 12 A. L. J. 311; 15 Cr. L. J. 598.

the complainant's house is no reason for rejecting his evidence as false. M. Roshan Khan, the Veterinary Assistant, Azamgarh, gives similar evidence and says that he has used the road not only to visit the complainant but to visit the bungalow of Munshi Muhammad Idris who is said to be a Deputy Collector living at Sidhari. The evidence called for the defence does not rebut this case; indeed, it contains a good deal to support it. These witnesses put forward the false story of the drain having been in existence for ten or fifteen years but the very first witness admits that all the Babus, *i.e.*, the *zemindars*, and other persons go *via* that path. In fact, the main burden of his evidence was that the drain was old and did not constitute an obstruction. The defendant has in fact not relied on his oral evidence in this Court. He relies entirely on the fact that the plot in suit was not shown as road but as waste land at the Settlement, and that it was divided between the different co-sharers at the partition. The former fact is not conclusive, and as to the latter the *amin* who carried out the partition has been called and he deposes that all the public paths of the village were divided up between the co-sharers at the partition. It appears to me, therefore, that this is emphatically not a case in which this Court would be justified in interfering in revision on the facts, and I would reject the application.

There being a difference of opinion between the learned Judges composing the Bench, the case came before Mr. Justice Walsh who recorded the following judgment:—

Walsh, J.—In this case a Magistrate, on the complaint of one Abdullah Khan, has ordered his neighbour one Abdul Wahid, to remove a nuisance, to wit, a drain drug in an alleged public road in front of the latter's house so as to obstruct the passage of the public and of the complainant. The order was made under section 133 of the Criminal Procedure Code. An application in revision was made to the Sessions Court of Azamgarh. The Sessions Judge, being of opinion that in substance there was no evidence upon which it could properly be held that the road was a public way, and that it was an abuse of the process of the Court to attempt to put the powers under this section in motion at all, referred the matter to the High Court. Mr. Justice Daniels, before whom it came, referred it to a Bench of two Judges; in due course it came before Mr. Justice Lindsay and Mr. Justice Daniels, and a difference of opinion has arisen both as to whether it could properly be held, on the evidence, to be a public road, and, further, whether, assuming the view of the Magistrate to be erroneous, it was not a merely debatable question of fact with the decision of which this Court ought not, following the well established principles, to refuse to interfere.

In my opinion, there is, upon the evidence, no real controversy of fact at all, except in so far as the question whether an inference of prior dedication to be drawn from an admitted state of facts may be said to be itself a question of fact. It is, perhaps, more properly described as a mixed question of fact and law. It will, therefore, be convenient to set out the history of this way as disclosed by the evidence.

The way is *kachcha*. It has never been properly made up, and it has certainly never been repaired by any public authority even if any kind of casual repair has ever been done to it. It forms a kind of irregular or tortuous base to a triangle, the sides of which consists of two *packa* roads which may be described as main roads, and which are undoubtedly roads vested in the District authority. The apex of the triangle is formed by the junction of these two main roads where they intersect at right angles. It might be described as a short cut, or loop, connecting these two roads, and cutting of the two sides of the triangle. But its construction, and course, as well as the absence of any work of repair to it by the road authority, all show that it was not brought into existence to serve this purpose. It passes the houses of the complainant and defendant who were formerly co-sharers. It clearly came into existence as a village by-road, or path, for the use and benefit of the persons, owning, or occupying, or wishing to visit the houses and lands which it feeds. The uncontradicted evidence, for example, that

of a Secretary to a Municipal Board, and of a Veterinary Surgeon, shows that it has been used indifferently by members of the public visiting the places of persons abutting on the road, without objection, though this user must in the nature of things have been quite casual and intermittent. This sort of user is a common incident in the case of all private roads which serve some purpose other than purposes exclusively those of the owners, who would not be likely to interfere, even if he knew of it, if it did not injuriously affect his own interests and it certainly cannot, *suo motu*, be treated as a ground for converting a private way, if it is one, into a public way. The *patwari* has known and used this road for many years, and is quite satisfied that it is public. But it would be unreasonable to expect, in the case of such an obvious local convenience, the use of which created no nuisance, a village owner to make himself generally unpopular by interference with every isolated user of this kind or with user by villagers. It is equally true that if he wished to interfere, he might find the labour of doing so a greater burden than the maintenance of his right was worth, and so be pursuaded to let the latter go, and throw the road definitely open to the public by a tacit dedication. In England landowners were very fond of doing this in order to throw the burden of repair on to the rates, until the Highways Act of 1835 intervened, and prevented automatic dedication without certain formalities, which included the consent of the Road Authority and their right to require the road to be properly made up first.

It, therefore, becomes material to inquire when, and in what way, the act of dedication, other than that to be inferred from subsequent permissive user, is said to have taken place, and what evidence of it is to be found in the documents. It is to be observed that, originally, before partition, the land was held jointly by co-sharers. This fact makes the necessity of inquiring when the dedication was made, all the more material. It was admitted in argument before me that it could not be suggested that it had been made since the partition. But one co-sharer of an undivided share cannot dedicate to the public a way over the common estate without the consent of his co-owners. The act must be the concerted act, at one given moment, of all the joint owners. It is odd that the complainant himself, who must be taken to be either one of the original dedicators, or the successor-in-title, did not venture to assist the Court in this matter by explaining how it happened. Indeed, the language of his complaint indicated (though it would be unduly hard to infer much from this fact) that he regarded the way as apurtenant to his own residence, and the user as mainly for those who came there. Neither the judgment of the Magistrate, nor that of Mr. Justice Daniels, contains any finding as to the actual dedication. The truth is, that not only is there no evidence of a joint dedication but that such evidence as there is, is inconsistent with it. At the Settlement in 1901 the plot or soil over which the way passes was described as "waste," or "fallow," and not as "*rasta*." By the partition in 1910 all village paths remained joint and were allotted to those who had jointly held the lands over which such ways passed. This was a just and almost inevitable proceeding, and in the absence of clear evidence of a prior dedication is really fatal to this claim. I come, therefore, to the conclusion that, upon the admitted and uncontradicted facts of the case as presented in evidence by both sides. (disregarding the foolish and dishonest allegation by the defence that the drain itself was old), a Judge would have to direct a Jury that there was no evidence upon which they could find that there had been a dedication, and that a finding in the affirmative would really be perverse.

As to the question of jurisdiction, my brothers are agreed, and perhaps it does not fall to me to express any opinion. But the whole case is before me, and I will merely content myself with saying that I agree that the Magistrate had jurisdiction. The fallacy in *Emperor* v. *Dost Muhammad* (1) lies in the confusion between jurisdiction and discretion, which latter was the second point left more or less open by the Full Bench in *Ram Sagar Mondal* v. *Alek*

Naskar (2). The section is quite plain. The Magistrate must deal with an alleged "public" way even though it is disputed. But it is obvious that these summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. It is impossible to peruse the judgment of the Magistrate in this case without realizing that he failed to appreciate the principles of law underlying a controversy of this kind. You cannot convert private property into public merely because it looks as though it ought to be, and because to do so would be convenient to a section of the public who have enjoyed permissive user over it, and I agree with the Sessions Judge that the Magistrate ought in this case to have declined to decide it.

Finally, I hold that, in finding that this was a public way, the Magistrate misdirected himself, and did so without any evidence to justify such a finding; that the complaint, whatever trespass the act committed upon the complainant's joint rights over the private way may have amounted to, which is a matter for a Civil Court, was an abuse of section 133 of the Criminal Procedure Code; that the Reference must be accepted, and the whole proceedings set aside.

Z. K. *Reference accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 289 OF 1923.
June 6, 1923.
Present:—Mr. Justice Foster.
Chaudhry MANDAR—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Order for prosecution—Reasonable probability of conviction.

An order under section 476 of the Criminal Procedure Code should not be passed unless there is a reasonable probability of conviction. [p. 856, col. 1.]

Jadunandan Singh v. *Emperor*, 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37, followed.

Criminal revision from an order of the Sessions Judge, Bhagalpur, dated the 19th March 1923, affirming that of the Sub-Divisional Officer, Supaul, dated the 13th February 1923.

Mr. *S. P. Varma*, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—The petitioner lodged an information at the *thana* on the 24th December last to the effect that some bundles of paddy and a *lota* had been stolen from his threshing floor the previous night. He came to the *thana* with the *chowkidar* and the man accused of having stolen the paddy, namely, Gokul. The Sub-Inspector searched Gokul's house and found some paddy which Gokul admitted that he had stolen from the complainant. That confession of Gokul made to a Sub-Inspector would not be admissible against Gokul but it will be admissible when the present petitioner brings it forward in Court as a justification for his having complained to the Court subsequently. The Sub-Inspector reported the case to be false and the petitioner thereupon moved the Sub-Divisional Magistrate. His petition was quite correctly treated as a complaint and he was examined on oath, and the Magistrate proceeded quite in accordance with the provisions of section 202 of the Criminal Procedure Code. He examined 17 witnesses in all, out of whom eight were produced by the petitioner as complainant and nine were produced by the Court Sub-Inspector. After this the Sub-Divisional Magistrate proceeded to dismiss the complaint passing an order of dismissal after enquiry made. But he was bound to record his reason for dismissing the complaint. The order which the Magistrate passed on the order sheet no doubt will have to stand as his reason for dismissing the complaint. The Magistrate also proceeded and passed an order under section 476 of the Code and I have no doubt, that he

had jurisdiction to do so inasmuch as the recording of the complaint, the enquiry and dismissal of the complaint were judicial proceedings. But he was also making an enquiry under section 476 and his order that I have referred to must also be taken to be a summary of the result of the enquiry under this section. The petitioner urges that the Magistrate had no jurisdiction to call upon the complainant to prove his case, but the rulings which he cited are not apposite, for in those cases the petitioner had not approached the Magistrate of his own accord. The only fault that I find with the order is not as to jurisdiction, but the absence of judicial discretion. After examining 17 witnesses the Magistrate's only reason (that deals directly with the merits of the case) for dismissing the complaint and passing the order under section 476 is the improbability that one of the accured, not Gokul, should act in a way that was described on the side of the prosecution. The Magistrate disbelieved that that accused would have kept a stolen *lota* in his varandah. Nothing is said about Gokul and nothing more is said bearing directly on the merits of the case. Had there been anything which pointed directly to the elements of the offence described in section 211, Indian Penal Code, elements which are very strictly defined and limited, the Magistrate would surely, after giving the careful attention which he says he gave, have been able to put his finger upon them. It is no use passing an order under section 476 unless there is a reasonable probability of conviction and the very meagre grounds given by the learned Sub-Divisional Magistrate indicate that this case is not one in which the Court could have had any such reasonable apprehension of success as is necessary when an order is passed under section 476, *Jadumandan Singh* v. *Emperor* (1). The case was a petty village quarrel, and the action of the Magistrate would have the effect of interference in a matter that is not primarily an offence against public justice. In this connection, I adopt the principle laid down in the case of *Ram Prosad Malla* v. *Raghubar Malla* (2).

I, therefore, set aside the order passed by the learned Sub-Divisional Magistrate under section 476, Criminal Procedure Code.

K. S. D. *Order set aside.*

(1) 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37.

(2) 4 Ind. Cas. 6; 37 C. 13 at p. 20; 13 C. W. N. 1038; 10 Cr. L. J. 454.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 696 OF 1922.

CRIMINAL REVISION PETITION No. 582 OF 1922.

February 6, 1923.

Present:—Mr. Justice Spencer.

In re AVADAYAPPA MUDALIAR—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 341, 447, 504—Wrongful restraint and insult in Court compound—Criminal trespass, conviction for, whether justified—Intent, necessary.

Accused was convicted of offences under sections 341, 447 and 504 of the Penal Code for having wrongfully restrained and abused a person in a Court compound in order to prevent him from bidding at an auction;

Held, (1) that the convictions under sections 341 and 504 were justified;

(2) that having regard to the facts:—

(*a*) that the Court compound was open to the public;

(*b*) that there was no suggestion that the accused entered the compound with the intention of intimidating, insulting or annoying the Magistrate, assuming that the latter was the person in possession;

(*c*) that there was no complaint of trespass by the Magistrate;

the conviction under section 447 of the Code was not justified.

Chandi Pershad v. *Evans*, 22 C. 123; 11 Ind. Dec. (N. S.) 83, relied on.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Ramnad, in Criminal Appeal No. 48 of 1922, preferred against the judgment of the Court of Stationary Second Class Magistrate, Sattur, in Calendar Case No. 50 of 1922.

WAHARI MANDER v. EMPEROR.

Mr. *F. S. Vaz*, for the Petitioner.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.

ORDER.—The petitioner has been convicted of offences punishable under sections 341, 447 and 504, Indian Penal Code, for having wrongfully restrained the complainant, who is an arrack renter, from going and bidding at the arrack sales held in the Sub-Magistrate's Office, Sattur, and for having abused him.

The facts that the petitioner pushed and obstructed the complainant and intentionally insulted him have been found to be proved by the evidence in the judgment of the Magistrate who tried the case and the Magistrate who heard the appeal. The facts found by them constitute the offences defined in sections 341 and 504. The language found to have been used by the petitioner towards the complainant was such as would provoke any person of ordinary temper to comit a breach of the peace. The conviction under these sections must, therefore, stand.

The joinder of a charge of criminal trespass (section 447), in the circumstances of the present case, was in my opinion uncalled for. The offence of criminal trespass is compoundable under section 345, Criminal Procedure Code, by the person in possession of the property trespassed upon. There is no suggestion that the accused entered the Court compound, which is a place open to the public, with the intention of intimidating, insulting or annoying the Sub-Magistrate assuming that he was the person in possession. Even if it be taken for granted that when the accused entered the compound he intended to commit an offence, the prosecution has not proved that the Court compound was at the time in possession of a complainant, who could compound the offence under section 345, Criminal Procedure Code (*vide Chandi Pershad* v. *Evans* (1). Moreover, there was no complaint of trespass from the Sub-Magistrate. Section 447 appears to have been added in order to enhance the gravity of the other two offences.

I quash the conviction under this section and reduce the sentence to the amount of imprisonment already undergone by the accused.

V. N. V.
Z. K.

Sentence reduced.

(1) 22 C. 123; 11 Ind. Dec. (N.S.) 83.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE NO. 15 OF 1923.

April 25, 1923.

Present:—Justice Sir John Buchnill, Kt.

WAHARI MANDER AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Magistrate, when can detain person in custody—Proper procedure.

Where proceedings have been instituted against a person under section 107 of the Criminal Procedurt Code it is only in the special circumstances referred to in sub-sections (3) and (4) of that section that the law empowers a Magistrate to detain a person in custody till the completion of the enquiry. [p. 858, col. 1.]

The sub-section can only be put into operation when a Magistrate, who has no powers to proceed under sub-section (1) of section 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance, and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest a person and he must send him then to another Magistrate who has got adequate powers for dealing with the case. [p. 858, col. 1.]

Raghunandan Pershad v. *Emperor*, 32 C. 801; 8 C. W. N. 779; 1 Cr. L. J. 775, followed.

Chidambaram Pillai v. *Emperor*, 31 M. 315; 3 M. L. T. 311; 7 Cr. L. J. 360 (F. B.), referred to.

Criminal miscellaneous application from an order of the Sessions Judge, Monghyr, dated the 22nd March 1923, and of the Sub-Divisional Officer, Monghyr, dated the 4th April 1923.

Mr. *G. C. Pal*, for the Petitioners.

JUDGMENT.—This was an application made to this Court on behalf of four persons, Wahari Mander, Ramlochan Mander, Saukhi Mander and Kamal Das asking that they should be released on bail. It is indeed somewhat difficult to understand

why or how they ever found themselves in gaol. But it would appear that the Sub-Divisional Officer of Monghyr initiated proceedings under section 107 of the Criminal Procedure Code against the petitioners and, at the same time, issued notice against them under section 144 of the Criminal Procedure Code. Further, on the 16th March, the opposite party, that is, the first party, made an application to this office that the petitioners should be put in gaol as they, the complainant first party, were in apprehension of personal injury or danger. On this, the Magistrate issued warrants against these men on the 4th April, and, on that date, apparently, the Sub-Divisional Maristrate sent them to *Hajat* purporting, presumably, to act under sub-section (3) of section 107 of the Criminal Procedure Code. It may be also pointed out that the warrants which were issued against these men by the Magistrate were bailable warrants. Now, the applicants made an application to be released on bail to the Sub-Divisional Officer but he refused the application; and what, to my mind, is somewhat more serious, is that an application was then made to the Sessions Judge, who, after pointing out that the accused were in *Hajat* under section 107, sub-section (4) of the Criminal Procedure Code, declined to grant bail to the applicants. Now, I think, it is desirable to point out that it would certainly appear that, where proceedings have been instituted against a person under section 107 of the Criminal Procedure Code, it is only in the special circumstance referred to in sub-sections (3) and (4) of that section that the law empowers a Magistrate to detain a person in custody until the completion of the enquiry. The point is that the sub-section can only be put into operation when a Magistrate who has no powers to proceed under sub-section (1) of section 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act, which might possibly occasion a breach of the peace or disturbance and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest such a person and he must send him then to another Magistrate, who has got adequate powers for dealing with the case. The case of *Raghunandan Pershad* v. *Emperor* (1) appears to lay this matter down very clearly. See also *Chidambaram Pillai* v. *Emperor* (2), where it was expressly held that a Magistrate has no jurisdiction to remand a person in custody under section 107, sub-section (4) of the Criminal Procedure Code when such person is not sent to him by another Magistrate under section 107 (3). Now, I find that it is said in the letter of explanation, which was given by the District Magistrate (as a result of the rule issued by this Court on the 9th April 1923) and which I may add is dated the 16th April last, that "Whari Mander and others in the marginally noted case" were granted bail of Rs. 300 each on the 14th April, as a result of a Police report from which it appears that there was no fruther immediate danger of a breach of the peace. If it is quite clear that the four applicants here have been thus admitted to bail there is nothing further to be done, but if there has been any mistake and these particular four petitioners are not those who have been so admitted to bail then they must be admitted to bail forthwith to the satisfactior of the District Magistrate.

K. S. D. *Order accordingly.*

(1) 32 C. 801; 8 C. W. N. 779; 1 Cr. L. J 775.
(2) 31 M. 315; 3 M. L. T. 311; 7 Cr. L. J. 360 (F. B.).

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 409 OF 1923.
June 20, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Daniels.
UMED AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 148, 302—Concerted attack by several persons armed with lathis*—Death of victim, liability of attackers.*

UMED *v.* EMPEROR.

Where five persons joined in beating an elderly person and beat him so mercilessly with *lathis* that his skull was fractured and eleven ribs were broken, and as a result of injuries he died two days afterwards:

***Held*, that all the assailants were guilty of murder and that it was immaterial by whose *lathi* the fatal injury was inflicted.**

Emperor v. *Ram Newas*, 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615, *Hanuman* v. *Emperor*, 21 Ind. Cas. 1005; 35 A. 560; 11 A. L. J. 926; 14 Cr. L. J. 685, *Emperor* v. *Gulab*, 47 Ind Cas. 805; 40 A. 686; 16 A. L. J. 731; 19 Cr. L. J. 953 and *Sipahi Singh* v. *Emperor*, 71 Ind. Cas. 234; 20 A. L. J. 900; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 106; 45 A. 130, followed.

Emperor v. *Bhola Singh*, 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130, *Chandan Singh* v. *Emperor*, 43 Ind. Cas. 438; 40 A. 103; 16 A. L. J. 11; 19 Cr. L. J. 150 and *Dhian Singh* v. *Emperor*, 14 Ind. Cas. 649; 9 A. L. J. 180; 13 Cr. L. J. 265, dissented from.

Criminal appeal from an order of the Sessions Judge, Mainpuri, dated the 9th April 1923.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Niranjan, Banwari, Ranjit and Umed were committed to the Court of Session at Mainpuri on charges under sections 148 and 302, Indian Penal Code. The learned Sessions Judge convicted Umed under sections 148 and 304, Indian Penal Code, and convicted the remainder under sections 148 and 325. He sentenced Umed to transportation for life under section 304 and the other three to five years' rigorous imprisonment under section 325. Umed appealed to this Court. On his appeal being admitted by a learned Judge of this Court notice was sent to Narinjan, Banwari and Ranjit to show cause why the conviction should not be altered in their case and the sentence enhanced accodingly. Niranjan has since died in Jail. The notice has been served on Banwari and Ranjit and no cause is shown on their behalf. We, therefore, take up the case of Umed on appeal and the case of Ranjit and Banwari in revision.

It is proved by the clearest evidence that Bhopal, an elderly Kachchi of Narayanpur, was mercilessly beaten by the four accused and one Gannu who is absconding. There had been litigation between Bhopal on the one side and Niranjan and Banwari, who are brothers, on the other in which Bhopal had been entirely successful, with the result that there was the bitterest enmity against him on the part of Narinjan and Banwari. Only very shortly before this occurrence, Bhopal had obatined a decree under section 9 of the Specific Releif Act against them and was then putting his decree into execution. Bhopal was taken to the hospital at Mainpuri where he died on the 13th January. The medical evidence shows that he was most mercilessly beaten and his skull was fractured and eleven ribs were broken.

The evidence against the accused is overwhelming. It consists of several eye-witnesses who saw the assault in broad day-light and who knew all the accused. In the first report which was made on information given by Bhopal himself all five are named. The learned Sessions Judge has come to the conclusion that on the evidence the apparent intention of the accused was to cripple Bhopal and not to kill him. He gathers this from the statements of the witnesses who say that the accused were saying as they were beating Bhopal that they would not leave him in a condition to fight a case in Mainpuri. We should have drawn a very different inference from these remarks but it seems to us quite unnecessary to do so. There is no doubt that all the five accused joined in beating Bhopal when he was on the ground with *lathis* and they inflicted such serious injury to him that he died two days afterwards. They must have known that at the least they were cuasing injury which was likely to cause death, and if death resulted they are all guilty of murder. In such cases it is immaterial by whose *lathi* the fatal injury is inflicted. The learned Judge has drawn a distinction between Umed and the other three accused before him, a distinction which we are entirely unable to appreciate. It may be that Umed inflicted the first blow or even the blow on the head but that does not distinguish his case from that of the others. They all joined in the attack and the death was the result of the beating inflicted by them all jointly. The learned Sessions Judge has relied on the case of *Emperor* v. *Bhola Singh* (1). That case has not

(1) 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130.

been followed in several later decisions and can no longer be treated as good law: *vide Emperor* v. *Ram Newaz* (2) *Hanuman* v. *Emperor* (3) and *Emperor* v. *Gulab* (4). In this case the decision of a Single Judge in *Chandan Singh* v. *Emperor* (5) which followed *Emperor* v. *Bhola Singh* (1) was expressly overruled. A similar decision reported as *Dhian Singh* v. *Emperor* (6) was dissesnted from in *Hanuman* v. *Emperor* (3). The latest decision on the point is that of *Sipahi Singh* v. *Emperor* (7). In our opinion all th accused ought to have been convicted of murder, and if they had been so convicted and sentenced to death we should not have interfered. As it is, we alter the conviction in the case of Umed from section 304 to section 302 and in the case of Banwari and Ranjit from section 325 to section 302. We maintain the sentence of Umed of transportaton for life and enhance that of Banwari and Ranjit to transportation for life with effect from the 9th of April 1923. The sentence under section 148 will remain and run concurrently.

M. A. A. *Sentences enhanced.*

(2) 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615.

(3) 21 Ind. Cas. 1005; 35 A. 560; 11 A. L. J. 926; 14 Cr. L. J. 685.

(4) 47 Ind. Cas. 805; 40 A. 686; 16 A. L. J. 731; 19 Cr. L. J. 953.

(5) 43 Ind. Cas. 438; 40 A. 103; 16 A. L. J. 11; 19 Cr. L. J. 150.

(6) 14 Ind. Cas. 649; 9 A. L. J. 180; 13 Cr. L. J. 265.

(7) 71 Ind. Cas. 234; 20 A. L. J. 900; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 106; 45 A. 130.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 120 OF 1921.

October 21, 1921.

Present:—Mr. Kanhaiya Lal, J. C.

DWARKA SINGH—ACCUSED

versus

EMPEROR—COMPLAINANT.

Evidence Act (I of 1872), s. 33—Statement recorded in one case, when can be treated as evidence in another—Essentials to be proved—Practice.

The evidence of a witness recorded in one case cannot be admitted as evidence in another case unless the requirements of section 33 of the Evidence Act are complied with. [p. 861, col. 1.]

Where, therefore, in a case under section 394 of the Penal Code, the complainants were not examined, a Police Constable having been produced to show that an attempt was made to summon them but they were not found, and the evidence of one of the complainants recorded in another case was admitted by the Magistrate:

Held, that in the absence of proof that the complainant could not be procured without an amount of delay, expense and inconvenience, her evidence could not be treated as evidence in the case. [p. 861, col. 1.]

Emperor v. *Kangal Mali*, 26 Ind. Cas. 161; 41 C. 601; 15 Cr. L. J. 713, *Annavi Muthiriyan* v. *Emperor*, 28 Ind. Cas. 518; 39 M. 449; 28 M. L. J. 329; 17 M.L. T. 214; (1915) M. W. N. 229; 16 Cr. L. J. 294, referred to.

Application against the order of the Sessions Judge, Gonda, dated 3rd September 1921, upholding that of the Magistrate, First Class, Gonda, dated the 8th August 1921.

Mr. *R. F. Bahadurji*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The accused, Dwarka Singh, has been convicted of an offence under section 394 of the Indian Penal Code and sentenced to rigorous imprisonment for one year.

The story for the prosecution is that, on the 13th February last, at about 11 P. M., *Musammat* Manraji and her mother-in-law, *Musammat* Maina, were sleeping in their house when the accused and three other persons entered the house and attacked *Musammat* Manraji and stripped her of her ornaments and forced *Musammat* Maina to point out where the ornaments were buried. In the report made by *Musammat* Manraji to the Police on the next day at noon Dwarka Singh was described as one of the persons, who entered the house and robbed her. The statement of Dwarka Singh is that his name was introduced at the instance of Sukhpal Singh, with whom he was on bad terms and to whom the woman is said to have first gone to get the report written.

The only direct evidence produced in the case is that of a person named Sahibdin, who professes to have gone to the place on hearing the cries and seen Dwarka Singh and another person removing ornaments from the person of *Musammat* Manarji. *Musammat* Manraji and *Musammat* Maina have not been examined. A Police Constable was produced to show

that an attempt was made to summon them but they were not found. On the 29th July 1921 the accused filed an application asking that both the women should be examined and an order was passed directing the issue of a warrant for their production. No warrants were, however, issued. An attempt was made to serve *Musammat* Manraji with summons a day before the date fixed for hearing but it was unsuccessful. The report of the Police Constable was that her where abouts were not known. The accused, however, states that both the women are still in the village and are available for giving evidence. The Courts below treated the evidence of *Musammat* Manraji which was recorded in a case in which another accused was charged with the same offence as admissible under section 512 of the Code of Criminal Procedure. But in the absence of proof to show that the attendance of *Musammat* Manraji could not be procured without an unreasonable amount of delay, expense and inconvenience, it was necessary for the Trying Magistrate to have taken further steps to summon her again or to issue a warrant for her production, and if the accused insisted, for the production of *Musammat* Maina too. The statement of the Police Constable that he went thrice to the house of the women and was unable to find them in the village is not sufficient to establish that their attendance was not procurable or that there would have been undue delay if warrants had been issued for their production. In fact, the order of the Trying Magistrate directing the issue of a warrant for the production of the complainants was never complied with.

The evidence of a witness recorded in another case, cannot be admitted as evidence in this case, under section 33 of the Indian Evidence Act (I of 1872), unless the requirements of that section are complied with. As the accused insisted on the examination of the complianants, a further attempt should have been made to enforce the attendance of the women who were the chief witnesses in the case. The evidence of *Musammat* Maina has not even been brought on the record and that of *Musammat* Manraji remains without cross-examination. In *Emperor* v. *Kanga Mali* (1) and *Annavi Muthiriyan* v. *Emperor* (2) the learned Judges pointed out the danger of allowing statements made in another case to be used as evidence without adequate steps having been taken to ensure the attendance of those witnessesin Court.

The Trying Magistrate is, therefore, directed to secure the attendance of *Musammat* Manraji and *Musammat* Maina and to record their evidence in the presence of the accused in the manner required by law. Such evidence, when recorded, should be certified and submitted to this Court within one month from this date or earlier, if practicable.

K. S. D. & Z. K. *Order accordingly.*

(1) 26 Ind. Cas. 161; 41 C. 601; 15 Cr. L. J. 713.
(2) 28 Ind. Cas. 518; 39 M. 449; 28 M. L. J. 329; 17 M. L. T. 214; (1915) M. W. N. 229; 16 Cr. L. J. 294.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS REVISION
No. 19 OF 1923.
June 6, 1923.
Present:—Mr. Justice Foster.
MANIRUDDIN AND OTHERS—
PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 114—Consideration justifying arrest—Magistrate, duty of—Substance of report not recorded—Order, legality of.

In order to take action under section 114 of the Criminal Procedure Code, the Magistrate must be of opinion that the only way of preventing an imminent breach of the peace is to commit the persons concerned to custody and must put on record the substance of the Police or other report by which he is influenced.

Where a Magistrate's order commiting certain persons to custody did not state who had made the report, or what in particular was stated in the report:

Held, that the Magistrate could not be said to have proceeded on any information to the effect that the arrest of those persons was the only way to preserve a breach of the peace and the order was, therefore, illegal.

Criminal miscellaneous revision from an order of the Sessions Judge, Monghyr, dated the 3rd May 1923 affirming that of the Sub-Divisional Officer, Monghyr, dated the 1st May 1923.

Messrs. *Akbari* and *Nooruddin*, for the Petitioners.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—In my opinion the order refusing bail and committing the applicants to custody is defective. Section 114 provides that, whenever it appears to the Magistrate upon the report of a Police Officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest. There are two stringent elements in these provisions which are obviously directed against any ill-considered precipitancy on the part of the Magistrate. The Magistrate must be of opinion that the only way of preventing an imminent breach of the peace is to commit the persons to custody and the Magistrate must put on record the substance of the Police or other report by which he is influenced. The latter provision is, in my opinion, intended as a safeguard with a view to the protection of persons whose liberty is affected by such order and who may have resort to the Superior Court under section 498 of the Criminal Procedure Code, or any other provision of the Code. Now, the Magistrate's order cannot, in any sense, in my opinion, be regarded as a record of the substance of a report. It is not stated who has reported or what in particular has been stated in the report. Looking at the Police report which is on the record, I see that the Sub-Inspector after stating the grounds for proceeding under section 107 against these applicants merely recommended that the proceedings should be instituted and made no special prayer for their immediate arrest. It is clear, that the Magistrate did not proceed upon any information to the effect that the arrest of these persons was the only way to prevent an imminent breach of the peace. As a matter of fact, these persons have now been at large for 15 days and nothing has happened. I am, therefore, of opinion that the order committing these persons to custody is not justified and I direct, that they be admitted to bail of the same amount as that already taken from them.

K. S. D. *Order set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 575 OF 1922.

CRIMINAL REVISION PETITION No. 495 OF 1922.

April 5, 1923.

Present:—Mr. Justice Krishnan.

DEENABANDHU RAJAGURU—COMPLAINANT—PETITIONER

versus

VISWARASARAYI LACHANNA DORA AND OTHERS—ACCUSED NOS. 1 TO 8—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 430—Obstruction of channel by putting up dam or raising existing one—Preventing cutting down of bund—Offence.

Where a supply channel is filled up or is obstructed by putting up a dam or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility, and which if done with the intention to cause, or with knowledge that it is likely to cause, wrongful loss to any person would constitute the offence of mischief. If the act so done causes a diminution of the supply of water an offence is committed under section 430 of the Penal Code.

Preventing a person from cutting down a *bund* does not constitute the offence of mischief.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order, dated 23rd May 1922, of the Court of the Sub-Divisional Magistrate, Chicacole, in Criminal Appeals Nos. 1 to 8 of 1922 preferred against the order, dated 30th September 1921, of the Court of the Stationary Sub Magistrate, Parlakimidi, in Calendar Case No. 766 of 1920.

Messrs. *L. A. Govindaraghava Iyer* and *L. S. Veeraraghava Iyer*, for the Petitioner.

Mr. *B. Jagannadh Doss*, for the Respondents.

The Public Prosecutor, for the Crown.

ORDER.—The Sub-Divisional Magistrate purports to follow the ruling in *Proceedings, 22nd October* 1868 (1). But the view expressed in that ruling has been departed from—see the ruling in *Ramakrishna Chetti* v. *Palaniyandi Kudambar* (2) which expressly overruled the case in *Proceedings, 12th November* 1874 (3) which followed the view in the *Proceedings*,

(1) 4 M. H. C. R. 15 (App.); 2 Weir 755.
(2) 1 M. 262; 1 Weir 502; 1 Ind. Dec. (N. S.) 174.
(3) 7 M. H. C. R. 39 (App.)

22nd October 1868 (1). See also the rulings reported as *High Court proceedings, 13th April* 1881 (4) and *In re Nalla Narayanasami* (5). The case in *Proceedings, 22nd October* 1868 (1) can no longer be considered to be good law. It seems manifest that if a supply channel is filled up, or is obstructed by a dam put up, or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility and which, if it was done with intention to cause, or with knowledge that it was likely to cause, wrongful loss to any person would constitute the offence of mischief. If the act so done causes a diminution of supply of water as mentioned in section 430, Indian Penal Code, an offence under that section is committed.

In this case the charge framed is, however, not for mischief by raising the *bund* but by preventing the Tahsildar from cutting it down. That cannot constitute mischief, and I think it will not be right to set aside the acquittal and order a retrial in this case. The petition is dismissed.

V. N. V. *Petition dismissed.*

(4) 1 Weir 503.
(5) 1 Weir 504.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION No. 278 OF 1923.

May 30, 1923.

Present:—Mr. Justice Macpherson.

DEBI SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 257—*Duty of Magistrate to summon defence witnesses—Warrant-case—Costs, failure to pay, effect of.*

The provision contained in section 257 of the Criminal Procedure Code that a Magistrate shall, save in exceptional circumstances, issue process on the defence witnesses is mandatory. The exception arises when the Magistrate considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice, and such ground must be recorded in writing. [p. 864, col. 2.]

In the matter of the petition of Sat Narain Singh, 3 A. 392; 5 Ind. Jur. 602; 2 Ind. Dec. (N. S.) 204, *Emperor* v. *Purshottam Kara*, 26 B. 418; 4 Bom. L. R. 38, *Narayana Mudaly* v. *Emperor*, 31 M. 131; 7 Cr. L. J. 425, **relied on.**

Nilhanta Singh v. *Queen-Empress*, 20 C. 469; 10 Ind. Dec. (N. S.) 317, **distinguished.**

The inability or even the refusal of an accused person to pay the costs of the witnesses would not, in a warrant-case, be an adequate ground, for refusing to summon the witnesses. [p. 864, col. 2.]

Revision from a conviction and sentence passed by the Deputy Magistrate, First Class, Arrah, dated the 6th February 1923.

Messrs. *Yunus* and *J. N. Sen Gupta*, for the Petitioners.

Mr. *S. P. Varma*, for the Crown.

JUDGMENT.—This Rule has been issued to consider the legality of the conviction of the four petitioners under section 448 of the Indian Penal Code and of the first petitioner also under section 379.

Of the petitioners the first two are brothers the third, a boy of sixteen, is the son of the first petitioner and the fourth is a servant of the others. Villages Pauna and Araila which lie on opposite sides of a District Board Road belong to the Raja of Surajpura except to the extent of eight pies in Araila of which two pies belong to the petitioner Debi Singh. There is a *dharana* there at which the bullocks of *baiparis* are accommodated at night and a toll is levied. The right to collect this toll was leased on behalf of the Surajpura estate for seven years terminating at the last *Dasahara* day to Debi Singh who accommodated the *baiparis* and their bullocks in a part of his own house. Since the last *Dasahara* the Raja has rented a house of Damri Sahu which apparently was also a *dharana* prior to 1915, and has through his servants realized the toll direct from the *baiparis*. The case for the prosecution was that, some 8 or 10 days after the *Dasahara*, the accused trespassed into the compound of the rented house, began to induce the *baiparis* to go to the *dharana* of Debi Singh in spite of the remonstrances of the Raja's servants, abused the complainant who was the *chaprassi* in charge and forcibly drove the bullocks to Debi Singh's *dharana* and took away the turban and *jhola* (bag) of the complainant containing three or four annas collected as toll that day. On these allegations the accused were convicted and sentenced as above.

It is urged on behalf of the petitioners that the conviction cannot stand because the Magistrate failed to comply with the provisions of section 257 of the Code of

DEBI SINGH v. EMPEROR.

Criminal Procedure. On the 14th December 1922, when the accused entered on their defence, they filed a list of 20 witnesses including the Raja of Surajpura and a Deputy Magistrate who had held a local enquiry in the case under section 202 of the Code. The Trying Magistrate wrote on the list: "Cost to be deposited and he (presumably Debi Singh) should explain for what evidence has summoned the Raja Sahib. The list should be curtailed." On the following day the accused filed a petition containing a list of 11 witnesses and stating that they could not afford to pay the costs of the witnesses which had been assessed at Rs. 80. The order of the Court was, "Nos. 2 to 10 may be summoned for the present, but not the Deputy Magistrate and the Raja." In the order dated the 30th January on the order-sheet it is noted that the "defence closed their case."

Mr. Yunus contends on the authority of *In the matter of the petition of Sat Narain Singh* (1), *Emperor* v. *Purshottam Kara* (2) and *Narayana Mudaly* v. *Emperor* (3) that in the circumstances the conviction is bad since the Magistrate was bound to issue process to the defence witnesses unless he considered that the application should be refused on the ground that it was made for the purpose of vexation or delay or for defeating the ends of justice and unless he recorded such ground in writing. The reply of Mr. S. P. Varma is that the facts appearing on the record show that the Magistrate's opinion was that the application had been made for the purpose of vexation. Reference is also made to the case of *Nilkanta Singh* v. *Queen-Empress* (4) in which it was held that it lies upon the party which thinks himself aggrieved to show the Court that the ends of justice had been in some way frustrated in consequence of the refusal to recall witnesses. That case, however, is not really relevant here as the matter before the Court was one of recall of witnesses, and indeed it is in that regard that the proviso to section 257 (1) introduced in the Code of 1898 affirms the view taken in the case.

(1) 3 A. 392; 5 Ind. Jur. 602; 2 Ind. Dec. (N. S.) 204.
(2) 20 B. 418; 4 Bom. L. R. 38.
(3) 31 M. 131; 7 Cr. L. J. 425.
(4) 20 C. 469; 10 Ind. Dec. (N. S.) 317.

The conclusion at which I have arrived is that the irregularity in procedure was such that the conviction cannot stand. There has been a plain departure from the law. The provision that the Magistrate shall, save in exceptional circumstances, issue process on the defence witnesses is mandatory. The exception arises when the Magistrate considers that the application of the accused should be refused on a special ground which, moreover, must be recorded in writing. In the present instance, the Magistrate has recorded no such ground for his refusal. Nor can it be clearly gathered from the record of his proceedings what his view was or that any legal ground existed. If the record itself showed a legal ground or perhaps if it appeared that there was absence of prejudice, this Court might refuse to interfere in revision. But the inability or even refusal to pay the costs of the witnesses would not be adequate ground in a warrant-case, and no inference can be drawn either that the accused failed to state orally to the Magistrate the reason why they desired process in respect of the Raja or that the Magistrate considered that there was ground such as is set out in section 257 for refusing process. It may be that the Raja's name was included for the purpose of vexation, but there is nothing to show that such was the Magistrate's opinion, more particularly as he also refused to summon the enquiring Deputy Magistrate in respect of whom it is difficult to see why he should be summoned for the purpose of vexation, or, as he was then at Arrah, for the purpose of delay, and in respect of whom a demand for deposit of costs would be decidely unusual.

It is to be observed also that in this case the Trying Magistrate refused process "for the present" and afterwards failed to pass any definite order. The curtailment of their list of witnesses by the accused at the suggestion of the Court also goes some distance to show that they did not intend to be unreasonable.

The conviction is set aside and the case is remanded to the Magistrate to dispose of the application under section 257 according to law, and, whether or not he issues process against the two witnesses named, or either of them, to record a fresh judgment in the case.

K. S. D. & W. C. A. *Conviction set aside.*

JHARI KOERI *v.* BIJAI SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 453 OF 1922.
May 8, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

JHARI KOERI — PLAINITIFF—APPELLANT
versus
BIJAI SINGH AND OTHERS—DEFENDANTS AND PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow's estate—Rent-decree against widow, personal—Sale in execution—Auction-purchaser, rights of.

The question whether the whole estate or only the right, title and interest of the widow passes on an execution sale against the widow depends on the nature of the suit. If the suit is a personal claim against the widow only her interest passes, but if the suit is in respect of the family estate or upon a cause not merely personal against her, the whole inheritance passes by the execution sale. [p. 866, col. 1.]

Jugul Kishore v. *Jotindro Mohun*, 16 C. 985; 11 I. A. 66; 8 Ind. Jur. 485; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.), followed.

A decree for arrears of rent against a widow is not necessarily in all cases personal whether the holding is ancestral or not. [p. 866, col. 1.]

Jiban Krishna Roy v. *Brojo Lal*, 30 C. 550; 5 Bom. L. R. 428; 7 C. W. N. 425; 30 I. A. 81; 8 Sar. P. C. J. 444 (P. C.) and *Baijun Doobey* v. *Brij Bhookun Lal*, 1 C. 133; 24 W. R. 306; 2 I. A. 275; 3 Suth. P. C. J. 207; 3 Sar. P. C. J. 541; 1 Ind. Dec. (N. S.) 86 (P. C.), distinguished.

Kristo Gobind Majumdar v. *Hem Chunder Chowdhry*, 16 C. 511; 8 Ind. Dec. (N. S.) 337, di sented from.

An execution sale against a widow which purports to pass the entire estate stands on the same footing as a voluntary alienation by her. [p. 866, col. 2.]

Where a decretal debt is not of a nature to support a sale of the entire interest of a Hindu widow in possession, an auction-purchaser at a sale in execut on of a decree against her, acquires a title to the property which is voidable only at the instance of the reversioners on the widow's death; and until challenged by them he has a good title, which cannot be treated as a nullity by any trespasser who has succeeded in getting possession of the property. [p. 866, col. 2.]

Sitaram Ravaji v. *Khandu Mairala Shinde*, 59 Ind. Cas. 480; 45 B. 105; 22 Bom. L. R. 1155 and *Kesho Prasad Singh* v. *Chandrika Prasad Singh*, 68 Ind. Cas. 394; 2 Pat. 217; 3 P. L. T. 797; (1923) A. I. R. (Pat.) 122, relied upon.

Second appeal from a decree of the District Judge, Benares, dated the 24th November 1921.

Mr. *Haribans Sahai*, for the Appellant.
Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—Jhari Koeri, the plaintiff-appellant in this case, is the auction-purchaser of a fixed-rate holding. The holding originally belonged to one Babu Lal and was inherited by his wife, *Musammat* Chaurasi. *Musammat* Chaurasi was in possession of another holding, either a fixed-rate or occupancy holding, probably the latter, which she had also inherited from her husband. A decree for arrears of rent against this latter holding was obtained against her. Instead of taking ejectment proceedings under sections 57 (*a*) and 61 of the Tenancy Act, the landholder put to sale the fixed-rate holding now in dispute which was already mortgaged to him and it was purchased by the plaintiff under two sale certificates dated the 21st June 1909 and 24th November 1910. The plaintiff obtained possession of the holding, *Musammat* Chaurasi died about two years before the suit and on her death the defendants, who are remote reversioners of Babu Lal, managed to get possession of the holding, thereby ousting the plaintiff. The defendants set up title to the holding on the strength of having obtained a relinquishment from a son of one of the daughters of Babu Lal. As it appears that there were daughters of Babu Lal in existence who were nearer heirs, the defendants' title is not assisted by this relinquishment and both Courts have found that they have no title. The Courts have differed as to whether the plaintiff is entitled to recover possession from them. The main point in dispute was, whether the plaintiff purchased merely the life interest of *Musammat* Chaurasi. The Trial Court held that in either case the plaintiff's title was good against all the world except the immediate reversionary heirs, and the defendants having no title the plaintiff was entitled to get back possession. The lower Appellate Court considered that as the decree for arrears of rent was passed against *Musammat* Chaurasi the plaintiff's purchase could only be of her life interest. It further held that as the defendants were in possession it did not matter whether they had a good title or not unless the plaintiff could prove that he purchased the entire interest in the holding. Being of opinion, that the plaintiff's purchase was of *Musammat* Chaurasi's life interest only the learned Judge allowed the appeal and dismissed the suit.

The question, therefore, for decision in this appeal is, what was the nature of

JHARI KOERI v. ABIJAI SINGH.

the interest which the plaintiff obtained by his auction-purchase in 1909-10, and whether he has a subsisting interest sufficient to entitle him to recover the property from the defendants who are in possession without any right whatever.

It was laid down by the Privy Council in the case of *Jugul Kishore* v. *Jotendro Mohun* (1), that whether the whole estate or only the right, title and interest of the widow passes on an execution sale against the widow depends on the nature of the suit. If the suit is a personal claim against the widow only her interest passes, but if the suit is in respect of the family estate or upon a cause not merely personal against her then the whole inheritance passes by the execution sale. The decree in that particular case was for mesne profits. It is contended before us that a decree for arrears of rent must necessarily be personal whether the holding was ancestral or not, and two cases are cited in support of the argument. The first is the decision in *Jiban Krishna Roy* v. *Brojo Lal* (2). The decision in that case was that in that particular case a sale in execution of a decree for arrears of rent passed against a Hindu daughter passed only her interest, but the decision was based on the circumstances of the case, and the provisions of section 64 of the Bengal Tenancy Act and is no authority for the proposition that a decree for arrears of rent must necessarily in all cases be treated as a personal liability. The second case is a decision of the Calcutta High Court in *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhry* (3) which laid down that a decree for arrears of rent against a daughter in possession was a personal decree in which only her life interest could be sold. No reasons are given for the decision. The Court considered the case concluded by the Privy Council ruling in *Baijun Doobey* v. *Brij Bhookun Lall* (4).

An examination of this ruling does not support the conclusion which the learned Judges drew from it. The case was decided on the ground that the sale which was held did not purport to be of anything more than the widow's interest, and the earlier cases cited by their Lordships in their judgment sufficiently show that it is possible for a sale under a rent decree against a widow to pass the entire estate. There has been no finding by the Courts below as to whether the holding in respect of which the decree was obtained was a fixed-rate or an occupancy holding. In either case the *zemindar* might, under section 57 (*a*) of the Tenancy Act, have enforced it by proceedings in ejectment, and had he done so the entire tenure would have been lost to the family. The difference between the two is that if the holding was an occupancy holding the reversioners could not in any case have succeeded to it on *Musammat* Chaurasi's death unless they shared in the cultivation during her lifetime. It appears to us, however, that it is unnecessary to enter into this question for this reason that it is clear from the record that what purported to be sold under the decree was the entire tenure. If it be assumed that the decretal debt was not of a nature to support a sale of the entire interest the purchasers obtained a title voidable at the instance of the reversioners on the widow's death. Until challenged by them it is a good title and cannot be treated as a nullity by any trespasser who has succeeded in getting possession of the property. On this point we agree with the learned Trial Judge.

If authority is necessary, we may refer to two recent decisions of the Bombay and Bihar High Courts respectively, *Sitaram Ravaji* v. *Khandu Matrala Shinde* (5) and *Kesho Prasad Singh* v. *Chandrika Prasad Singh* (6). In this respect an execution sale against a widow which purports to pass the entire estate stands on the same footing as a voluntary

(1) 10 C. 985; 11 I. A. 66; 8 Ind. Jur. 485; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.).
(2) 30 C. 550; 5 Bom. L. R. 428; 7 C. W. N. 425; 30 I. A. 81; 8 Sar. P. C. J. 444 (P. C.).
(3) 16 C. 511; 8 Ind. Dec. (N. S.) 337.
(4) 1 C. 133; 24 W.R. 306; 2 I. A. 275; 3 Suth. P. C. J 207; 3 Sar. P. C. J. 541; 1 Ind. Dec. (N. S.) 86 (P. C).
(5) 59 Ind. Cas. 480 45 B. 105; 22 Bom. L. R. 1155.
(6) 68 Ind. Cas. 394; 2 Pat. 217; 3 P. L. T. 797; (1923) A. I. R. (Pat.) 122.

alienation by her. In this view, we set aside the decree of the Court below and restore that of the Trial Court with costs in all Courts.

M. A. A. & W. C. A. *Appeal allowed.*

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 170 AND 185 OF 1922.

June 8, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

IN M. A. No. 170 OF 1922.

SIA SHACHARI PEARI—JUDGMENT-DEBTOR—APPELLANT

versus

RAM KISHORI KUER—DECREE-HOLDER—RESPONDENT.

In M. A. No. 185 of 1922.

Babu KISHUN PRASHAD SINGH—PETITIONER—APPELLANT

versus

Musammat RAM KISHORI KUARI—OPPOSITE PARTY—RESPONDENT.

Execution—Decree for maintenance creating charge on immoveable properties of judgment-debtors—Decree, whether executable without bringing fresh suit—Properties of decree-holder's husband in hands of judgment-debtor, whether liable—Procedure—Civil Procedure Code (Act V of 1898), O. XXXIV.

A decree allowed maintenance at a specified rate payable in two equal instalments annually during the lifetime of the decree-holder. The Court directed that the amount of maintenance then in arrear as well as future maintenance was to be realised as a charge, on certain immoveable properties in the possession of the judgment-debtors, members of the family of the decree-holder's deceased husband. In her execution petition the decree-holder prayed that as one of the judgment-debtors had in her possession some property belonging to the estate of her deceased husband, she was entitled to recover the judgment-debt by sale of that property. She also prayed that as the remaining judgment-debtors had realised a decree in which her husband was interested, she was entitled to the proportionate share of her husband in the amount realised;

Held. (1) that the decree was one enuring for the duration of the decree-holder's life and it was open to her to execute her present claim for arrears of maintenance without bringing a fresh suit; [p. 868, col. 2.]

(2) that the charge created in the case was a lien not antecedent to the decree but created by the decree itself and it could not be said that there was any mortgage on the property or that the decree was a true mortgage-decree; [p. 868, col. 2.]

(3) that the decree-holder could, at any time after the mortgage properties were exhausted, proceed to execute the decree against the properties which belonged to her husband and were in the possession of the judgment-debtor; [p. 868, col. 2.]

(4) the procedure of the execution of the decree was not limited to the provisions of O. XXXIV of the Civil Procedure Code. [p. 868, col. 2.]

IN M. A. No. 170 OF 1922.

Appeal from an order of the Additional District Judge, Darbhanga, dated the 26th May 1922.

Mr. *Janak Kishore*, for the Appellant.

Messrs. *N. C. Sinha* and *Sunder Lal*, for the Respondent.

IN M. A. No. 185 OF 1922.

Appeal from an order of the Subordi-Judge, Darbhanga, dated the 12th August 1922.

Mr. *S. N. Rai*, for the Appellant.

Mr. *N. C. Sinha* for Mr. *Sunder Lal*, for the Respondent.

JUDGMENT.

M. A. No. 170 OF 1922.

Mullick, J.—These two appeals arise out of the execution of a decree dated the 8th March 1911 passed by the Additional Subordinate Judge of Darbhanga in suit No. 21 of 1910. By that decree the respondent *Musammat* Ram Kishori Kuer, was allowed maintenance at the rate of Rs. 50 per month payable in two equal instalments annually for the duration of her life. The Court directed that the amount of maintenance then in arrear as well as future maintenance was to be realised as a charge on certain immoveable properties mentioned in the plaint in the possession of the judgment-debtors who were members of the family of Rajballav, the deceased husband of *Musammat* Ram Kishori, and had succeedeed to Rajballav's property. The first execution taken out in 1914 realised a sum of about Rs. 9,000 by the sale of the properties charged. There were two other executions in 1917 and 1919. The present execution case was filed on the 25th November 1921 for a sum of Rs. 5,587 on account of principal (amounting to Rs. 3,300) and interest. The decree-holder prayed that as the judg-

SIA SHACHARI PEARI *v.* RAM KISHORI KUER.

ment-debtor, Siasahchari, had in her possession some property belonging to the estate of her deceased husband, she was entitled to recover the judgment-debt by the sale of that property. She also prayed that as the remaining judgment-debtors had realised a decree in which her husband was interested she was entitled to the proportionate share of her husband in the amount realised in the execution of that decree and she also contended that as some of the judgment-debtors had sold portions of a *mauza* named Keotgavan in which her husband had an interest she was entitled to recover from the vendors the value of her husband's interest in the portions sold. Objections were thereupon made by Siasahchari and two other judgment-debtors. The objections of these two were dismissed, but Siasahchari's objection was partially allowed by a judgment passed by Mr. A. N. Mitter, Additional District Judge, dated the 26th May 1922: The learned Judge held that a 7 annas 2 *gandas* share of Keotgavan belonging to the estate of Rajballav was in the possession of Siasahchari and that it was liable to sale in satisfaction of the decree-holder's claim.

With regard to the decree holder's claim against Siasahchari in respect of her husband's share in the proceeds of the mortgage decree above referred to the learned Judge held, that the money had been realised by Siasahchari's mother-in-law, Ramsohaon, and that there was no evidence to show that any part of it had come into Siasahchari's hands. He, therefore, dismissed the decree-holder's claim for that portion.

Siasahchari now prefers Appeal No. 170 of 1922 against the decision in regard to the sale of 7 annas 2 *gandas* of villare Keotgavan.

Now, the first objection taken is that the decree as it stands cannot be executed. It is contended that the decree is a mortgage decree and as the properties charged have already been exhausted, the only remedy open to the decree-holder is to take out an order under r. 6 of O. XXXIV, Civil Procedure Code. It is contended that the decree being a mortgage decree it cannot be executed as a personal decree against the judgment-debtor. Now it is quite clear on the authority of *Ashutosh Bannerjee* v. *Lukhimoni Debya* (1), that it is not necessary for the decree-holder to bring a fresh suit for maintenance. In the decree of the 8th March 1911 there was not merely a declaration of the right to maintenance, but also a direction, that the arrears of maintenance payable at certain dates were to be realised from the judgment-debtors and the Court directed that the arrears were to be charged upon certain properties. Now, that was a decree enuring for the duration of the decree holder's life and it is open to her to execute her present claim for arrears of maintenance without bringing a fresh suit.

As for the contention that being a mortgage decree it cannot be executed as a simple money decree, the argument proceeds on a fallacy. The decree is clearly not a mortgage-decree. The mode of execution is partially that provided for the execution of mortgage decrees, but the charge in this case was a lien not antecedent to the decree, but created by the decree itself and, therefore, it cannot be said, that there was any mortgage on the property or that the decree is a true mortgage decree. In my opinion, the decree holder can, at any time after the mortgage properties are exhausted, proceed to execute the decree against the properties which belonged to her husband and are in the possession of the judgment-debtor. In effect, an application under O. XXXIV, r. 6 would not be materially different from the application which has been made in the present case. In either event, the decree-holder would be entitled to proceed against the other properties of the judgment-debtors provided those properties belonged to the estate of her deceased husband. The difference between the maintenance right of a Hindu widow and a mortgage charge has been recognized in section 39 of the Transfer of Property Act and ordinarily it is enforceable like any other liability in respect of which no charge exists. A Court may decree that the liability shall be enforced as a charge but, in my opinion, the law does not say the procedure of the execution of the decree is limited to the provisions of O. XXXIV, Civil Procedure Code. Therefore the objection that the

(1) 19 C. 139; 9 Ind. Dec. (N.S.) 538 (F.B.).

UMAN SHANKER v. AISHA KHATUN.

execution cannot proceed is, in my opinion, untenable.

Then comes the question as to the merits. Now with regard to Siasahchari, it is established that she is in possession of a 7 annas 2 *gandas* share of *Mauza* Keotgavan which share was the property of Rajballav. It is true that this property was not included in the properties specified in the decree of the 8th March, 1911 as being liable to the decree-holder's charge; but as under the Hindu Law a widow is entitled to proceed against all the properties of her deceased husband to recover her maintenance allowance, there can be objection to the order which has been made in this case. The result is that the judgment of the learned Additional District Judge is affirmed and Appeal No 170 of 1922 is dismissed with costs.

M. A. No. 185 of 1922.

In this appeal the same objection is taken with regard to the execution of the decree, but, as already stated above, the decree appears to me to be quite capable of execution and the only question is whether the respondent Kishun Prasad has any property appertaining to the estate of Rajballav against which the decree-holder can proceed. Now on this point the judgment of the learned Subordinate Judge of Darbhanga dated the 12th August 1922, does not give us any assistance. The learned Judge does not find what is the property claimed by the decree-holder which is in the possession of Kishun Prasad. We are told that the claim is in respect of two items: (1) Rajballav's interest in *Mauza* Keotgavan which the respondent Kishun Prasad has sold and the sale proceeds of which are in his possession (2) the proportionate share of Rajballav in the money realised by the execution of a mortgage decree for Rs. 3,064. We have no information as to how much, if any, of these sums was realised by the appellant and the case must, therefore, go back to the learned Subordinate Judge in order that it may be dealt with according to law.

It is contended that in the second execution Kishun Prasad had already paid a sum of Rs. 448 which must be deducted out of the decree-holder's present claim. On this point again we have no information and the accounts must be adjusted by the Subordinate Judge in due course.

Finally, it has been urged that it is inequitable that the judgment-debtors should be all jointly and severally liable for the whole amount of the arrears claimed in the present execution. The only reply that it is possible to make to that contention is, that the decree created a joint and several liability and so long as the decree stands it is not open to any of the judgment-debtors to ask the Court to determine, what shall be his several liability in the matter. The only remedy open to a judgment-debtor who has paid more than his share (*sic*) is a contribution suit against his co-judgment-debtors.

The result, therefore is that Appeal No. 185 is decreed, the order of the Subordinate Judge is set aside and the case is remanded in order that it may be disposed of according to law.

The appellant will get his costs in this Court. We make no variation in the order of the Subordinate Judge as to costs in his Court.

Bucknill, J.—I agree.

K. S. D. & W. C. A.

Order set aside.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 159 OF 1921.

June 20, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

UMAN SHANKER AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat AISHA KHATUN—DEFENDANTS—RESPONDENTS.

Adverse possession—Hindu widow in possession—Presumption of separation, whether arises—Reversioners, right of, when extinguished.

Unless it is clearly shown that when a Hindu widow took possession she professed to do it as claiming only the limited estate of a widow, it would be impossible to hold that the rights of the reversioners were not extinguished, after the lapse of the statutory period. [p. 872, col. 2.]

Lachhan Kunwar v. *Manorath Ram*, 22 C. 445; 22 I. A. 25; 5 M. L. J. 1; Rafique and Jack.

son's P. C. No. 136; 6 Sar. P C. J. 523; 11 Ind. Dec. (N. S.) 297 (P. C.), followed.

Satgur Prasad v. *Raj Kishore Lal*, 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.), relied on.

Baijnath Prasad Singh v. *Tej Bali Singh*, 38 Ind. Cas. 894; 14 A. L. J. 913; 38 A. 590, distinguished.

The mere fact that a widow's name is entered in the revenue papers does not necessarily raise the presumption that she is the widow of a separated Hindu. [p. 871, col. 1.]

First appeal from a decree of the Subordinate Judge, Aligarh, dated the 26th of January 1921.

Mr. *P. L. Banerji*, for the Appellants.

Messers *S. A. Haider*, *Ibn-i-Ahmad* and *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for recovery of possession as reversioners of Sarjiwan Lal, the alleged last male owner. It was the plaintiffs' case that Sarjiwan Lal, who was a separated Hindu, died many years ago and on his death *Musammat* Dulari, his widow, entered into possession of his estate; that she made a transfer of the property in dispute without any legal necessity in the year 1911 to Chait Ram who in his trun on the 15th of March 1917 sold it to the defendant-respondent; that *Musammat* Dulari died within twelve years of the suit and the plaintiffs are entitled to possession.

On behalf of the contesting defendant it was denied that Dulari's husband, Sarjiwan Lal, was separate from his other brothers, and it was further pleaded that *Musammat* Dulari without any right and title had entered into possession and remained in adverse possession for more than twleve years and had acquired title to the property absolutely. It was also pleaded that in any case there was legal necessity for the transfer.

The learned Subordinate Judge was of opinion that the evidence was insufficient to establish that Sarjiwan Lal had separated from his brothers at the time of his death. He found that *Musammat* Dulari had entered into adverse possession and that, therefore, the plaintiffs' claim was barred by time. On the question of legal necessity he found that the defendant had failed to establish it. The suit, however, was dismissed on the finding that the family had been joint.

In appeal it is contended that it is proved that Sarjiwan Lal was a separated Hindu and, further, that, even assuming that he was joint with his brothers, *Musammat* Dulari's possession in consequence of her own admissions was never adverse and that at best she only acquired a Hindu widow's estate.

On the question of jointness or separation the documentary evidence is practically nil. The earliest document which we have on the point is an application dated the 21st of March 1896 filed by *Musammat* Dulari in the Revenue Court for a perfect partition of her share which was described as being 20 out of 54 shares in a 5-*biswas* share of the *mahal*. On the 21st of May 1896 another application on behalf of Hori Lal was also presented desiring partition. These applications were resisted by an objection dated the 28th May 1896 filed by *Musammat* Mano Kunwar on behalf of Kirpa Shanker and Bodh Raj. In this objection she asserted that the family had all along remained joint and that *Musammat* Dulari had no right to possession or to have any share separated. This objection does not appear to have been pressed at all and was ultimately disallowed. The Revenue Court apparently directed the partition to be effected and *Musammat* Dulari's share was actually separated. Afterwards, we find that on the 20th December 1898 *Musammat* Dulari executed a mortgage-deed in favour of Maharaj Tika Ram in which she stated that the property mortgaged had belonged to her husband and was in her possession but that she was the owner of it. The amount borrowed was taken partly in order to pay off a bond of the 5th April 1897 said to have been executed in order to meet the expenses of the Revenue Court litigation as well as for cash received at the time of registration. On the 26th April 1903 she executed a second mortgage-deed in favour of the same Tika Ram in order to pay off the amount due on the previous mortgage-deed of 1898 as well as some parole debts due to the mortgagee and for a further advance in order to meet certain miscellaneous debts and expenses of her food. These mortgage-deeds remained unchallenged for a large number of years.

UMAN SHANKER *v.* AISHA KHATUN.

On the 13th February 1911 she executed a sale-deed of the entire share in this village in favour of Chaitram for a sum of Rs. 2,000. The amount was said to have been required in order to pay off the earlier mortgage deed as well as some previous debts and there was a further advance of Rs. 1,200. In this sale-deed she did state that the property sold was the *zemindari* property left by her husband. As we have already said, this was followed by the sale-deed of the 15th of March 1917 which is the subject-matter of dispute in this case. We can find nothing in any of these documents which would necessarily show that her husband at the time when he died had been separate from his brothers. The mere fact that the widow's name is entered in the revenue papers does not, in our opinion, necessarily raise the presumption that she is the widow of a separated Hindu.

Coming to the oral evidence adduced by the plaintiffs we find that that evidence too is not reliable. The learned Subordinate Judge who heard the witnesses did not believe them. The first witness is Pitambar Das who stated that all the brothers of Sarjiwan Lal lived separately. They were separate in mess, business, house and everything. He admits, however, that he is by relationship connected with the plaintiffs and that this alleged separation must have taken place prior to his attaining the age of discretion. It is admitted that all these brothers lived in one and the same house, some living in the upper storey and some in the lower storey. There is nothing to show that the names of these brothers were separately entered during their lifetime against the *zemindari* property owned by them. This witness in cross-examination stated that it was five, six, eight or ten years after Sarjiwan Lal's death that the name of *Musammat* Dulari was entered in the revenue papers.

If this statement were to be accepted it would follow that she could not have got her name entered by right as the widow of a separated Hindu.

The next witness is Hazari Lal whose statement in examination-in-chief was to the same effect, but in cross-examination he too admitted that Sarjiwan Lal and his brothers did not separate in his presence; that they did not divide the amount of profits in his presence, and that they lived in separate portions of one and the same house. Balkishun, one of the brothers, lived in the upper storey and the other brothers in the lower storey. The remaining three brothers also lived in the upper storey. This witness also is related to the plaintiffs by family relationship and was not considered an independent witness by the Court below.

The third witness, Kishen Narain, also stated in a general way that the brothers of Sarjiwan Lal were separate from each other. In cross-examination he had to admit that he did not know who used to make the collections in respect of the *zemindari* property.

The fourth witness, Gouri Prasad, in cross-examination stated that as far as he knew Sarjiwan Lal and his brothers did no work except collecting rents from the *zemindari* property; that Sarjiwan Lal and his brothers did not divide the income in his presence and that *Musammat* Dulari obtained possession of the estate not on Sarjiwan Lal's death but on the death of Inderjit; that Inderjit died 20 or 22 years ago and as long as he was alive he himself was in possession of the property and it was he who used to give money to *Musammat* Dulari. If this statement of the plaintiff's own witness is to be believed, it would destroy the plaintiffs' case and would show that *Musammat* Dulari never obtained possession as a Hindu widow as long as the surviving brother Inderjit was alive, that it was somehow or other after Inderjit's death that she obtained possession of the property.

The last witness on the point is Murad Lal who stated that he had seen Inderjit and Dulari separate since 1878 but in cross-examination he admitted that he saw Inderjit and Dulari separate in mess only and in no other way. It is admitted by the other witnesses that all the branches of the family lived in one and the same house.

It is true that the oral evidence produced by the defendant is even worse. Banke Lal who was only 56 years of age stated that he had seen Sarjiwan Lal and Inderjit and found them living and dining together. He stated that he himself used to live and

dine with them. In cross-examination, however, he could not fix the exact date. He had said originally that he was appointed *Patwari* in 1875 and that he was living in the house of Inderjit in 1877 or 1878. In cross-examination though he repeated this statement yet he said that during the days when he was living with Sarjiwan Lal he was not a *Patwari* at all. His statement was to the effect that Dulari lived separate from Inderjit and that it was after the death of Sarjiwan that she became separate and that she was separate also as regards food, etc.

The only other witness is one Abdul Hafiz who himself has no personal knowledge of the matter.

There can be no doubt that the presumption of law was in favour of the jointness of all the four brothers. The plaintiffs who came into Court on the allegation that they were separate, had to establish it by clear and cogent evidence. The documentary evidence, we have already pointed out, is altogether inconclusive. The oral evidence also is, under the circumstances suggested above, altogether unreliable. In this view of the matter we find it impossible to differ from the view taken by the learned Subordinate Judge that the plaintiffs have failed to prove that the four brothers were separate.

It is, however, contended on behalf of the appellants that, even assuming that the four brothers were joint, the possession of *Musammat* Dulari was never adverse. Reliance is placed on the statement contained in the mortgage-deed of 1898 and the sale-deed of 1911 to the effect that the property transferred had been acquired by the lady from her deceased husband. Although those statements profess to show the origin of her title, it does not follow that these statements necessarily imply that at that time she was not asserting her full ownership but was only putting forward a limited interest in the estate. In 1896 when she applied for partition there was no admission on her behalf that she was only a limited owner. The evidence as to when and how she obtained possession is practically nil. Some of the plaintiffs' own witnesses have stated that she entered into possession many years after Sarjiwan Lal's death—one witness going so far as to say that she obtained possession after Inderjit's death. Under these circumstances, we are bound to hold that there is absolutely nothing to show how she originally obtained possession of the estate and when and how her name was entered in the revenue papers. All that we know is that in the year 1896 she was a co-sharer when she applied for partition in the Revenue Court as against the other co-sharers. From this conduct of hers no inference can be drawn one way or the other. The subsequent admissions also are not conclusive on the point. It was laid down by their Lordships of the Privy Council in the case of *Lachhan Kunwar* v. *Manorath Ram* (1). "That unless it was clearly shown that when the widow took possession she professed to do it as claiming only the limited estate of a widow it would be impossible to hold that the rights of the other claimants were not extinguished."

In the present case, we have already said there is nothing whatsoever to show how she got into possession. It may be that she got into possession claiming adverse title to the estate or it may be that she obtained possession surreptitiously or with the consent of the other members. So long, however, as the plaintiffs have not shown that she entered into possession of the estate with an assertion of only a limited interest it seems to us impossible to hold that her possession had all along remained either permissive or qualified. Her subsequent conduct, namely, the execution of the mortgage-deeds, would rather go to show that she was all along treating herself as full owner of the property. The case of *Satgur Prasad* v. *Raj Kishore Lal* (2) is somewhat similar inasmuch as in that case there were also a number of admissions of *Musammat* Dilla Kunwari that she had acquired the property

(1) 22 C. 445; 22 I. A. 25; 5 M. L. J. 1; Rafique and Jackson's P. C. No. 136; 6 Sar P. C. J. 523; 11 Ind. Dec. (N. S.) 297 (P. C.).

(2) 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.).

as heir to her husband. These admissions, however, were not taken to necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right. The learned Vakil for the appellants relies on the case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (3), in particular on the observations made by one of the learned Judges at page 946*. That case, however, was quite a different one. There the lady was not in possession of the property as a trespasser but only asserted a Hindu widow's estate. As was pointed out by the learned Chief Justice at page 936,* her possession could be legally explained on the basis of a Will by her late husband as well as on the basis of custom set up in the case. When the case went up in appeal to their Lordships of the Privy Council the question of adverse possession was altogether dropped. That case, therefore, is, in our opinion, no authority for the contention advanced on behalf of the appellants.

The result, therefore, is that, in our opinion, the lady must be deemed to have remained in adverse possession of the property for more than twelve years and as having asserted her full ownership. Under these circumstances the plaintiffs' claim is barred by limitation. The appeal accordingly fails and is hereby dismissed with costs including in this Court fees on the higher scale.

M. A. A. *Appeal dismissed.*

(3) 38 Ind. Cas. 894; 14 A. L. J. 913; 38 A. 590.

* Pages of 14 A. L. J.—[*Ed.*].

ALLAHABAD HIGH COURT.
FULL BENCH.

EXECUTION SECOND CIVIL APPEAL NO. 580 OF 1922.

February 2, 1923.

Present:—Mr. Justice Lindsay Mr. Justice Ryves and Mr. Justice Daniels.

BINDESHRI PRASAD TEWARI—APPLICANT

versus

BADAL SINGH AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 47, 144—Execution of decree—Sale—Decree set aside—Auction-purchaser, whether can recover purchase-money from decree-holder—Remedy, proper.

An auction-purchaser under a decree which has, after confirmation of the sale, been set aside as the result of a separate suit, can recover his purchase-money from the decree-holder, and his remedy is by application under section 47 of the Civil Procedure Code. [p. 875, col. 1.]

(Case-law discussed.)

An auction-purchaser is not bound to look beyond the decree; if a decree is in existence he is entitled to assume that it is a valid decree. [p. 876, col. 1.]

Rewa Mahton v. *Ram Kishen Singh*, 13 I. A. 106; 14 C. 18; 4 Sar. P. C. J. 746; 10 Ind. Jur. 428; 7 Ind. Dec. (N. S.) 13 (P. C.), followed.

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. [p. 876, col. 1.]

Rodger v. *Comptoir D'Escompte de Paris*, (1871) 3 P. C. 465 at p. 475; 7 Moo. P. C. (N. S.) 314; 40 L. J. P. C. 1; 24 L. T. 111; 19 W. R. 449; 17 E. R. 120, followed.

Execution second appeal from a decree of the Subordinate Judge, Basti, dated the 9th January 1922.

Dr. *K. N. Katju* (with him Mr. *N. P. Upadhiya*), for the Appellant:—In this case both law and equity demand that the relief prayed for by the appellant be granted. It does not matte whether it is granted in a summary manner by an application under section 47 or section 144, Civil Procedure Code, or by a suit. The lower Courts were wrong in holding that no application under section 47 or section 144 lies and that a suit is barred by limitation. It is submitted that an application under section 47 does lie. The view taken by the lower Appellate Court that the Full Bench case, *Bhagwati* v. *Banwari Lal* (1), is an authority for the proposition that an application under section 47 does not lie is incorrect. Nor does *Ram Saroop* v. *Dalpat Rai* (2) bar the appellant's remedy. The facts in the present case are totally different from the facts of *Ram Saroop* v. *Dalpat Rai* (2). In the latter cases and cases of that type the decree is a good decree and the auction-purchaser is refused the refund of his money on the ground that in an auction-sale the purchaser gets no warranty of title. But in the present case, the decree itself in execution of which

(1) 1 Ind. Cas. 416; 6 A. L. J. 71; 5 M. L. T. 185; 3[illegible] A. 82.

(2) 58 Ind. Cas. [illegible]05; 43 A. 60; 18 A. L. J. 905; 2 U. P. L. R. (A.) 318.

the sale took place has been declared void, and, therefore, no question of warranty of title arises. The decree-holder is in possession of money to which he has no title. This view is supported by the Privy Council ruling in *Shama Pershad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (3). At page 211 of this case their Lordships observe: "There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force, but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceedings. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action." The case was followed in *Collector of Meerut* v. *Kalka Pershad* (4).

The Full Bench case, *Munna Singh* v. *Gajadhar Singh* (5), also supports this view.

It is well-established law that the auction-purchaser is a representative of the judgment-debtor. This being so the subject-matter of the application is a question between the decree-holder and the representative of the judgment-debtor. The question also relates to the execution, discharge and satisfaction of the decree. The application was, therefore, correctly made under section 47. This was the opinion expressed by Banerji, J., in *Collector of Meerut* v. *Kalka Pershad* (4). Even if section 47 does not apply, section 144 would apply. In any event, the Court has inherent powers under section 151 to do justice. I rely upon *Mookoond Lal Pal Chowdhury* v. *Mahomed Sami Meah* (6) which case was approved by the Allahabad High Court in *Collector of Meerut* v. *Kalka Pershad* (4).

Mr. *M. A. Aziz* (for Dr. *S. M. Sulaiman*), for the Respondents:—The two questions involved in this case are whether, in the circumstances of the case, a refund of his purchase-money can be allowed to the auction-purchaser, and, if so, what is the procedure to be adopted. As to the first question it is submitted that no restitution can be allowed in law or in equity. The present case is hardly distinguishable from *Ram Sarcop* v. *Dalpat Rai* (2). It is true that in the latter case the decree was not declared invalid. In the present case, however, all that can be said is that the decree has been declared invalid against Ram Bhujarath. If this is conceded, then it is clear that on the authority of *Ram Sarcop* v. *Dalpat Rai* (2) the appellant is not entitled to the recovery of the purchase-money. In that case Sulaiman, J., after an exhaustive review of the case-law on the subject, clearly demonstrated that the provisions of the present Code of Civil Procedure do not recognize any substantive right of the auction-purchaser at an execution-sale to maintain a suit for the refund of the purchase-money, where it is found that the judgment-debtor had no saleable interest in the property sold; his right is limited to an application for an order for re-payment of the purchase-money in case the sale has been set aside by the Court.

Now, an application for a refund of the purchase-money could be made either under section 47 or section 144 or O. XXI, r. 91. As for section 47 it is clearly not applicable. It has been laid down by a Full Bench ruling of our High Court *Bhagwati* v. *Banwari Lal* (1), that section 47 is not applicable to a question between the auction-purchaser or his representative and the judgment-debtor or his representative; that upon the judgment-debtor's property being sold and the amount due upon the decree being realized, the decree is fully executed, discharged and

(3) 10 M. I. A. 203; 3 W. R. P. C. 11; 2 Suth. P. C. J. 103; 19 E. R. 948.

(4) 28 A. 655; 3 A. L. J. 556; A. W.N. (1906) 171.

(5) 5 A. 577; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491

(6) 14 C. 484; 7 Ind. Dec. (N. S.) 321.

satisfied, and no question relating to the execution, discharge and satisfaction of the decree remains to be determined. Nor can section 144 be said to apply. The words used in the section are 'when and in so far as a decree is varied or reversed.....' These words clearly show that the section is applicable to a proceeding by way of appeal, revision or review and not to the case of a decree declared void by a separate suit.

The only other remedy open to the auction-purchaser is an application under O. XXI, r. 91. But such an application is time-barred in this case. The lower Courts were, therefore, justified in dismissing the appellant's application.

Dr. *K. N. Katju* was not called upon to reply.

JUDGMENT.—The main question for decision in this appeal is whether an auction-purchaser under a decree which has been, after confirmation of the sale, set aside as the result of a separate suit, can recover his purchase-money from the decree-holder. If the answer is in the affirmative, as we think it must be, there is a subsidiary question as to whether his remedy is by application under section 47 or 144 of the Civil Procedure Code or by a separate suit.

The appellant Bindeshari Prasad is the auction-purchaser. The decree under which the sale was held was a decree for sale on the basis of a mortgage executed in favour of the respondents by one Debi Saran Dhar. Debi Saran Dhar formed a joint family with his minor grandson Ram Bujharat. The respondents brought a suit for sale on the basis of their mortgage in the year 1917 impleading Debi Saran Dhar and Ram Bujharat. In this suit they obtained a preliminary decree for sale on 1st June 1917. The decree was made final on 22nd January 1918. The property was put up for sale on 22nd April 1919 and purchased by the appellant for Rs. 660. The appellant was a stranger to the suit. The sale was confirmed under O. XXI, r. 92 on 24th May 1919.

Unfortunately for themselves, the respondents made Debi Saran Dhar guardian *ad litem* of his grandson, thereby debarring the latter from pleading that the mortgage was not for legal necessity. The result was that Ram Bujharat through another person as next friend afterwards brought a suit against the respondents decree-holders and the auction-purchaser for a declaration that neither the mortgage, nor the sale decree, nor the auction-sale held thereunder were binding on him. The suit was decreed in his favour on 14th August 1919 in respect of all the three declarations asked for. Armed with this decree Ram Bdujharat was successful in ousting the appellant from possession of the property. On an application under section 144 of the Civil Procedure Code in the original mortgage suit possession was restored to him on 24th August 1920. The auction-purchaser then made the present application for refund of the price which he had paid. It was filed as an application under section 47 of the Civil Procedure Code in the original mortgage suit brought by the respondents, but the applicant subsequently asked that if the application was held not to come under section 47, it should be treated as a separate suit under the provisions of sub-section (2) of that section.

The Courts below dismssed the application. Both Courts have held that section 47 is inapplicable and the lower Appellate Court has held on the authority of *Ram Saroop* v. *Dalpat Rai* (2) that no separate suit to recover the amount could be entertained. We think that the ruling in question is clearly distinguishable. That was a case in which property was sold in execution of a simple money-decree. A third party subsequently came forward and claimed that the property which had been sold belonged to him and to the judgment-debtor. His suit was decreed and the auction-purchaser was deprived of the property. The ruling relies on the principle that there is no warranty of title at an auction sale and that what was sold was merely the right, title and interest of the judgment-debtor and that the purchaser took the risk that the judgment-debtor's title might turn out to be defective. No question was ever raised, or could be raised as to the validity of the decree under which the sale was held. Here the facts are altogether different. Ram Bujharat claimed and obtained a declaration that not merely the sale but the decree and

the mortgage on which it was based were void and of no effect as against him. The decree-holders have, therefore, obtained from the auction-purchaser, under an invalid decree, money to which they have no right, and there is a clear equity in favour of the purchaser entitling him to recover it back. It is a well-established principle that the auction-purchaser is not bound to look beyond the decree. If a decree is in existence he is entitled to assume that it is a valid decree. This was laid down by the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (7). If the law were otherwise, a purchase at an execution sale would be reduced to the merest gamble. A distinction between a defect in the judgment-debtor's title to the property sold and the case where there was no jurisdiction to sell the property is recognised in the well-known case of *Dorab Ally Khan* v. *Abdool Aziz* (8).

In a recent case in which a sale was set aside by a separate suit and the judgment-debtors were restored to possession of the property, their Lordships of the Privy Council held that the auction-purchasers were entitled to recover from the judgment-debtors purchase-money which had been paid in satisfaction of debts of the latter. They quoted with approval the judgment of Cairns, L. C., in *Rodger* v. *Comptoir D' Escomple de Paris* (9), that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and they pointed out that the auction-purchasers had parted with their purchase-money and paid it into Court on the faith of the order of confirmation and certificate of sale, and were entitled to be re-paid.

It has been argued for the respondents that the decree was not wholly set aside but was only set aside in so far as it affected Ram Bujharat. The result was substantially to set aside the decree altogether. The decree was for sale of joint family property on a mortgage executed by the manager. It being found that the manager had no right to encumber the property, the decree for sale fell wholly to the ground, and the successful plaintiff was entitled to recover and did in fact recover the entire property. This argument, therefore, is of no avail to the respondents. The latter have obtained money to which they were not entitled under a decree and sale which were invalid and they are bound in equity to restore it to the appellant.

The question whether the application comes under section 47 or 144 of the Civil Procedure Code is one of some difficulty. The words 'varied or reversed' used in section 144 seem more applicable to a proceeding by way of appeal, revision or review than to a separate suit declaring that a decree is not binding on a particular party. The Madras High Court has however held in *Tangutur Subrayudu* v. *Yerramsetti Seshasani* (10) that the section is applicable where a decree is set aside as the result of a subsequent proceeding. If the auction-purchaser can be regarded as the representative of the judgment-debtor whose interest he purported to acquire, the question is *prima facie* one coming under section 47. It is a question relating to the satisfaction of a decree, for it alleges that money has been wrongfully applied in satisfaction of the decree. There is the authority of the Full Bench of the Madras High Court in *Veyindramuthu Pillai* v. *Maya Nadan* (11) for the view that a stranger purchaser at Court auction is entitled and bound to have any question relating to the satisfying of the decree decided under section 47. The learned Judges refer to and follow the decision of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (12) which laid down that the Courts in India were right in not placing a narrow construction on the langauage of section 244 (now section 47) of the Civil Procedure Code and that the fact that a purchaser was interested in

(7) 13 I. A. 106; 14 C. 18; 4 Sar. P. C. J. 746; 10 Ind. Jur. 428; 7 Ind. Dec. (N. S.) 13 (P. C.).

(8) 5 I. A. 116; 3 C. 806; 2 C. L.R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097 (P. C.)

(9) (1871) 3 P. C. 465 at p. 475; 7 Moo. P. C. (N.S.) 314; 40 L. J. P. C. 1; 24 L. T. 111; 19 W. R. 449; 17 E. R. 120.

(10) 33 Ind. Cas. 739; 40 M. 299; 3 L. W. 236; (1916) 1 M. W. N. 155; 30 M. L. J. 366; 19 M. L. T. 235.

(11) 54 Ind. Cas. 209; 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32 (F. B.).

(12) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).

the question in dispute had never been held to be a bar to the application of the section. In the Bombay High Court a contrary view has been taken [*Narsinhbhat* v. *Bandu Krishna Kulkarni* (13)] but it was admitted that the Bombay view was contrary to the decisions of both the Allahabad and Calcutta High Courts. In a recent Full Bench of this Court in *Sita Ram* v. *Janki Ram* (14) it was suggested, if not definitely held, that even a question between a judgment-debtor and an auction-purchaser, who had failed to deposit the 25 per cent. of the purchase-money required by O XXI, r. 84, came within the provisions of section 47. We think, therefore, that we are entitled to treat this application as coming within the provisions of that section. Even if we were not so satisfied, we should have been prepared to grant the relief asked for on the analogy of section 144 in exercise of our inherent power under section 151 of the Code. There is admittedly no question outstanding between the parties except that which has been decided in this appeal and to require the question to be now tried out in a regular suit would be merely to put the parties to unnecessary expense.

For the reasons already given, we allow the appeal and give the appellant a decree for the amount claimed against the respondents decree-holders with costs in all Courts, including in this Court fees on the higher scale, if any.

Z. K. *Appeal allowed.*

(13) 46 Ind. Cas. 113; 42 B. 411; 20 Bom. L. R. 495

(14) 65 Ind. Cas. 813; 44 A. 266; 20 A. L. J. 105; (1922) A. I. R. (A) 200.

PATNA HIGH COURT

SECOND CIVIL APPEAL NO. 951 OF 1921.

June 18, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Kulwant Sahay.

RAMNANDAN PARBAT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DENI SAHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 68 (c)—Mortgage—Subsequent partition—Mortgagee dispossessed by share-holder—Suit to recover money from mortgagor, whether maintainable.

Where subsequent to a mortgage there is a partition and the mortgagee is turned out by the share-holder to whose share the mortgaged land falls, the mortgagee is entitled on being dispossessed to sue the mortgagor for the mortgage-money. [p. 879, col. 1.]

Talek Singh v. *Jalal Singh*, 5 Ind. Cas. 130; 11 C. L. J. 136, followed.

Appeal from a decision of the Subordinate Judge, Saran, dated the 29th January 1921, reversing that of the Munsif, Sewan, dated the 22nd December 1919.

Messrs. *S. M. Mullick* and *S. Saran*, for the Appellants.

Mr. *Harnarayan Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—The appellants in this case were granted a *zarpeshgi* in the year 1883 over certain lands measuring 30 *bighas* odd by the representatives in interest of the defendants in the suit. The mortgagors were share-holding proprietors of village Siedhi bearing *Tauzi* Nos. 3911 and 3912 and the mortgage granted by them was not a mortgage of their share in those *Tauzi* numbers but of certain specific *bakasht* lands of which they had, by an arrangement, between themselves and their co-sharers, possession at that time. The *zarpeshgi* deed is in the usual form. The *zarpeshgi* money was Rs. 1,600. The *zarpeshgidars* were to be given possession of the mortgaged land and to satisfy themselves by the profits for the interest payable on the *zarpeshgi* money. The mortgagors were to repay the advance at the end of three years but if they did not do so the terms of the mortgage were to continue until the mortgagors did in fact pay of the mortgage-money which they might do in Bahado any year after the due date. It appears that some years ago, in the year 1893, the share of the mortgagors in *Tauzi* No. 3911 was sold for arrears of Government revenue. The auction-purchasers who acquired the interest of the mortgagors subsequently, at some date which is not very clear upon the evidence before us but which is stated to have been in the year 1913, effected a partition between themselves and their

co-sharers and the *zarpeshgi* lands in so far as they were within *Tauzi* No. 391, fell in to the *takhta* of other co-sharers who dispossessed the plaintiffs. Subsequently, one of the mortgagors executed a deed of sale in favour of certain purchasers, a portion of the purchase-money being retained by the vendees for the purpose of paying off the vendors' share in the mortgage and, in the result, Rs. 800 out of the Rs. 1,600 originally lent was paid back to the mortgagees. In these circumstances, the mortgagees appear to have been content to remain in possession of the remaining mortgage lands as security for the balance of the mortgage-money due. In the year 1917 there was also a *batwara* partition of *Tauzi* No. 3912 and the mortgaged property in so far as it remained in the possession of the plaintiffs, the mortgagees, fell into the *takhta* of other shareholders than the mortgagors, the result being that the mortgagors were then dispossessed entirely of the remaining interest they had in the mortgaged lands. The plaintiffs then brought the present suit on the 18th May 1919 to recover from the defendants who represent the mortgagors the balance of the *zarpeshgi* money due together with interest since the date of their dispossession. Several pleas were raised in answer to the plaintiffs' claim and amongst others a question of limitation.

The learned Munsif before whom the case came for trial decided all the issues in favour of the plaintiffs including the question of limitation.

The defendants then appealed to the Subordinate Judge before whom the questions raised were (1) is the plaintiff entitled to sue for his mortgage-money under section 68 of the Transfer of Property Act? and (2) Is the suit barred by limitation? The learned Subordinate Judge came to the conclusion that the plaintiffs were not entitled to sue under the provisions of section 68 of the Transfer of Property Act and having arrived at this conclusion he did not decide the question of limitation. It seems to me that the reasons given by the learned Subordinate Judge for dismissing the plaintiffs' claim cannot stand. He appears to have been under the impression that the case was governed by the provisions of section 99 of the Estates Partition Act which provides that, "If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has created his share or any portion thereof any encumbrance such encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor and only as to such land" and being of opinion that the plaintiffs had never attempted to enforce their security upon the share allotted or upon the lands allotted to the mortgagors and had never requested the mortgagors to put them in possession of such lands their case must fail. It may be pointed out in passing that the plaintiffs had by their plaint pleaded that the defendants had not allowed the plaintiffs to take possession either of the *asamiwar* lands or of the *bakasht* lands, that the plaintiffs had requested them repeatedly but they paid no heed to their request hence the necessity of this suit. That plea was not specifically denied in the written statement and, so far as the Munsif was concerned, it appears to have been accepted as the fact. The learned Subordinate Judge, however, relied upon some evidence given on behalf of the plaintiffs to the effect that they did not serve the mortgagors with any notice of their dispossession. The learned Subordinate Judge was also of opinion that the last clause of section 68 of the Transfer of Property Act had not been complied with. That clause provides for cases where the mortgaged property has been wholly or partially destroyed or the security has been rendered insufficient within the meaning of section 66 of the Transfer of Property Act and enacts that in such cases, apart from the wrongful act or default of the mortgagor or mortgagee, the mortgagee may require the mortgagor to give him any sufficient security for his debt, and if the mortgagor fails so to do may sue him for his money. With great respect to the learned Subordinate Judge, I think he failed to appreciate the real nature of the present case. The case is not one which comes under that part of section 68 to which I have referred nor is it a case which is governed by section 99 of the Estates Partition Act. There is no question here of the mortgaged prop-

erty having been wholly or partially destroyed or the security rendered insufficient. Similarly, it is not a case of a proprietor of an estate held in common tenancy who has created an encumbrance upon his share or a portion thereof. The mortgage granted in this case was a mortgage not of the mortgagor's share in the estate but of specific lands of which the mortgagors were in possession by an arrangement with their co-sharers and the provisions of section 99 of the Estates Partition Act appear to me to have no application to such a case. The section which does appear to me to govern the case is section 68, clause (*c*), of the Transfer of Property Act which provides that where the mortgagee being entitled to possession of the property the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any other person, then in such a case the mortgagee has a right to sue the mortgagor for the mortgage-money. What happened in the present case was that after the partition the plaintiffs were dispossessed of the property of which they were in possession under the *zarpeshgi*. They could not resist that dispossession and, therefore, they were bound to give up possession and the result is that the mortgagors have failed to secure the possession of the property to the mortgagees and in such a case the Statute expressly provides that the mortgagees have a right to sue for the mortgage-money. The question arose for determination in the Calcutta High Court in the case of *Talek Singh* v *Jalal Singh* (1) which is a case practically on all fours with the present case. "A usufructuary mortgagee," says the head-note in that case, "can bring a suit for mortgage-money on dispossession from land given in lieu of interest, by a co-sharer of the mortgagor who obtained the same on partition and is not precluded from so doing by section 99 of the Estates Partition Act." In that case the facts were, for all material purposes, the same as in the present case. It was a case of a mortgage not of a share in an estate but of certain specific lands of which the mortgagors were in possession. There was a subsequent partition and the mortgagees were turned out by the share-holders in whose *takhta* the mortgaged lands fell and it was held that section 99 of the Estates Partition Act had no application to a case of that sort. It was further held that the case fell directly within the provisions of section 68, clause (*c*), of the Transfer of Property Act and that under that section the mortgagee was entitled, on being dispossessed after the *batwara*, to sue for the mortgage-money. In my opinion this appeal must succeed and the decision of the learned Subordinate Judge must be set aside, but as he has not come to any decision upon the question of limitation and we are not in possession of the facts upon which that question depends the case must be remanded to the lower Appellate Court to be disposed of upon the second point which was raised, namely, whether the suit is barred by limitation. The appellants are entitled to the costs of this appeal. The other costs in the suit will abide the result of the lower Appellate Court's decision on the question of limitation.

Kulwant Sahay, J.—I agree.

K. S. D. *Case remanded.*

(1) 5 Ind. Cas. 130; 11 C. L. J. 136.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1627 OF 1921.
May 8, 1923.

Present:—Mr. Justice Gokul Prasad.

Lala RAGHA MAL—PLAINTIFF—APPELLANT

versus

ABDUS SATTAR—DEFENDANT—RESPONDENT.

Adverse possession—Burden of proof.

Where a suit for possession is resisted on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years: rather the burden of proof is on the defendant to prove his title by adverse possession. [p. 880, col. 2.]

Secretary of State v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.) and *Jai Chand* v. *Girwar Singh*, 52 Ind. Cas. 966; 17 A. L. J. 814; 41 A. 669, relied on.

RAGHA MAL v. ABDUS SATTAR.

Second appeal from a decree of the First Additional Judge, Aligarh, dated the 19th July 1921.

Mr. *Panna Lal*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession of a rent-free grove and damages.

The facts appear to be as follows. Khadim Husain was the original rent-free grantee of a 1 *bigha* 7 *biswas* of land. He planted a grove on it and sunk a well. On the 24th of January 1882 he sold the grove and the well to Ganga Sahai. On the 23rd of February 1884 Ganga Sahai aforesaid sold the grove and the well to Allah Bakhsh. Allah Bakhsh was the father of the defendant. On the 30th of June 1893 Allah Bakhsh aforesaid sold the grove and the well to Nathi Mal, the brother of the plaintiff. By some oversight, however, the name of Allah Bakhsh continued to be recorded against the grove in dispute in the revenue papers. At the last Settlement of the year 1917 the plaintiff applied for correction of the record and entry of his own name. The defendant who is the son of Allah Bakhsh objected. His objection was allowed and the plaintiff now says that on the strength of this decision the defendant has now dispossessed the plaintiff and has cut down ten trees out of the grove, hence the present suit for possession and damages.

The defence was that the defendant was the occupancy tenant of this plot and held it rent-free (2) that the transfer of Allah Bakhsh to the plaintiff's brother was never given effect to, and (3) that the defendant and his predecessor-in-title Allah Bakhsh had been in adverse proprietary possession. On these pleadings the parties went to trial. The Trial Court found that the property in dispute was a rent-free grove and the defendant or his predecessor-in-title could not acquire occupancy right in it, and that the plaintiff had proved his title and possession. On these findings the learned Judge of that Court decreed the plaintiff's claim. The defendant went up in appeal. The learned District Judge has apparently concurred with the Court of first instance in finding the title to be with the plaintiff. Then he entered into the question of possession and has come to a finding that the plaintiff has failed to prove his possession within 12 years. This finding is bad for two reasons. The first is that the learned Judge seems to think that in a case where the suit is resisted on the ground of acquisition of title by prescription it is for the plaintiff to prove his title within 12 years. That this is not so and it is for the defendant to prove his adverse proprietary title is clear from the cases of *Secretary of State* v. *Chelikani Rama Rao* (1) and *Jai Chand* v. *Girwar Singh* (2). The second reason why the finding aforesaid cannot be accepted is that the learned District Judge in the course of his judgment says: "the *kabuliyats* and applications to the Municipal Board on which the plaintiff relies, appear to me to be no proof of possession at all." It is not quite clear what the learned Judge means. They may not be sufficient to prove possession but *prima facie* counter-parts of leases executed by tenants and applications for permission to build put in the Municipal Board are the best possible evidence of possession. They would at least tend to show which were the persons who were in actual possession and on whose behalf they held that possession, and the application would show that at a certain time a certain party alleged himself to be in possession of the property in dispute and asked for permission of the Municipal Board as the person being in possession to make erections on the property with the permission of the Municipal Board. I cannot, therefore, accept this finding of fact as binding upon me. In order to dispose of this appeal satisfactorily it is necessary for me to have a finding on the following issue:—

(1) When did the defendant first enter into possession of the property in dispute and when did he set up a title adverse to the plaintiff to the latter's knowledge?

No fresh evidence will be taken.

Or receipt of the finding the usual ten days will be allowed for objections.

Case remanded.

M. A. A.

(1) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L.R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P.C.).

(2) 52 Ind. Cas. 366; 17 A.L. J. 814; 41 A. 669.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 61 OF 1919.

June 1, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Maharaja KESHAVA PRASAD SINGH BAHADUR OF DUMRAON—DEFENDANT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—Alluvion and diluvion—Emerging of land on opposite bank of river—Land, whether can be treated as accretion to estate—Estate permanently settled—Liability to pay revenue for accretion—Sale in default of payment of revenue—Notice to proprietors, whether necessary—Bengal Land Revenue Sales Act (XI of 1859).

In a suit by the Secretary of State claiming a declaration of title and posssession over the lands comprised in *Mahal* Turk Ballia, a revenue paying estate on the roll of the Collector of Shahabad, it appeared that the *mahal* was originally settled with proprietors in 1793. Owing to a change in the course of the river Ganges, it became diluviated and after some years emerged on the opposite bank and eventually became fit for cultivation. In 1911, it was sold for non-payment of arrears of revenue and in the absence of bidders was purchased on behalf of the Government. The defendant claimed the land as his own as an alluvial accretion to his *zemindari* and as such exempt from any revenue. He also disputed the right of the Crown to sell, contending that the revenue claimed was not payable, and also challenged the validity of the sale upon the ground of defective and irregular procedure:

Held, that the defendant was not entitled to hold the land as part of his estate free from revenue merely because it happened to adhere to his land; [p. 890, col. 2.]

(2) that there was nothing to prove an estoppel against the plaintiff precluding him from treating such lands as outside the terms of the Settlement; [p. 890, col. 2.]

(3) that the sale was a valid sale under the provisions of the Bengal Land Revenue Sales Act, 1859, notwithstanding the fact that no formal notice was served on the proprietors demanding payment of the revenue. [p. 894, col. 1.]

Appeal from a decision of the District Judge, Shahabad, dated the 19th December 1918.

Messrs. *P. K. Sen, A. Sen* and *N. N. Sinha*, for the Appellant.

The Government Advocate and the Government Pleader, for the Respondent.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted by the respondent, the Secretary of State for India in Council, as plaintiff against the appellant, the Maharaja Bahadur of Dumraon, as defendant, claiming a declaration of the plaintiff's title and possession over the lands comprised in Mahal Turk Ballia, a revenue paying estate, now bearing *Tauzi* No. 10805 on the revenue roll of the Collector of Shahabad, in the Province of Bihar and Orissa.

Mahal Turk Ballia, which consists of a single *mauza* of that name, was settled with proprietors other than the appellant in the year 1790 as a separate estate and in 1793 was permanently settled and assessed to revenue at Rs. 251. It was at that time situated on the north side of the river Ganges in the territory now known as the United Provinces of Agra and Oudh. It was entered as *Tauzi* No. 178, at first on the roll of the Collector of Ghazipur, and afterwards of Ballia. Owing to a change in the course of the river, it became diluviated and after being under water for some years it emerged on the opposite or southern bank of the river in the District of Shahabad and in time became again fit for cultivation. In 1910 it was transferred from the revenue roll of the Ballia District in the United Provinces to that of Shahabad in Bihar, then part of Bengal. In 1911, as nobody came forward to pay the revenue, it was sold under the provisions of the Bengal Land Revenue Sales Act (Bengal Act XI of 1859) for non-payment of arrears of revenue and in the absence of bidders was purchased on behalf of the Government for a nominal sum. The Maharaja of Dumraon whose estates lie, for the most part, on the south side of the river in this locality claims the land as his own. He says it is an alluvial accretion to his *zemindari* and that all such accretions are, by the terms under which his ancestors took Settlement in the years 1790 and 1800, included in the *jama* agreed upon at that time, and are exempt from any additional revenue. He disputes the right of the Crown in such circumstances to sell, contending that the revenue claimed was not payable. He further contends that the identity of Turk Ballia with the lands in his possession has not been established and, in addition,

he challenges the validity of the sale upon the ground of defective and irregular procedure. He accordingly refused to give up possession with the result that the present suit was instituted before the District Judge of Shahabad on the 8th December 1916. The plaintiff succeeded before the District Judge. From his decision the Maharaja has appealed to this Court.

The appellant is admittedly in possession of the disputed property. He further contends, that he has acquired a good title to it. In the first place, he relies upon section 4 of Bengal Regulation, XI of 1825, and contends that the land in question was gained by gradual accession from the recess of the river and must be considered as an increment to his estate. In answer to this the respondent objects that the section in question has no application to cases in which the land can be identified as the property of another. Secondly, the appellant claims title by reason of a local custom whereby the deep stream of the Ganges in the locality in question forms the boundary between the estates of the proprietors on opposite banks of the river. The existence of such a custom is disputed by the respondent. Thirdly, the appellant bases his title upon abandonment by the original proprietors whereby the estate fell again into the public domain and when it emerged on the opposite bank was a fit subject-matter for the operation of section 4 of the Regulation of 1825. The respondent contends that no abandonment by the previous proprietors in fact took place. Fourthly, the appellant alleges a title as against the former proprietors by adverse possession for a period of over twelve years. The respondent contends that the land in suit was not fit for cultivation until about the year 1909 and that no acts of possession which would oust the former proprietors took place before that date.

In the ordinary course, even assuming that the appellant acquired title to the land in suit either as an accretion to his estate, or by the custom, or transfer, or in any other way he would nevertheless be liable for revenue that might be assessed under the provisions of Regulation II of 1819 and Bengal Act IX of 1847 or for any existing assessment in respect of such lands. If an assessment had already been made, and the land remained charged with it, the appellant would take subject to such assessment and would be liable to the Government for payment of the revenue so assessed. No claim has been made on behalf of Government to impose a fresh assessment under the provisions of the two enactments last mentioned, the land having been already permanently assessed to revenue at the date of the Permanent Settlement It was in respect of non-payment of arrears of the revenue already imposed that the land was sold. The appellant, however, claims special privileges with regard to alluvial lands under the terms of the Settlements made with his ancestors in the years 1790 and 1800 as already mentioned. It will be necessary presently to consider the terms of those Settlements and it is upon the construction of those terms that the determination of this appeal mainly depends.

The appellant also raised certain other contentions which may be divided into two main heads. In the first place, he challenged the validity of the sale upon certain grounds which will be dealt with hereafter, and, secondly, he contended that the identity of Turk Ballia with the lands now in his possession has not been established and that an action for ejectment must fail.

The circumstances under which the present dispute arises and the history of Turk Ballia from the date of the Permanent Settlement have been fully dealt with by the learned District Judge in a careful lucid judgment. But it will be necessary to refer again to some of the important features of the history of the estates in the locality with which we are concerned in dealing with the questions for determination. In that locality the deep stream of the Ganges is, for administrative purposes, the dividing line between the Shahabad District in the Province of Bihar and Orissa, which lies to the south, and the Balia District of the United Provinces which lies to the north of the river. This boundary line, however, is by no means constant. The surrounding country is for the most part flat and the banks of the river on one side or the other are subject

to erosion, especially during the summer and autumn months when the volume of water is greatly increased by the monsoon rains and the melting snows which descend from the Himalayan range, and flow into the river near its source. This process of erosion is generally slow and gradual, the river in flood time impinging on one bank or the other especially where it takes a curve, as here, and undermining it until in time the over-hanging portion falls, and is carried down by the stream. Occasionally, a more rapid change takes place by the river overflowing its banks, the escaping water forcing for itself a new channel through cultivated lands and some times leaving a considerable portion of the old river bed exposed. The vagaries of the river Ganges are various and manifold, both in kind and degree but, generally speaking, the gradual process of erosion is referred to as diluvion; the more sudden change in the river's course as avulsion. In the immediate neighbourhood of Turk Ballia the process of erosion has for many years been in progress on the northern bank of the river. About 1871 the *mauza* itself began to disappear as the course of the river shifted gradually to the northward. As the lands became diluviated a suspension of revenue was allowed to the proprietors by the Revenue Board of the United Provinces in proportion to the profits of the area lost until, after some 10 or 12 years, a nominal sum only was being paid. In 1884 the whole village had disappeared and the payment of revenue was suspended and written off from year to year in the revenue account. It does not appear, however, that any permanent remission was ever made and, had the land re-appeared on the north side by the recession of the river and again become fit for cultivation, there can be no doubt that the Board of Revenue in the United Provinces would have been entitled to enforce payment of revenue from the proprietors. It appears from the correspondence which took place between the Board of Revenue and the Commissioner and Collector of the Ballia District in 1884 that the proprietors were proposing to pay a nominal revenue of Rs. 2 in order to preserve their rights in the event of the land again re-appearing, but the Board of Revenue considered that this was not necessary and wrote to the Commissioner of the Benares Division that all *mahals* entirely washed away should be retained on the Revenue Roll and the revenue written off from year to year and that a nominal *jama* was not required to keep alive the rights of a proprietor and should not be taken. The Board accordingly ordered, that the entire *jama* of the *mahal* should be suspended and reported for remission at the close of the year. Each year thereafter a *kanungo* was deputed to make an inspection and ascertain if any of the lands had re-appeared. His reports have been produced and show that up to the year 1908 none of the submerged land had re-appeared on that side. In that year, it was noted on the *kanungo's* report that as the *mahal* was still under water there was no need to take any further action, and each year from 1884 the revenue had been suspended and written off in the revenue accounts of the Collectorate. As the river altered its position to the northward accretions took place upon the opposite bank in the Shahabad District, and, from time to time, as villages which had previously been in the United Provinces re-appeared in the Shahabad District on the other side, they were transferred from the Collectorate of the Ballia District to that of Shahabad. In 1909 some correspondence took place between the respective Collectors from which it appeared that, in addition to other villages, Turk Ballia had also re-formed in Shahabad on the south side and it was proposed to transfer it to the Revenue Roll of that District. After some further correspondance the revenue officials appear to have satisfied themselves that Turk Ballia had in fact re-appeared in the Shahabad District of Bihar. Accordingly, by two notices issued in the *Gazetts* of the respective Provinces dated the 25th and 26th May 1910, it was formally notified that the permanently settled estate of Turk Ballia had ceased to form part of the Ballia District in the United Provinces of Agra and Oudh and now formed part of the Shahabad District in Bengal (which at that time included Bihar) in respect of its Civil, Criminal and Revenue jurisdiction. When the village of Turk Ballia first appeared as dry land on the south side it is not very

easy to determine. There can be little doubt that for some years after it emerged as the river subsided after the floods it would be again covered during the next rainy season. It may also be reasonably inferred that for some time after its emergence it would be sandy waste unfit for cultivation. The learned Judge has found upon the evidence that it did not become cultivable before 1909, and I see no reason to differ from his finding in this respect. The question as to when it first became cultivable and was taken into the possession of the Maharaja is only material in considering whether he had acquired a title by adverse possession as against the recorded proprietors when the present suit was instituted on the 8th December 1916. There was a considerable contest in the Trial Court on the question whether accretions on the Shahabad side were gradual within the meaning of Regulation XI of 1825. The learned District Judge found that they were. This finding was not challenged by the respondent on appeal and the finding on this point may be accepted. When the estate was transferred in May 1910, the *kist* payable on May 1st was then due but under the Bengal Land Revenue Sales Act of 1859, section 2, it did not become an arrear until the 1st of the following month. Neither that nor any subsequent *kists* were paid although the notice of transfer was served on the surviving proprietors of Turk Ballia in the beginning of 1911. And when one year's revenue had fallen into arrears the estate was put up for sale under the provisions of Act XI of 1859, and sold on the 7th June 1911, and, as already stated, in the absence of bidders, was purchased by the Collector on behalf of the Government and a certificate of title was duly issued under section 28 of the Act. It will be observed that no attempt was made to assess a fresh revenue upon the lands in question under the provisions of Regulation II of 1819 or Bengal Act IX of 1847 and I apprehend that such a procedure would not have been permissible as the land in question was already subject to a fixed revenue from the date of the Permanent Settlement. Had the land been assessed now for the first time, I have no doubt that the assessment would have been much higher than Rs. 251 and the appellant does not contend that the procedure referred to in either of these enactments was applicable to the case. Indeed, his contention is, that once the land had appeared on the south side attached to his estate no revenue in respect of it, whether previously assessed or not, could be recovered from him or any body else.

It is now necessary to consider the ground of exemption upon which the appellant relies. Long before the date of the Permanent Settlement the Maharaja's ancestors had been the proprietors of considerable estates for the most part on the south side of the river in the District of Shahabad and the neighbourhood. These estates after the acquisition of the *Dewani* were at the disposal of Government and were settled with Raja Bikramajit Singh of Dumraon between the years 1790 and 1800 under various instruments. Some of them contained special terms as to diluvion and alluvion. Others did not. On the 12th January 1790 (1197 Fs.) a Decennial Settlement was made with him in respect of a large number of named villages comprised in Bhojpur and four other *parganas*. The names of the different villages, between six and seven hundred in all, are set out in the schedule attached to the deed of Settlement. It appears that the first engagement entered into with regard to these villages bound the *zemindar* to pay the revenue without any objection on the score of calamity, by which is no doubt meant diluvion of parts of the settled area as some of the villagers were at that time bounded by the river bank. It appears from the petition of the Raja dated the 10th January 1792 (Exhibit B), that the Collector had in 1790 intimated that any newly accreted lands would be subject to additional assessment, but the Raja had pointed out that large areas of the land in the villages of his *taluka* had been washed away by the river and no provision was made for abatement of revenue on that account. Probably the engagement had not been finally accepted by Mr. Brooke, the Collector at that time, but, however that may be, it was not acted upon and a fresh *ekrarnama* was taken from the Raja with regard to the villages in question which contained the terms that he should continue to pay without any objection

Government revenue fixed in respect of those villages including diluviated land and that Government should not for any reason have any claim in respect of land newly accreted thereafter. This Settlement, however, was in respect of certain specified villages with their dependencies and does not purport to include the land of other villages not mentioned therein, even if they should be at that time submerged or partly submerged and should accrete to the land of the villages settled with the Raja. In *Parganna* Bhojpur and immediately to the north of some of the villages settled in 1790 were other villages which were not named in that Settlement and which were either waste or diluviated, although at one time they may have been under cultivation. It was, no doubt, the intention of Government, it was certainly to their interest, that all the villages previously comprised in *zemindars'* estates should be settled with them, and assessed to revenue. In the case of larger estates, and more especially those of riparian owners, it took some time to ascertain the names and situation of the villages previously in their possession. Some had been diluviated, others had re-appeared and were either waste or unpopulated, or only partly fit for cultivation. These unpopulated villages were known as *virani* villages and, until Settlement with the *zemindar*, remained the property of Government. It appears that Mr. John Deane, who succeeded Mr. Brooke as Collector in the neighbourhood with which we are concerned, had taken great pains to ascertain the *virani* villages, which still remained unsettled with the Raja of Dumraon. He compiled a list of such villages and on the 26th August 1800 issued a *parwana* (Exhibit 77) to the Raja ordering him to file his *darkhast* (petition) for settlement of the *virani Gangbaramad* lands according to the list recorded in his office. It is unnecessary to refer in detail to what took place between Mr. Deane and the Raja before the date of this *parwana*. It would appear that in some instances the Raja had contended, that the lands were accretions to the villages already settled in 1790 and were not re-formations of diluviated villages not previously settled. There is nothing to indicate that the Raja at that time was claiming as accretions to the villages already settled, lands which in fact formed part of villages left out of the Settlement. A letter dated the 18th November 1800 written by Mr. Deane to the President and members of the Board of Revenue (Exhibit 78) shows, how by his exertions in discovering the *virani Gangbaramad taufir* lands he had materially added to the Government's Revenue. In the result, the Raja applied for and obtained a settlement of the villages of the description mentioned in the year 1800 all of which lay immediately to the north of the villages previosuly settled and were, in some instances, waste, unpopulated, or partly, if not entirely, covered by the Ganges. The terms of the Settlement of these villages are to be gathered from the Raja's petition (Exhibit C) dated the 29th August 1800. It does not contain in terms the special stipulation as to alluvion and diluvion mentioned in the Settlement of 1790, but from the opening words it appears to be a petition for a Settlement of the villages mentioned in the schedule, some 85 in all, referred to as *virani* or unpopulated villages appertaining to the *zemindari Parganna* Bhojpur, and what was settled was both alluviated and diluviated land. Then follow certain words "*Taufir tamam wo kamal*" about the interpretation of which some discussion arose both in the Trial Court and before us on appeal. The actual words used in the beginning of the document are: "*Darkhast dehat virani wo Gangbaramad wo Gangburd taufir tamam wo kamal mutallaqe zemindari Pargana Bhojpur sarkar Shahabad.*" The main difference between the parties is as to the proper construction of the words *taufir tamam wo kamal* and more particularly as to the meaning of the word *taufir*. *Virani* admittedly means the unpopulated or waste villages, *gangbaramal* means that which has been given up by the Ganges or all alluviated land, *Gangburd* means that which has been covered by the Ganges or diluviated. The words *taufir tamam wo kamal* mean literally "excess complete and entire." The word *taufir* according to the Dictionaries means excess or balance, something left over, and it also has various derived meanings but I have no doubt that the proper interpretation of the whole passage is that accepted by the learned

Judge, namely:—"The whole balance of the lands belonging to the *zemindari* of *Pargana* Bhojpur above water and under water." The word *taufir* is frequently used in the correspondence which took place at about the date of the Settlement in relation to the villages which had not been included in the previous Settlement, that is to say, those left over and not taken into account in the previous Settlement are referred to as the *taufir* villages, and there seems to me to be little doubt that the words used were meant to indicate that the Settlement includes the whole and entire balance of the villages not previously settled and appertaining to the *zemindari* of *Pargana* Bhojpur whether above or under water. The interpretation contended for by the appellant is: "all additions and accretions, whether above water or under water" and in this, he would include lands outside the boundaries of the villages concerned which may in future emerge from the Ganges and become attached to the settled land even if they had been separately settled with another proprietor and assessed to revenue. The learned Counsel for the appellant contended when pressed, that under his interpretation even, if the Ganges should go on receding to the northward as far as the foot hills of the Himalayas all the country in between would become accretions to his *zemindari* free from revenue for all the time provided the alluvion was gradual. Such a phenomenon is hardly likely to occur but it is by no means improbable that the Ganges in this locality may continue to recede gradually to the northward for several miles enveloping in its course other estates similar to Turk Ballia whose revenue was assessed at the time of the Permanent Settlement and leaving them dry upon the southern bank. This interpretation involves such startling results that one must hesitate to accept it without a clear indication that it was intended. In my opinion, the words cannot bear such an interpretation. Even if the word *taufir* is interpreted as excess, it seems clear from the document as a whole that what was settled at a fixed *jama* of Rs. 1,510 in the year 1800 was the villages named in the schedule whether they were recently alluviated or still under water or partly under water and that the *jama* was to include the diluviated area which might in future be given up by the river without any additional revenue becoming payable and it did not include, even potentially, lands at that time on the opposite side of the river which had been settled with other proprietors and assessed separately for revenue.

It was contended, however, by the learned Counsel for the appellant that the Government itself had accepted the interpretation now placed by him upon this Settlement and in support of this he referred to certain proceedings which took place in 1818, 1834 and 1883. He contends that the action of the Government operates as an estoppel and that they should not be heard to dispute now the representations they made on previous occasions. He says that, relying on those representations, he abstained from paying the revenue and should not be allowed to suffer thereby. It will be remembered that the Settlement of 1800 was in respect of villages lying on or near the banks of the Ganges and immediately to the north of those settled in 1790. The later Settlement included, *inter alia*, the villages Parsanpa and Jagdispur which were either totally or partially submerged at that time and formed part of the Jouhi Mahal. These villages are opposite to Turk Ballia and it is as an accretion to the villages of Parsanpa and Jagdispur that the lands in suit are now claimed. In 1918 a petition was presented by one Bhuabal Rai asking for Settlement of certain lands which had newly formed on the south side of the river in this neighbourhood. In this petition he mentions that the lands in certain villages in *Parganna* Ballia had been washed away and that on the south side land had newly accreted and that the Raja had settled it with tenants. The petitioner, Bhuabal Rai, submitted that these new formations were part of the Government estate and asked that they should be settled with himself. The statements made in his petition as to the area of land which had been washed away or which had re-formed cannot necessarily be taken as accurate. The Raja of Dumraon, at that time Raja Jai Prakash Singh, appears to have objected to the petitioner's claim, and the order endorsed

upon the petition is to the effect that the Settlement made in 1800 with the Raja of Dumraon was of unpopulated villages alluviated and diluviated land and the entire quantity of excess land appertaining to the *zemindari* in *Parganna*s Bihia and Bhojpur and such being the case the petition of the applicant relating to settlement of lands newly accreted was not fit to be entertained. I can find nothing in the fact that Bhuabal's petition was rejected on the ground that the lands claimed had been previously settled in 1800 which supports the interpretation of that Settlement now urged on behalf of the appellant. On the contrary, the order passed seems to assume that the land of which Bhuabal sought Settlement was land appertaining to the *zemindari* of Bhojpur and which as such had newly accreted. The order passed on that occasion is important as it forms the basis of the future action of the Government when questions arose as to exacting additional revenue in respect of new accretions which subsequently formed in Parsampa and Jagdispur. It cannot be assumed that the Government in 1818 accepted the facts set out by Bhuabal Rai in his petition. It is a somewhat loosely worded document and he apparently was not aware of the terms of the Settlement made with the Raja of Dumraon in 1800 and it may well be that he over-estimtated the extent of the accretions which he refers to as Government estate. The villages mentioned in that petition as having been washed away from the Ballia side do not appear to have been permanently settled until about the year 1841. According to Mr. Roberts' Settlement Report of the Ballia District they were diluviated about the beginning of the last century and reformed about 40 years later when they were settled with *zemindars* on that side. However that may be, the land of which Bhuabal claimed settlement appears to have been treated by the Government as included in *Parganna* Bhojpur and, therefore, within the Raja's *zemindari*, and not capable of a new Settlement. The decision of the Government on that occassion, to any mind, affords no support to the broad proposition put forward by the appellant. From that time onward questions arose as to further assessment on re-formed lands: In 1821, the local Revenue Authorities claimed to assess certain re-formed land under Regulation II of 1819 and the Raja's petition dated the 28th February 1821 (Exhibit 89) shows how he dealt with that claim and appears to throw some light upon the meaning which he himself attributed to the Settlement of 1800. In that petition he refers to the action taken by Mr. Deane before the Settlement, and points out how he made a total of all the *mahals* belonging for a long time to his ancestors, and deducted therefrom the *mahals* settled in 1197 F. S., and pressed his ancestor to apply for such of the *virani taufir Gangbaramad* lands, etc., as had not been settled and adds: "My ancestor was obliged by the orders of the Authorities to file applications in the office of the Collector of District Shahabad in respect of *virani taujir* alluviated and diluviated lands with the words "the whole and entire of *Pargana* Bihia and Bhojpur" and the Collector after making further enquiries made settlement thereof with my ancestor. Thus not a piece of unsettled land is in my possession." The attitude taken by Raja Jai Prakash Singh on that occasion was, that the lands which it was sought to assess under Regulation II of 1819 were comprised in *Pargana* Bhojpur which had already been settled with him and he adds, "I did not and do not object to pay the revenue believing from the contents of the petitions of 1208 F. that all the villages appertaining to my *zemindari* including the alluviated and diluviated, *taufir* and *virani* lands were settled with the words 'the whole and entire' attached thereto." In the result, no fresh assessment was made.

It may be mentioned here that the schedule of villages in the 1800 Settlement, unlike that of 1790, gave no areas, and this is hardly surprising when it is remembered that the villages then settled were waste or unpopulated, and to a large extent under water and that no Surveys were made at the time. It may also be mentioned that from 1801 up to 1810 the Raja had been complaining that he was paying revenue for the villages settled in 1800 which he could not find and he was petitioning the authorities either to give him possession

of those lands or grant a remission of revenue. Those which he could not trace included Jagdispur and Parsanpa. He also complained that his neighbours were encroaching upon some of them. The matter was referred to the Board of Revenue and, in the result, these objections to the payment of revenue were rejected (see Exhibits 81 to 87.)

From that time on, the question of imposing additional revenue on newly formed lands in this neighbourhood under Regulation II of 1819 kept cropping up. The Subordinate Revenue Officials of the District appear to have been zealous in their efforts to augment the revenue both in this and other parts of the Dumraon *zemindari*. In 1822, two *Kanungos* were deputed to enquire as to the land newly accreted in 33 villages including Jagdispur and Parsanpa in excess of the recorded area. Their report was made on the 21st January 1823 (Exhibit J) and a very rough map was prepared showing the relative positions of the villages. They reported that the newly accreted lands appertained to seven villages only, including Jagdispur and Parsanpa They appear to have assumed that the Settlement of 1800 covered merely, the land in existence in 1800 and not submerged. They also reported that 250 *bighas* had newly accreted to Jagdispur and 500 *bighas* to Parsanpa and they gave the recorded areas of the villages as 245 and 1027 *bighas* respectively. The accretions are in each case in round figures and are probably rough guess work based on some sort of enquiries made from *Patwaris* and others. How the recorded areas were arrived at is not known; they were not recorded in the Settlement; they may have been what are known as the *kitabi* areas which were frequently unreliable. They treated the excess as Government land. This document is relied on by the appellant as showing that even in 1823 there were accretions of Jagdispur of an area larger than the recorded area of the whole village and, therefore, this must have included something outside the village itself. But little reliance can be placed upon this report either as to the extent of the accretions or as to the original area of the settled villages, and it is not surprising that eventually the Government decided not to assess the accreted areas under Regulation II of 1819. The matter was not finally settled until 1834 when the Government came to the decision mentioned. But there is nothing to show that the Government Officers or anybody else considered that the accretions at that time were lands outside the area of the villages settled in 1800. The *rubakar* of the Collector relating to this assessment case which had been dragging on since 1822 is dated the 29th August 1834 (Ehibit L). It dismissed the Government's claim for assessments. It referred to the previous proceedings and the petition of Bhuabal Rai and treated the accretions as being included under the words in the 1800 Settlement which it describes as the "Settlement of unpopulated alluviated and diluviated villages with the entire quantity of excess land lying in *taluka zemidari* of *Parganna* Bhojpur." The Collector, being of opinion that the accretions were included under the words quoted, dismissed the claim for fresh assessment. This order was confirmed by the Commissioner on the 15th September 1834, Exhibit M, and there the matter rested for the time. It is difficult to conceive how this decision can be interpreted as an admission by Government or by the Revenue Officers that accretions of land outside the settled villages of *Parganna* Bhojpur were covered by the Settlement of 1800. The very basis of the decision seems to be that the lands were included in *Parganna* Bhojpur and that the whole excess lying therein was included in the Settlement at the agreed *jama*.

The next dispute began in 1866 but was not finally set at rest until 1883. Before 1866 certain events had happened which should be borne in mind. No Survey had been made in Bengal before the Permanent Settlement and the areas of settled lands had not always been accurately recorded in the various engagements entered into by the *zemindars*. In some cases the areas were recorded at all. Those that were recorded were largely rough estimates or *kitabi* areas taken from document frequently unreliable as to the state of affairs existing when the Settlements were made especially in the case of riparian estates subject to a change of cultivable area. Mr. Robbert's Survey Report of 1882-1885 of the Ballia District (page 49) shews how unreliable

the early village records of areas ound in the *jamabandis* at the time of Settlement were. The first Scientific Survey throughout Bengal began in 1839 and was completed a few years later. It recorded the areas in the possession of the various *zemindars* at that time. In 1847, the Bengal Alluvion and Dilluvion Act (IX of 1847) was passed. It authorised new survey of land on the banks of rivers and on the shores of the sea to be made. It directed the Revenue Authorities, whenever a new Survey map showed that lands had been washed away, to grant a deduction from the revenue, and, when additional lands were found to have accreted by alluvion to revenue paying estates, to assess such accretions to revenue. In 1863-1864 the next Revenne Survey, known as the first Diara Survey, took place on both banks of the Ganges. It showed accretions to Jagdispur and Parsanpa and other villages in the Maharaja's estates since the previous Survey of 1839. In 1866 the Deputy Collector of Shahabad issued a *rubakar* (Exhibit UI) suggesting reasons why action should be taken under Act IX of 1847 for assessing additional revenue on the ground of excess area in the Jauhi Mahal including Jagdispur and Parsanpa and other villages. The report shows that those villages had been almost entirely submerged in 1839 when the first Revenue Survey was made, whereas the Diara Survey of 1863 showed large formations partly fit for cultivation. The Maharaja of Dumraon filed an objection to the course proposed, but in spite of this the Commissioner, Mr. Jenkins, was of opinion, that an assessment of the accreted lands should be made under the Act of 1847. The members of the Board of Revenue to whom the matter was referred took the same view, and on the 19th February 1869 issued orders to the Collector to assess the newly formed lands to revenue. The Maharaja appealed, contending that the terms of the Settlement of 1790 were extended to that of 1800, but the Board took a different view, and in 1869 the lands were assessed at the revenue of Rs. 5,687 for a period of ten years. The Maharaja took Settlement under protest. The proceedings before the Board of Revenue on that occasion are not in evidence, but what took place is set out in some detail in a long report made by the Commissioner of the Patna Division to the Board on the 8th September 1882 (Exhibit AB), after the term of the Settlement had expired and when the re-Settlement of the alluvial lands in the villages of the Jauhi Mahal was under consideration. This document contains a concise account of the disputes which had been going on between the Maharaja and the Government with regard to the assessment of the alluvial accretions from 1818 up to 1882. It appears that, when the Settlement of 1869, which had been accepted under protest, expired, fresh proceedings were instituted with a view to a re-settlement. The Maharaja presented a lengthy petition urging the same objections as he had previously raised and also adopting a further contention in support of his claim for exemption. On the previous occasion his claim was based upon the agreement of 1790 which he alleged extended to the Settlement of 1800. On the later occasion he further claimed that, under the Settlement of 1800, independently of that of 1790, he was entitled to exemption from assessment on newly accreted lands. He further produced certain documents relating to the previous decisions of the Board in 1818, 1822, 1824 and 1834, which had apparently not been before the Board when the Decennial Assessment was made in 1869. The Commissioner considered that the contention put forward by the Maharaja with regard to the interpretation of the Settlement of 1800 was a strong one in view of the previous action of the Board between 1818 and 1834, as the lands covered by the Settlement of 1800 had been invariably treated as being exempt from assessment. In the event, he recommended that the proceedings for assessment should be withdrawn and the lands declared exempt from further assessment. The matter was referred by the Board of Revenue to the Government of Bengal and on the 22nd June 1883 the Lieutenant-Governor adopted the recommendation of the Commissioner and sanctioned the exemption of the alluvial lands in question from assessment, directing that the assessment proceedings in connection therewith should be abandoned (Exhibit AC). Subsequently, in 1884, the Maharaja was granted a refund of the

revenue which he had paid for those lands under the Decennial Settlement of 1869.

The appellant lays great stress upon the fact that the Survey maps of 1863-1864 show, that at that time some portions of villages which had previously been in the Ballia District had appeared on the south bank and that by 1882 considerably larger portions had appeared and argues that it must, therefore, be taken that the lands which were exempted from additional assessment at that time comprised parts of previously settled estates on which a revenue had already been assessed at the time of the Permanent Settlement. He contends that the Government with the recent Survey maps before it and with full knowledge of the existing circumstances, had knowingly allowed him an exemption from revenue under the terms of his engagement of 1800 in respect of these lands as accretions to his estate. If it could be clearly shown that the Government had knowingly allowed an exemption from revenue in respect of such lands on the ground that the Settlement of 1800 included accretions from lands outside the settled area, there would be much to be said for the appellant's argument that the Government had acquiesced in his present contention and treated the agreement as including such lands. But on considering all the documents which have been referred to, I can find nothing which gives any support to this argument. The lands which were in dispute between 1867 and 1869 and which again came up for re-consideration in 1882 were 3379 *bighas*. These were found by the Diara Survey of 1863 to have become accretions to the Jauhi Mahal which included the 8 villages mentioned in the second paragraph of the Commissioner's letter of the 8th September 1882 (Exhibit AB). Throughout the documents these accretions are referred to either as alluvial lands formed in these villages in *Parganna* Bhojpur or in the Maharaja's *zemindari*. There is no suggestion from first to last that the lands then under consideration ever formed part of some other revenue paying estate or that they did not appertain to the villages of the Jauhi Mahal settled in 1800. I have already referred to some of the earlier documents before 1882. That of 1882 refers to them as "alluvial lands formed in these villages." The letter of the Government of India of the 1st October 1824 referred to in the same document, speaks of the accretions in another *mahal* as "the alluvial lands comprised in his *zemindari*" whilst in the letter from the Government of Bengal to the Board of Revenue, dated the 22nd June 1883 (Exhibit AC), there is nothing to show that the lands then under consideration were outside the area of the villages of the Jauhi Mahal. Indeed, the exemption sanctioned by the Lieutenant-Governor on that occasion appears to have been based entirely upon a consideration of the attitude taken by the Government of India on the 1st October 1824 which had not been before the Board when it imposed the Decennial Settlement in 1869. But even assuming that in 1869 some portions of previously settled estates which had been originally on the north side re-appeared on the south, there is nothing from which it can be shown either that they were included in the 3379 *bighas* under discussion in 1869 and again in 1882, or that they were at that time anything but waste and sandy lands on the foreshore of the river. Even if inadvertently some such lands had been included in those which were exempted from revenue in 1882, this could not, in my opinion, form the basis of an estoppel which would preclude the Government from contending, when the whole facts are known and appreciated, that lands of this description were not included under the terms of the Settlement of 1800. I agree with the learned District Judge in finding that there is nothing in the agreements to support the claim of the Maharaja that if the land in suit is proved to be a re-formation *in situ* of the Turk Ballia estate, he is nevertheless entitled by his agreement to hold it as a part of his own estate free from revenue merely because it may adhere to land in the Jauhi Mahal. I further find that there is nothing disclosed in the evidence which acts as an estoppel to preclude the respondent from treating such lands as outside the terms of the Settlement.

The learned District Judge found, that the appellant acquired no interest in the land in Turk Ballia under the provisions of section 4 of Regulation XI of 1825, on the

ground that it was a re-formation *in situ* of the property of other proprietors who had not abandoned their interest therein, and it was not an accretion of that which was formerly the public domain. Relying upon the decision of the Judicial Committee in *Lopez* v. *Muddun Mohun Thakoor* (1), he held that the section relied upon did not apply to land which had formed, by accretion, rapid or gradual, on a site which can be identified as the site of another man's property. He further found that the custom relied upon by the appellant whereby the deep stream of the Ganges is regarded as the boundary between the estates of riparian owners on opposite sides of the river was not proved. He also found that there had never been an abandonment of Turk Ballia by the original proprietors and that the claim by them for the remission of revenue afforded no evidence of abandonment, the Government having intimated that it was not necessary to continue to pay revenue in order to retain their rights. He also found that no portion of the land became cultivable until 1909. From this it would follow that no title was acquired by the appellant by adverse possession up to the date when the suit was brought.

I should be prepared to accept the findings of fact arrived at by the learned District Judge upon the points just mentioned, but having already determined that the Settlement of 1800 does not include the lands now in suit and assuming that the lands never reverted to the Crown by abandonment, it becomes unnecessary, in my opinion, to consider whether the appellant has acquired any proprietary interest in the lands or not. Assuming that he acquired an interest under the first clause of section 4 of the Regulation XI of 1825, it seems clear from the proviso to that clause, as well as on general principles, that he would not be exempt from payment to Government of any assessment for the public revenue to which the land might be liable under any Regulation in force. The liability to payment of revenue in respect of Turk Ballia would be in force under Regulation I of 1793, and unless the appellant's Settlement of 1800 provided for exemption in such a case he could not escape liability for revenue already imposed upon the land acquired by him outside the settled area. Similarly, if he acquired a title by adverse possession he would, I think, clearly take subject to existing revenue. Assuming, further, that by the custom pleaded he acquired a proprietary interest as against the previous owner, the custom was one dealing with the rights of neighbouring proprietors *inter se*, and there is nothing to suggest in the custom pleaded, that the proprietor who acquired an interest in accordance with such custom, would take the lands free from the obligation to pay revenue already assessed. Indeed, such a custom would, in my opinion, be bad on the ground of its unreasonableness. If, however, the land was abandoned by the former proprietors so as to fall again into the public domain, it would be necessary to consider whether in such a case, it would be covered by the Settlement and if not whether the procedure adopted by Government was justifiable, as no fresh assessment was made under Regulation II of 1819 or Act IX of 1847. I apprehend that if the land was abandoned so that the proprietary interest re-vested in the Crown, the assessment to revenue would cease to have any operation, and, if the land was afterwards acquired by the appellant as an accretion to his estate, it would be necessary to assess it to revenue under the Act of 1847 before any revenue could be validly demanded, and that it could not be sold for non-payment of arrears of that which no longer existed. There is, however, no direct evidence of abandonment by the settled proprietors and the only evidence of an implied surrender or abandonment relied on is their application for remission of revenue. The evidence shows that they were anxious to retain their rights and willing to pay a nominal revenue for that purpose. It was only on the representation of the Revenue Board that such a course was not necessary that the payment of revenue ceased in 1884. I agree with the learned District Judge that there was no abandonment.

It remains to consider whether the property claimed has been identified as the

(1) 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

site of Mahal Turk Ballia and whether the sale can be successfully challenged as invalid.

The plaintiff claims as Turk Ballia the land which has been demarcated on the spot as the site of Turk Ballia according to the Diara Survey of 1863, or alternatively the area demarcated according to the Revenue Survey of 1840. The recorded area of Mahal Turk Ballia has changed from time to time. The earliest record before us is a copy of the Decennial *daul* register of 1197 F. S. (Exhibit 1), which shows the area to be 248 *bighas*. This was, no doubt, the *kitabi* area but what the standard of measurement was we do not now. No Survey was made at that time. The Revenue Survey of 1839-1840 shows the area to be 101 acres equal to 155 *bighas*. The Diara Survey of 1863, which was also a Revenue Survey, records the area as 177 acres equal to 282 *bighas*. There is some evidence although very slight to show, that in 1835 the area was found by enquiry to be 275 *bighas*. This appears from the report of the Collector of Shahabad dated the 9th February 1914, paragraph 5 (Exhibit AM).

The large difference between the areas recorded in the 1840 and 1863 Surveys would appear to be accounted for by the fact, that the neighbouring proprietors of Mauza Bijaipur and Mauza Shahpur Digwar had at the former date encroached upon that part of the lands of Turk Ballia which lay to the south of the river Sarju. The Survey map of that date shows this river as the south boundary of the village whereas the Survey Map of 1863 shows the boundary to be well south of the river. Before the latter date the proprietors of Turk Ballia appear to have sued successfully to recover back their property and when the Survey of 1863 took place they were recorded as proprietors of the larger area which was included in the Survey map of that date. These facts may be gathered from a *rubakari* of the *Tehsildar* of Ballia relating to the correction of village paper dated the 6th December 1867 (Exhibit 5) and a report of a *Kanungo*, dated the 31st December 1875 (Exhibit 8, part 3). From the time on, the Survey Records of 1863 have been accepted without question and the *mahal* in respect of which the revenue of Rs. 251 is payable has remained that which was recorded as having an area of 282 *bighas* as demarcated in the Survey map of that year. The appellant contended that unless the land now claimed can be identified as the exact area settled in 1790, the suit must fail. I think this is stating his case too high. The question appears to me to be what are the geographical limits of Mahal Turk Ballia and has the estate been demarcated and identified as the land now claimed. Whether the estate now known as Turk Ballia and in respect of which a revenue of Rs. 251 is assessed may or may not have been found at different times to have increased or diminished in area for any reason, it remains the same estate and as such is liable to the same revenue unless and until good ground for a reduction or an increase is shown. Since 1867 when a Record of Rights was prepared in the presence of the proprietors of Turk Ballia, the proprietors of adjoining estate and the Government, the record then prepared has been accepted by all parties concerned as accurate and it is not open to the appellant, any more than it would have been to the original proprietors, to question the accuracy of that record. No argument was adduced before us to impugn the accuracy of Mr. Alderson and the other Survey Officers who demarcated on the spot the boundaries of Turk Ballia as shewn in the Diara Survey Map of 1862. No doubt, the topographical features of the site have altered but the site remains geographically the same. The learned District Judge found that the site had been accurately identified and demarcated and no reason has been shown for rejecting his finding, which I accept.

The last question for determination is whether the sale was a valid sale under the provisions of the Bengal Land Revenue Sales Act, 1859.

The revenue of Turk Ballia was payable by four *kists* as follows:—

November 15th	...	Rs. 62-12-0
January 15th	...	Rs. 94- 2-0
May 1st	...	Rs. 47-10-0
June 15th	...	Rs. 47-10-0

When the estate was transferred from Ballia to Shahabad in May 1910 the May *kist* of that year had already fallen due. No sale could take place, however, for this default until after the unpaid instalments became an arrear of revenue within the meaning of the Bengal Land Revenue Sales Act of 1859. By section 2 of that Act if a *kist* or instalment payable in any month remains unpaid on the 1st of the following month it shall be considered an arrear of revenue. Section 3 provides that the Board of Revenue shall determine upon what dates all arrears of revenue shall be paid up in default of which payment the estates in arrear shall be sold at public auction. The dates of payment determined under that section and applicable to the present case were the 7th of June, 28th of September, 12th of January and the 25th of March. Consequently, if the May *kist*, which became an arrear on the 1st June, was not paid by the 7th of June the estate could be sold. Similarly, if the June *kist* which became an arrear on the 1st July was not paid by the 28th of September, the estate could be sold at any time after that date for non-payment of that and any ealrlier *kist* remaining unpaid. In fact, no steps were taken to sell the estate until after the 28th of March 1911 by which time the May, June and November *kists* of 1910 and the January *kist* of 1911 had become arrears and the date of payment of the arrear for January had expired. It was in respect of those four *kists* that the sale was notified on the 4th May 1911 and eventually took place on the 7th June 1911. The May *kist* of 1911 was not included as it had not become an arrear at the date of the Notification.

It was contended by the learned Counsel for the appellant that the transfer from Ballia to Shahabad did not take effect until the commencement of the following financial year. The financial year begins on the 1st April and it was argued that a transfer in May 1910 would not take effect until April 1911. In support of this argument Chapter II, section 6, rule 3, of the Bengal Revenue Board Touzi Manual was relied on. This rule provides that: "Transfers are ordinarily sanctioned to take effect from the commencement of the following financial year only," But it is also provided therein that "this rule is not absolute in the case of transfers sanctioned during the first *kist* of the financial year and that it is sometimes convenient to give these effect from the beginning of the current year." It is argued that, in the absence of any special sanction, the transfer must be deemed to have become effective only from April the 1st, 1911. If there was no effective transfer before April 1911 it would seem that the Bengal Revenue Authorities would have no power to sell the estate for arrears of revenue in respect of a period during which the estate was not effectively entered on the Tazui Roll of a Collectorate within their jurisdiction. The question for determination is from what date the transfer was sanctioned to take effect. The two Notifications of transfer in the *Gazettee* of the Province of Bengal and the United Provinces in May 1910 state in the one case that the estate "has ceased to form part of the Ballia District in the United Provinces of Agra and Oudh and now forms part of the Shahabad District in Bengal," and in the other case that the estate "is transferred from the District of Ballia in the United Provinces of Agra and Oudh to the District of Shahabad in Bengal in respect of its Civil, Criminal and Revenue Jurisdiction." These Notifications must be taken to represent the decisions already come to and sanctioned by the respective Revenue Authorities. They are inconsistent with a transfer to take effect *in futuro*, and, on turning to the *Tauzi* Ledger of *Maha.* Turk Balha in Shahabad for 1910-11 (Exhibit 33) it is noted in two places therein that the estate was received with effect from the 1st April 1910 and there can be no doubt, in my opinion, that the transfer was sanctioned to take effect from that date. There is a note in the remarks column of the *khataoni* (*khewat*) or rent in respect of Mahal Turk Balha for 1317 *Fasli*, a document forming part of the Ballia Collectorate records (Exhibit 25C), that the *mahal* has been transferred to Shahabad under certain Government orders and that it will be struck off from the *tauzi* in 1318. It is argued from this that it still remained on the Revenue Roll of Ballia until the end of 1317 *Fasli* corresponding to the middle of September 1910 A. D., and that, therefore, no instalment could become an arrear

in Shahabad before that date. Assuming that the name of the estate was not formally expunged from the Revenue Roll of the Collector of Ballia until the end of the *Fasli* year 1317, the transfer had already become complete and the estate was duly entered under a new *tauzi* number in the Shahabad Collectorate. The date of the formal rectification of the Ballia Revenue Roll could not, in my opinion, have any effect upon the valdity of the transfer. I agree with the learned District Judge in holding that the Collector of Shahabad had power, in the circumstances disclosed, to sell the estate for arrears of revenue in respect of the *kists* named and that the sale cannot be impugned on the ground of want of jurisdiction.

It was also argued that as no notice re-imposing revenue had been served after the payments had been suspended in Ballia, no revenue for the period in question became payable. The suspension of revenue was a matter within the discretion of the Board of Revenue in the United Provinces as long as the estate remained under their control. It was temporary and only intended to operate whilst the estate was diluviated. There was never any permanent remission. When the lands re-formed on the south side and were transferred to Shahabad it was for the Bengal Authorities to determine whether the revenue should be exacted. There was no longer any reason in 1910 why it should not be paid. There was no obligation upon the Collector to make a formal demand or to give any notice that it should be paid. The Act of 1859 requires no notice to be served on proprietors before sale where the arrears are for the current or next preceding year, and by section 8 of Act VII of 1868 the certificate of title granted to the purchaser is conclusive evidence of the service of all notices required by the two Acts. For some reason the proprietors, although they had notice of the transfer and must have known that the land had re-formed, took no steps to discharge their liability. They may have thought that the property was not worth the revenue, or that they may not have thought it worth while to become involved in litigation with the Maharaja of Dumraon who was in possession; but, whatever their reason may have been, they took no steps to prevent a sale and the fact that they received no formal notice demanding the revenue is no ground for setting aside the sale under Act XI of 1859.

In my opinion, this appeal fails on all the points raised and should be dismissed with costs.

Foster, J.—I agree.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 320 OF 1922.

June 25, 1923.

Present:—Mr. Justice Ryves.

TEWARI GAJRAJ SINGH—DEFENDANT—APPELLANT

versus

SRI THAKURJI MAHARAJ RADHA RAWANJI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Appellate Court, whether can allow withdrawal of suit—Decision of First Court set aside on appeal—Res judicata.

It is open to an Appellate Court to pass an order under O. XXIII, r. 1 of the Civil Procedure Code permitting a plaintiff whose suit has been dismissed to withdraw his suit with leave to institute a fresh suit. [p. 895, col. 1.]

Afzal Begam v. *Akbari Khanam*, 28 Ind. Cas. 857; 37 A 326; 13 A. L. J. 444, followed.

Rama Singh v. *Janak Singh*, 56 Ind. Cas. 697; 1 P. L. T. 300; (1920) Pat. 232; 2 U. P. L. R. (Pat.) 121, *Kali Prasanna Sil* v. *Panchanan Nandi*, 33 Ind. Cas. 670; 44 C. 367; 20 C. W. N. 1000; 23 C. L. J. 489, *Raj Kumar Mahton* v. *Ram Khelawan Singh*, 64 Ind. Cas. 337; 1 Pat. 90; (1922) Pat. 17; 3 P. L. T. 80; (1922) A. I. R. (Pat). 41 and *Hridyunath Roy* v. *Ram Chandra Barua Sarma*, 58 Ind. Cas. 806; 48 C. 138; 24 C. W. N. 723, 31 C. L. J. 482 (F. B.), referred to.

The decision of a Trial Court which is set aside in appeal is wholly inoperative and cannot operate as *res judicata*. [p. 895, col. 1.]

Abdul Rahman v. *Lal Behari*, A. W. N. (1885) 151 and *Chhajju* v. *Khyali Ram*, 14 Ind. Cas. 175; 9 A. L. J. 378, relied on.

Second appeal against a decree of the District Judge, Mainpuri, dated the 3rd of February 1922.

Mr. *M. L. Sandal*, for the Appellant.

Mr. *J. M. Banerji*, for the Respondent.

GAYRAJ SINGH v. SRI THAKURJI MAHARAJ RADHA RAWANJI.

JUDGMENT.—This appeal raises a somewhat interesting point of law. In 1919 Buddhu brought a suit in the Court of the Munsif of Phaphund, in the Mainpuri District, against the present appellant in which he stated that the property in suit belonged to an idol, Sri Thakurji Maharaj Radha Ramanji, and that he was manager on behalf of the said Thakurji and he sued for possession. Various defences were raised to that suit and it was dismissed by the Munsif in a very short judgment. He held that as the property belonged to the idol the plaintiff could not maintain the suit. Then, on the 3rd issue, namely, whether a *shedari* in dispute belongs to the temple or to the defendant he found as follows:—"The allegation that the *shedari* in dispute belongs to the temple is unsubstantiated. The plaintiff could produce one witness and himself and he refrained from giving any evidence at all. The issue is decided in the negative. And the order was that the suit be dismissed with costs. The plaintiff appealed to the District Judge of Mainpuri and along with the appeal presented an application praying that, for reason of the formal defect in the pleadings, the plaintiff be allowed to withdraw the suit and bring a fresh suit. The order of the District Judge on the appeal ran as follows: "Ordered that the appeal be allowed and the decree of the Court below be set aside and plaintiff be permitted to withdraw the suit, with permission to file a fresh suit." Thereafter the present suit was filed. Sri Thakurji Maharaj Radha Ramanji was described as the plaintiff suing through Buddhu Singh, manager. The suit was against the same defendant and for the very same reliefs as had been sought in the previous suit. Both Courts have decreed the suit. In second appeal it is urged that the District Judge of Mainpuri had no jurisidiction at all in appeal to pass order under O. XXIII, r. 1 of the Code of Civil Procedure or, alternatively, that he had no jurisdiction under the circumstances to pass the orders which he did, and that, therefore, his order can be treated as a nullity and disregarded and the original decision of the Munsif in the former case operates as *res judicata* in this case. That an Appellate Court has power to pass orders under O. XXIII, r. 1, has been decided by a Bench of this Court which is binding on me in *Afzal Begam* v. *Akbari Khanam* (1). Two cases have been cited by the learned Counsel for the appellant to the effect that an order of withdrawal unless it complies strictly with the provision of O. XXIII, r. 1 is void and can be treated as a nullity. They are *Rama Singh* v. *Janak Singh* (2) and *Kali Prasanna Sil* v. *Panchanan Nandi* (3). These two cases are exactly similar but they need not be further considered because the former case, which was a Patna case, was expressly overruled in *Raj Kumar Mahton* v. *Ram Khelawan Singh* (4) and the latter in *Hridyanath Roy* v. *Ram Chandra Barua Sarma* (5). It seems to me that in this case the Judge had jurisdiction to pass the order which he did which was one allowing the appeal. The order allowing the appeal rendered the order of the Munsif dismissing the suit as wholly inoperative and, therefore, that decision cannot be considered for any purpose. It is dead and gone. The plaintiff had been given leave to bring a fresh suit. This is not perhaps quite accurate because the suit is the same. The only difference is that the mistake made in the former suit, if it was a mistake, was that Buddhu called himself the plaintiff and sued on behalf of the idol claiming though not for himself but for the idol, was corrected and the suit was brought strictly in conformity with the law as laid down by this Court, namely, that a suit shall be brought in the name of the idol through its manager. In my opinion the order of the District Judge having set aside the decision of the Munsif, that cannot operate as *res judicata*. I think the cases of *Abdul Rahman* v. *Lal Behari* (6) and *Chhajju* v. *Khyali Ram* (7) are in point. I, therefore, dismiss this

(1) 28 Ind. Cas. 857; 37 A. 326; 13 A.L. J. 444.
(2) 56 Ind. Cas. 697; 1 P. L. T. 300; (1920) Pat. 232; 2 U. P. L. R. (Pat.) 121.
(3) 33 Ind. Cas. 670; 44 C. 367; 20 C. W. N. 1000; 23 C. L. J. 489.
(4) 64 Ind. Cas. 337; 1 Pat. 90; (1922) Pat. 17; 3 P. L. T. 80; (1922) A. I. R. (Pat.) 44.
(5) 58 Ind. Cas. 806; 48 C. 138; 24 C. W. N. 723; 31 C. L J. 482 (F. B.).
(6) A. W. N. (1885) 151.
(7) 14 Ind. Cas. 175; 9 A. L. J. 378.

appeal with costs including in this Court fees on the higher scale.

M. A. A. & W. C. A. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 66 OF 1923. CIVIL REVISION PETITIONS NOS. 289 AND 359 OF 1923.

April 24, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

KONTHALATTAMMAL—APPELLANT IN A. A. O. NO. 66 OF 1923 AND PETITIONER IN C. R. P. NO. 359 OF 1923—PETITIONER IN BOTH

THANGASWAMI PILLAI AND OTHERS—PETITIONERS IN C. R. P. NO. 289 OF 1923

versus

SOUNDARATHACHI—RESPONDENT IN ALL.

Hindu Law—Will — Guardian, testamentary, whether can be appointed—Guardians and Wards Act (VIII of 1890), ss. 47, 48—Order refusing to remove guardian—Appeal, whether lies.

Under the Hindu Law, a Hindu father can by Will appoint a guardian for the person and property of his minor child. [p. 899, col. 2.]

Case-law discussed.

An order refusing to remove a guardian is not appealable under section 47 of the Guardians and Wards Act and becomes final under section 48 of the Act.

Mohima Chunder Biswas v. *Tarini Sunker Ghose*, 19 C. 487; 9 Ind. Dec. (N. S.) 769, *Pakhwanti Dai* v. *Indra Narain Singh*, 23 C. 201; 12 Ind. Dec. (N. S.) 134, *In re Bai Harkha*, 20 B 667; 10 Ind. Dec. (N.S.) 1013 and *Imtiaz-un-nissa* v. *Anwar-ul-lah*, 20 A. 433; A. W. N. (1898) 97; 9 Ind. Dec. (N. S.) 637, followed.

Appeal against, and Civil Revision Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act to revise, an order, dated the 23rd February 1923, of the District Court, South Arcot, in Original Petition No. 13 of 1923.

Messrs. *A. Krishnaswamy Aiyar* and *K. Aravamuda Ayyangar*, for the Appellant.

Messrs. *E. L. Thornton* and *T. R. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.

Oldfield, J.—The first and more important of the two orders before us was passed by the District Judge of South Arcot on a petition for the removal of first respondent from her position as testamentary guardian of the person and property of a minor, Thirugnanavalli Ammal, for the appointment of the petitioner or any other fit person in her stead and for connected reliefs. Against that order there is an appeal by the petition and also a revision petition.

I deal first with the respondent's preliminary objection to the appeal, that this order, consisting in refusal to remove a guardian, is not appealable under section 47, Guardians and Wards Act (VIII of 1890) and is final under section 48. The order, as it stands, is certainly of that character, its conclusion being that the Court is not prepared to remove the guardian on any of the grounds stated in the petition and that the petition is dismissed; and the objection is supported by authority which I am prepared to follow. *Mohima Chunder Biswas* v. *Tarini Sunker Ghose* (1), *Pakhwanti Dai* v. *Indra Narain Singh* (2), *In re Bai Harkha* (3), and *Imtiaz-un-nissa* v. *Anwar-ul-lah* (4). But the objection has been met by the arguments (1) that the order is really one declaraing a testamentary guardian under section 7 (1) (*b*) and, as such, appealable under section 47 (*a*), and (2) that as the right of a Hindu to appoint a testamentary guardian is not recognised by the law and first respondent's appointment as a nullity, there was no necessity for the Court to remove or to refuse to remove her and its order must be regarded simply as one refusing to appoint petitioner, which is appealable under section 47 (*a*).

The first of these arguments can be dealt with shortly. It rests solely on the fact that the lower Court in his order has referred to first respondent as the testamentary guardian, has affirmed her fitness for the appointment and found against the conduct alleged as disqualifying her for it. But all that was relevant to the prayer for her removal and did not amount to the making of a declaration which was not made in terms, which neither

(1) 19 C. 487; 9 Ind. Dec. (N. S.) 769.
(2) 23 C. 201; 12 Ind. Dec. (N. S.) 134.
(3) 20 B. 667; 10 Ind. Dec. (N. S.) 1013.
(4) 20 A. 433; A. W. N. (1898) 97; 9 Ind. Dec. (N. S.) 637.

party had asked for, which the lower Court was not conscious that it was considering and in order to which the procedure enjoined in Civil Rules of Practice, Chapter XI was not employed.

The second argument calls for fuller discussion notwithstanding that, as I shall hold, there is ground in any event for interference with the order before us in revision, because a conclusion against the legality of first respondent's appointment as guardian will be relevant, not only to the question whether that order is appealable, but also to the merits in further enquiry to be held, since, if she has not been legally appointed, the question will not be of her right to retain the appointment, but only of her eligibility for it, in competition with the petitioner or any other candidate. It is not disputed that by a Will dated 6th July 1915 the father of the minors left her his separate property, worth (it is said) several lakhs of rupees, and purported to appoint first respondent guardian of her person and property. But it is argued that the terms of decision of a Full Bench of this Court in *Chidambara Pillai* v. *Rangasami Naicker* (5) require us to hold generally against the right of a Hindu to appoint a guardian of a person or property of his child by Will, not only when the property is, as it was in that case, ancestral, but also when it is, as in this case, separate. It is not disputed that this is the only authority, by which the argument can be supported, and we must, therefore, scrutinize its terms to see whether they entail the acceptance of any principle applicable to the present case. Such scrutiny is the more clearly required, when, as appears from the fuller report of the arguments in the *Chidambara Pillai* v. *Ranagasami Naicker* (5), the experienced petitioner, who attacked the appointment, conceded that it would have been valid, if the property in question had been separate. It is further to be observed that the decision does not deal with the guardianship of the person, except in the statement of the Coutts-Trotter, J., that the appointment of such a guardian may be a natural right vested in the father.

What is urged, however, is that each of the judgments refers generally to the absence of any recognition in Hindu Law of the father's right to appoint a posthumous guardian for his children and that section 6 of the Guardians and Wards Act authorises only such appointments as are valid by the law to which the minor is subject. If that were indeed the effect of the judgments, the arguments under consideration would no doubt be established. But, to take them in order, that of Ayling, J., refers to the necessity for careful consideration, if the existence of such a power is to be recognised on the sole grounds that its exercise is not forbidden and is expedient, and then decides against its existence on the ground, irrelevant in the case before us, that it would run counter to the conception of a Hindu joint family. Seshagiri Aiyar, J., no doubt, refers first to the absence of any foundation for the existence of the power in Hindu Law or as a Common Law right recognised by other systems of jurisprudence. But he then enters on a survey of the case-law, to which I return, observing for the present only that many of the authorities cited dealt with the joint family property, with which he was directly concerned, that he distinguished one case on the ground that the property in question was self-acquired and that he explained the recognition of a testamentary power of appointment in certain Statutes on the ground that they "referred to cases in which such power is permissible under the law, for example, cases of self-acquired property in Madras." It may, in the circumstances, be doubted whether these learned Judges intended to negative the existence of a testamentary power generally or otherwise than in connection with joint family property. Coutts-Trotter, J., alone, if I understand him correctly, adhered to the argument that absence of a statutory basis for the power or of any basis for it except natural right was conclusive against its existence generally and in connection with separate as well as family property. We are not, in my opinion, debarred by *Chidambara Pillai* v. *Rangasami*

(5) 45 Ind. Cas. 905; 41 M. 561; 34 M. L. J. 381; 23 M. L. T. 266; (1918) M. W. N. 265; 7 L. W. 451 (F. B.).

Naicker (5) from scrutinizing petitioner's argument on its merits.

In doing so, I make no attempt to follow the demonstration that the testamentary guardianship in other systems of law has had no original independently of Statute. That demonstration before the Full Bench did not, it may be observed, include any reference to the mention of testamentary guardianship in the Twelve Tables (Mackeldoy's Roman Law and Dropsie, section 621, note) or to the former practice of the Ecclesiastical Courts in England in respect of personal property (*vide* Simpson on Infants, 3rd Edition, page 203) and the complication of the matter in respect of real property by the existence of feudal rights, which 12, Charles II, Ch. XXIV was passed to determine; and it is, therefore, doubtful whether the argument, so far as the Roman and English systems were concerned, was exhaustive. We are, however, on firmer ground in confining attention to India. It may be said at once that it is useless to look for this or any other testamentary power in Hindu texts which recognise no power to make a Will or execute an instrument to take effect after the executant's death at all. It may in fact be suggested that the powers to appoint a testamentary guardian and to make a Will were, as regards any demonstrable or legitimate origin and until the Hindu Wills Act in 1870, on the same footing. The real justification for the one, as for the other, is that it has been exercised from the earliest times, after the reception of English Law without objection and with the countenance of the Legislature and the Courts. It is urged that this is inconclusive, when the Will making power can be explained in terms of legal conceptions, always current in India, whilst the appointment by Will of the guardian cannot; and we have been referred to the suggestion in the *Jotendromohun Tagore* v. *Ganendromohun Tagore* (6), of a connection between Wills and Gifts *inter vivos*. But this suggestion, like others, considered by Mr. Mayne at page 366, Hindu Law, 9th Edition, is at best conjectural; and, if conjecture as to the origin of the power in dispute is necessary, when the argument in its favour is based primarily on its exercise and recognition, it is easy in a country, where the distinction between legal and beneficial ownership has always been neglected, to explain the testamentary appointment of a guardian of property in terms of the execution of a trust, the similar appointment of a guardian of the person following by mistaken analogy or on the ground of mere convenience.

The reply to the contention that such appointments have been continuously recognised by the Legislature has been that such recognition is always subject, as it is under Act VIII of 1890, to their validity under the personal law of those concerned. But it is difficult to suppose that any such reservation was contemplated in sections 18 and 19, Madras Regulations V of 1804 in connection with permanently settled estates, the owners of which have in almost all instances been Hindus; and none is conceivable in connection with section 3, Hindu Widows' Marriage Act (XV of 1856). It is true that the Hindu Wills Act (XX of 1870) did not apply section 47, Indian Succession Act (XV of 1856) to Hindu Wills; but that section, evidently based on the Statute of Charles II, was framed with reference to the Wills which the Succession Act controlled; and the result of the failure to apply it to Hindu Wills was only to limit the privilege of testamentary appointments to adult testators and the authority of the commentators follows the evident intention of the Legislature. In a case of 1807 referred to in Strange's Hindu Law, II, page 72, the Pandit recognised, apparently as a matter of course, that the father's testamentary nomination of his brother as guardian, should prevail against the claim of the natural guardian the widow; and, if the Court's compliance with this view was, as Mr. Colebrooke suggests, in the exercise of his discretion; that was natural where the testamentary power itself was still in controversy. Later on, Trevelyan on Minors, 3rd Edition, page 62, and the successive editions of Mayne's Hindu Law and Usage are clear, *Chidambara Pillai* v. *Rangasami Naicker* (5) being

(6) I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

referred to in the last edition of the latter as relating only to guardianship of family property.

The conclusion in favour of the right of testamentary appointment is supported indirectly by the fact that except in *Budhilal* v. *Morarji* (7), where the point was taken but not decided, we have not been shown that; unless perhaps in two cases, any general objection to such an appointment was ever suggested before the decision of the Madras Full Bench, although in several cases, for instance *Venkayya Garu* v. *Venkata Narasimhulu*, (8), *Sami Row* v. *Elivatha Row Gayabavadu* (9) and *In the matter of Srish Chunder Singh* (10), such an objection, if sustainable, would have been conclusive. Of these two cases, *Alagappa Iyenger* v. *Mangathai Ammangar* (11), related to guardianship of the person, and *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (12) to guardianship of the property. There seems to me no reason, in view of the considerations already referred to, why the former decision should not be followed, although it appears to have been based entirely on *Albrecht* v. *Bathee Jellamma* (13), in which the validity of the appointment was, so far as appears, not disputed. The second authority calls for closer consideration, because Sadasiva Aiyar, J., in *Alagappa Iyengar* v. *Mangathai Ammangar* (11) understood it apparently as contemplating an appointment in respect of family property, whilst Coutts-Trotter, J., in *Chidambara Pillai* v. *Rangasami Naicker* (5) thought that it referred only to a possibility and contained no definite decision. The answer to Sadasiva Iyer, J., is, however, given in the judgment of Seshagiri Iyer, J., in the case last mentioned, that self-acquired as well as family property was in question; and his further comment is significant: "In respect to such property it can hardly be disputed that it is open to the testator to appoint a guardian to manage it." The recognition of that right in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (12) seems to me, with all respect for Coutts-Trotter, J., clear. No doubt, the learned Judges there, as they avoided finding on the genuineness of the Will relied on, were compelled to adjudicate, so far as the family property was concerned, with reference to representation and, so far as the separate property was concerned, with reference to estoppel; and they conceded that the Will in respect of the family property was in any event inoperative. But their treatement of both pleas depended on their conclusion that if the Will was genuine, it conferred a definite legal character and that the Courts dealing with the earlier litigations and the then respondent in connection with a foreclosure were justified in assuming that it did so. No doubt the learned Judges in referring to the Will as operative as regards the guardianship, said that it was not so as regards the family property. But it should be remembered that in the previous litigation relating to that property, the suit of 27th July 1848, the guardianship was in dispute only between the alleged testamentary and the natural guardian, for both of whom the separate character of the property was common ground. This decision given in 1867 has not, so far as is shown, been subjected to adverse comment, until now, and in my opinion, corroborates strongly the inference based on the materials already considered. I hold that a Hindu can appoint a guardian of the person and property of his child by Will, that the appointment of first respondent is not a nullity and that, therefore, the present appeal does not lie and must be dismissed. No order as to costs.

We are, however, asked by a separate petition to interfere with the lower Court's order in revision on the ground that it has failed to exercise its jurisdiction in respect of its omission first to consider certain allegations that the first respondent has alienated the minor's estate without jurisdiction. The fact is that in paragraph (17) (*a*) (*b*) (*c*) and (*e*) there are allegations of misappropriation by first respondent for the benefit of, or at the instance of

(7) 31 B. 413; 9 Bom. L. R. 553.
(8) 21 M. 401; 8 M. L. J. 112; 7 Ind. Dec. (N. S.) 640.
(9) 16 M. L. J. 357.
(10) 21 C. 206; 10 Ind. Dec. (N. S.) 770.
(11) 34 Ind. Cas. 766; 40 M. 672; 30 M. L. J. 504.
(12) 7 W. R. 74.
(13) 13 Ind. Cas. 453; 22 M. L. J. 247; 11 M. L. T. 531; (1912) M. W. N. 53.

second respondent, who under the Will is associated with her in the management of the minor's property, and that the lower Court dismissed them on the sole ground that under the Will first respondent is not to be required to account in respect of her management. Whether evidence to prove these allegations was offered is not clear; but it would have been useless to offer any, when a different ground of decision had commended itself. It is not, however, possible for us to accept the ground. For, apart from the question whether the intention of the testator was that gross negligence or dishonesty by first respondent should be condoned, the allegations in paragraph 17 (*e*) and (*f*) are not, as they are stated, matters of account; the contention that those in paragraph 17 (*a*) and (*b*) are so, because they relate to the disposal of the collections of the estate, cannot be accepted, when the suggestion is that the investment of those collections as *corpus* has been made with the object of benefitting second respondent. In this respect the lower Court failed to exercise its jurisdiction. We must, therefore, set aside its order and remand the petition for further enquiry. As the effect of charges, such as those in questions, must be cumulative, all the allegations in the petition will be open to further consideration, before orders are passed. Costs of the Civil Revision Petition in this Court will be costs in the cause and be provided for in the lower Court's order.

This result reached, it is unnecessary for us to consider the other failure to exercise the jurisdiction relied on in the Civil Revision Petition, the lower Court's omission to ascertain from the minor in person her wishes as to her guardianship and the proposal for her marriage, on account of which the removal of first respondent was principally asked for. It is sufficient that neither the Guardians and Wards Act nor any authority makes such ascertainment obligatory and that the lower Court may very well have refrained from seeing and questioning the minor in the exercise of its discretion, an exercise which in view of her tender age was very likely sound and with which, therefore, we cannot interfere. In this connection, however, we think it advisable to direct the attention of the lower Court to certain allegations as to the efforts by both sides to interfere with the custody of the minor's person and to prevent her from coming from Chidambaram to appear at the hearing. Some of these allegations were made in this Court by affidavit, in connection with an application for temporary injunction and it is not disputed that some of them were also made orally on the last day of the hearing in the lower Court. It will be for the lower Court to consider, after obtaining any definite statement which either party may wish to make regarding the facts, whether anything has been done which would constitute a disqualification for the custody and guardianship of the minor and whether the appointment of an impartial third person as guardian of either the person or the property is not advisable.

In this connection reference must be made to Civil Revision Petition No. 289 in which we are asked to revise an order by the lower Court, granting an injunction restraining four persons specified, here petitioners, from taking steps towards the minor's marriage against first respondent's wishes. This order was passed on the day on which the guardianship petition was dismissed on the oral application of first respondent's Counsel. Whether such an oral application should have been listened to it is unnecessary to decide, but it may be observed that no special reasons appear for the deviation from ordinary practice involved. There are, however, other fundamental objections to what was done. For there was not a proceeding before the Court initiated by the first respondent, in which even an *in erim* injunction could have been granted, much less a permanent one, such as that before us. No notice was given to the persons against whom the order was made, and they are not alleged to have been in fact present. There was no evidence, by affidavit or otherwise, adduced for the Court to act on and the statement in the order that the facts were not disputed is futile, when the persons concerned to dispute them, those against whom the order was asked for, never had

an opportunity to do so. It is difficult to understand how any one concerned can have thought that a permanent injunction granted in such a way could be legal. The Civil Revision Petition must be allowed with costs against first respondent, the injunction being dissolved.

Devadoss, J.—I entirely agree with the order passed by my learned brother and the reasons therefor, and I wish to add a few words of my own on the question of a Hindu father's right to appoint a guardian by W ll for his minor children, as it is a question the decision of which, one way or other, will affect millions of His Majesty's subjects in this Presidency.

Mr. Krishnaswamy Iyer who appears for the appellant contends: "That under the Hindu Law a father has no right to appoint a guardian by Will for his minor son and relies for his contention on the Full Bench ruling in *Chidambara Pillai* v. *Rangasami Naicker* (5). His argument is, that it is settled law that a father cannot also appoint a guardian for his minor son by Will when there is a joint family property, and that he cannot appoint a guardian for him if he bequeaths to him his separate or self-acquired property; for, that would mean the existence of two guardians, one in respect of joint family property and one in respect of his separate property. Even if the Hindu father is the sole surviving member of a joint fam ly he cannot appoint a testamentary guardian for his son who by birth acquires an equal right with the father in ancestral property. The right to appoint a guardian does not go with the right to make bequests. For a testator cannot appo nt by his W ll a guardian to a minor legatee, who is not his child, and a Hindu who is not empowered by Hindu Law to appoint a guardian for his son cannot claim the right, by virtue of his being able to leave his son some of his own property, and it is illogical to say that he can appoint a guardian in respect of his separate property when he cannot do so in respect of joint family propery. Wills and testaments were unknown to Hindu Law and, therefore, a Hindu father has not, by his personal law, a right to appo nt a testamentary guard an for his m nor children. The right to appoint a guardian by Will or testament is a creation of Statute in England, and there is no Statute Law in India empowering a Hindu father to appoint a guardian by Will."

The real question for consideration is: has a Hindu father the right to appoint by Will a guardian for his minor son? It is considered as settled law that he cannot appoint a guardian to manage the joint family property as the manager of the family is the guardian of all minor members. The last surviving member of a joint family cannot appoint by Will a guardian for his son to manage the family property, as it is said to be inconsistent with the theory of survivorship. If the father has not the right to appoint a guardian by Will for his minor son by virtue of his being the father, he cannot acquire the right by virtue of his power of disposition of his separate or self acquired property, for it is a well known principle of law that a testator cannot appoint a guardian for a minor legatee only by reason of the disposition in his favour. A testator can appoint trustees to hold property for a legatee and that does not depend upon the legatee being a minor. So the right to appoint a guardian for a minor son is to be sought for elsewhere than in the power to bequeath the property to him. A father as well as his mother have obligations as well as rights in respect of their children during minority. The penal law prescribes a penalty for abandoning a child and punishes any one who kidnaps a child under a certain age from rightful guardianship. The father has the right to the custody of the children against all the world, till a Court of Law sees fit to take away the guardianship from him. Under the Hindu Law a father can give away a boy in adoption. The mother can give a boy in adoption only with the express permission of the father. Even where a father is a junior member of a joint Hindu family, he alone has the right to give the boy in adoption. The managing member of a joint family has not the right to give in adoption any junior member who is not his own son. The Hindu Law recognises the right of the father, as paramount in this respect to that of the managing member of the family. The Hindu

KONTHALATTAMMAL v. SOUNDARATHACHI.

Law permitted the father to sell his son. If such is the right of the father, why could he not appoint by Will some one to look after the minor son during his minority?. The answer is that the Hindu Law does not permit it. On a close examination it will be found that it does not prohibit or discountenance such an appointment, Wills being unknown to Hindus no provision is found in the authorities. as to the power of a father to appoint a testamentary guardian for his minor son. The text on which reliance is placed is No. 27, in Chapter 8 of Manu. "The property of a student and of an infant, whether by descent or otherwise, let the King hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year." The Chapter is headed: "On judicature, and on law, private and criminal." From the said heading, the text appears to be a direction to the King's Judges to do what is proper in the case of an infant; when his property has to be protected. There is nothing to show that in the case of infants the father could exercise his right of guardianship. No doubt the King's power was paramount. But that is no ground for saying that the father did exercise, or could not exercies his right as guardian of his own minor son; for, if he had had no power over his son how did it allow a father to give away his son in adoption thereby cutting him off from all the benefits that would accrue to him in his natural family. Nor does the text in any way infringe or take away the right of the manager of a joint family to have the guardianship of the minor members. I take it, though not without some hesitation, that the direction is only to the Judges to decide cases that might come up before them. Whatever may be the meaning of the text, I think, there is nothing in the Hindu Law to prevent a Hindu father appointing a guardian for the person of his minor son.

The argument urged against this view is that there can only be one guardian for a minor and that there cannot be one guardian for the person and another for the property. No doubt there cannot be two guardians for one and the same property of a minor. But there is nothing in law or reason or equity to prevent there being two guardians, one for the person and one for the property. The Guardians and Wards Act expressly permits the appointment of more guardians than one. [*vide* section 15, clauses (4) and (5)]. Where it is not permissible to appoint a guardian for the property of a minor, a guardian for the person alone can be appointed by testament. The case in *Virupakshappa* v. *Nilgangava* (14) decided by a Full Bench of the Bombay High Court is sufficient authority for this position. It is sheer pedantry to seek for texts or authority in ancient law books, for giving relief suitable to the conditions now prevailing. The Code of Manu was intended for a primitive society which has long since ceased to exist. How would it be possible to enforce the law contained for instance in the following texts ?

"270. A once-born man who insults the twice-born with gress invectives, ought to have his tongue slit; for he sprang from the lowest part of Brahma.

"271. If he mentions their names and classes with contumely, as if he say 'Oh Devadatta, thou refuse of Brahmans' an iron style, ten fingers long, shall be thrust red hot into his mouth.

"380. Never shall the King slay a Brahman, though convicted of all possible crimes, let him banish the offender from his realm, but with all his property secure, and his body unhurt.

"371. Should a wife, proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the King condemn her to be devoured by dogs in a place much frequented.

"81. In Chapter 9: A barren wife may be superseded by another in the eighth year. She, whose children are all dead, in the tenth; she who brings forth only daughters, in the eleventh, she who speaks unkindly without delay."

It is unnecessary to quote further examples from Manu to show the utter unsuitability of applying wholesale the directions or laws contained therein to the present society. It would be as absurd to apply the Code of Manu

(14) 19 B. 309; 10 Ind. Dec. (N. s.) 209 (F. B.)

in its entirety to the present soc ety as to apply the Levitical Law to Modren Europe. When the family or clan lived in a small village it was deemed prudent to live jointly to have one manager and to prevent alienation. But to-day a member of a jo nt family may live in England or America while the other members live in this Presidency. If it is said that a father cannot appoint by Will a guardian for his minor son, because there is some joint family property, what is to happen to a minor whose father dies in California or South Africa? If the boy happens to be a minor at the date of his death, no one can take charge of him or look after the property till an undivided cousin or a distant relative in India takes steps to protect him. If a successful member of the Bar or a member of the Viceroy's Council sends his son for education to Eton, or Harrow, and dies before his son attains age, should the boy be left to the tender mercies of an ignorant co-parcener, by reason of the misfortune that the family owned an ancestral hut in a small village in the Presidency? The Court has to take into account the modren condition in giving effect to ancient texts or law that was considered valid and binding once, but which has been departed from for generations. The Hindu Law, as now obtains, has departed in many vital respects from the law that was codified, if such an expression could be used with regard to the Code of Manu, perhaps 2,000 years ago.

The Law of Wills has grown up quite within recent times and judicial decisions have recognised the validity and Hindu Wills, and the Hindu Wills Act has put the matter on a satisfactory bas s. The following passage from West and Buhler, page 667, illustrates the opposition to the recognition of Wills by Courts. Mr. Ellis thought that a Hindu could not make a Will at all. Strange's Hindu Law, 419. It is obviously opposed to the Brahminical family system and to the interest of the ancestral means in the estate out of which sacrifices to them are to be provided. A general opinion unfavourable to the testamentary power was expressed by native judicial officers consulted in Bombay in 1864. But the pr nciple obtained early recognition, though but a qualified one, that what could be given away during life could be bequeathed by Will. "Whether the Law of Wills has grown out of the power to make gifts *inter vivos* or not, it is unnecessary to enquire. It is sufficient for the present purpose to say that Wills had come to be recognised as valid, by a long course of decisions before the Hindu Wlills Act was passed. The power of a father to appoint a guardian for his minor son by Will was recognised in a case reported as *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (12). All writers on Hindu Law without exception have recogn sed the right. Writers like Mayne, Trevaleyan and Gour have accepted the father's right to appoint a testamentary guardian as unchallenged. It was the consciousness of the people in this Presidency that a father could appoint a testamentary guardian for his son, till the decisions in *Chidambara Pillai* v. *Rangasami Naicker* (5) was given. No one seriously disputed the r ght of the father to appoint a guardian for his minor son. With due respect, I must observe that the decision in *Chidambara Pillai* v. *Rangasami Naicker* (5) is not only against the consciousness of the people but is opposed to their notion of the law on the subject. The point that was referred to the Full Bench in *Chidambara Pillai* v. *Rangasami Naicker* (5) was "whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners?" and the answer given was in the negative. Seshagiri Aiyar, J., tries to explain *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (12) on the ground that the property dealt with was the self-acquired property of the testator. If the father had no power to appoint a testamentary guardian, he could not acquire the right merely because he had self-acquired property. There are remarks in the judgment to the effect that there is nothing in Roman Law or English Common Law which empowered a father to appoint a guardian for his minor children. Mr.

Moyle in his book on Roman Law, at page 13, with regard to the Twelve Tables, makes this observation: "Nor did they include the *leges regiae*, law and religion having now been differentiated. Much again relating to the effects of legal acts and dispositions which was the matter of common knowledge and formed no subject of dispute remained, as we might say, Common Law the familiar possession of every citizen." Leage in his book on Roman Law describes the various kinds of *tutela*. *Tutela testamentaria* was appointed by Will. The duties of *tutela* are set out at page 101 of his book. Pollock and Maitland in their History of the English Law, at page 314, trace the origin of Wills to very early times. "We may believe that even in the first days of Christianity the Church was teaching that the dying man was in duty bound to make such atonement as possible for the wrongs that he had done and to devote to the relief of the poor and other pious works a portion of the wealth that he was leaving behind him * * * *. From the middle of the ninth century, we begin to get documents which are spoken of as the Anglo-Saxon Wills and Testaments." Volume 2, page 314.

With regard to guardianship, the learned authors make this observation at page 445 of the same volume: "This part of our law will seem strange to those who know anything of its next of kin. Here in England old family arrangements have been shattered by seignorical claims and the King's Court has felt itself so strong that it had no need to re-construct a comprehensive law of wardship. That the King should protect all who have no other protector, that he is the guardian above all guardians is an idea which has become exceptionally prominent in this much governed country. The King's Justices see no great reason why every infant should have a permanent guardian because they believe that they can do full justice to infants." The testamentary power was hotly opposed by the King and his Officers, while it was sedulously supported by the Church and its dignatories. Finally, the Church triumphed. Until recently, the Ecclesiastical Courts dealt with all testamentary matters and granted Probate. So it was necessary in the time of Charles II to have a Statute empowering a father to appoint a testamentary guardian. This does not mean that under the Common Law the father had not the right of guardianship but under the peculair tenures obtaining in England and the Law of Primogeniture, the power of the father to appoint a guardian for his heir was resisted till the Legislature had to intervene. There is nothing in the law of tenures in this country to militate against the right to guardianship of a father, and, therefore, it cannot be contended that that right was denied in ancient times. The decision in *Chidambara Pillai* v. *Rangasami Naicker* (5) can only govern cases where a testamentary guardian is sought to be imposed upon the co-parceners of a joint Hindu family. It cannot be extended so as to take away the right of a father to appoint a guardian for the person of his minor son.

The source of law is custom, judicial decisions and Statutes. The custom, as now prevalent, recognises the father's right as shown by the numerous Wills, in which a guardian is appointed for the minor children by a father; and the judicial decisions have recognised the right at least from the time of *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (12), case; and the fact that the correctness of that decision has not been questioned for a long number of years can only be attributed to the consciousness of the people that it was in accordance with the custom prevailing among the people. I am led to make these observations in the hope that the decision in *Chidambara Pillai* v. *Rangasami Naicker* (5) will come up for reconsideration before long.

In the present case the minor is a girl. She can have no cummunity of interest in property with her father. The question of joint family status cannot come in. I hold that it is the inherent right of a father to have the custody of his minor children and that right is transmissible by Will or testament, and there

is nothing in the Hindu Law to prevent such transam ssion.

There is a further argument which I need only mention, for, it has not been pressed before us, that is, the applicability of the Code of Manu to the Dravidians of this Presidency. The English Judges who administered justice in the days of the East India Company took their law from the Pandits, who always looked up the ancient texts for guidance. The more ancient the text, the greater was its sanctity, and *ergo* its binding character. This view was sedulously propagated by the Pandits, and the Judges who were ignorant of the customs of the people naturally adopted the view of the Pandits. This question need not be pursued further. But it should be remembered when it is sought to apply wholesale what is foreign to the Dravidians, to the conditions now prevailing. The Courts in India are enjoined to decide cases according to justice, equity, and good conscience where no specific rule exists. There being no specific rule against the appointment of a testamentary guardian by a father for his minor children either in Hindu Law or in any valid custom, I hold that a father has power to appoint by Will a guardian for the person of his minor children whether there be joint family property or not, and that right does not depend upon the father being able to devise by Will any property to his children for whom he appo nts a guardian.

V. N. V. *Appeal dismissed;*
Z. K. *Petition allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 372 OF 1923.

May 28, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

NASIR KHAN—OBJECTOR—APPELLANT

versus

ITWARI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17—Absence of appellant and his Counsel on date of hearing—Court, whether can dismiss appeal on merits—Second appeal, right of.

An Appellate Court has no jurisdiction to dismiss an appeal on the merits when neither the appellant nor his Counsel is present on the date fixed for hearing.

Muhammad v *Manavikrama*, 69 Ind. Cas. 513; 45 M. 882; 43 M. L. J. 317; 16 L. W. 434; (1922) M. W. N. 604; (1923) A. I. R. (M.) 13, followed.

The right of appeal does not depend on what the Court ought to have done but on what it actually did.

Therefore, an order dismissing an appeal on the merits when neither the appellant nor his Pleader was present in Court amounts to a decree and a second appeal lies against such decree.

Execution second appeal against a decree of the District Judge, Farrukhabad, dated the 13th October 1922.

Mr. *A. Sanyal*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—The appellant before us was the judgment-debtor, and on an application being made to execute the decree against him, he objected that the application was time-barred. The Trial Court dismissed the objection. The objector appealed and on the date fixed for the hearing of the appeal failed to put in an appearance, and he was not represented by Counsel. The learned District Judge recorded the following order:—

"Counsel for the appellant is absent. Appellant is himself absent. His brother, or a person alleging himself to be his brother, applies for an adjournment. I see no good reason to grant this. There does not seem to me to be the least force in this appeal; the reasons given by the Subordinate Judge holding that the application of the decree-holder-respondent for execution was in time and not time-barred are good and sound. I dismiss this appeal with costs on the merits."

The appellant comes here in second appeal and urges that under O. XLI, r. 17, the learned District Judge should not have dismissed the appeal on the merits, but should either have allowed an adjournment or should have dismissed it for default. This point was considered recently in the Madras High Court, in *Muhammad* v. *Manavikrama* (1), and we entirely agree with that decision.

A preliminary objection is taken that no appeal lies on the ground that, on the appellant's own showing, the Court below had no jurisdiction to pass the order which it did pass. The form which the argument takes is this. The only order which the Court below had jurisdiction to pass was an order dismissing the appeal for default. The order under appeal must, therefore, be treated as an order dismissing the appeal for default, since this is the only order the Court below could legally pass. From such an order no appeal lies.

The argument is ingenious but unsound. The right of appeal does not depend on what the Court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal. When the appeal comes up for decision the Appellate Court has then to decide whether the order passed was a proper order and one which the Court below had jurisdiction to pass. If it decides this question in the negative, it will set the order aside. The respondents' reasoning would deprive the aggrieved party of the right of appeal just in those cases in which it is most needed. The respondent relies in support of his argument on two old cases. *Kanahi Lal* v. *Naubatrai* (2) and *Krishna Ram* v. *Gobind Ram* (3). These were decisions under the old Act, the language of which is different from that of the present Code, but if there is anything in these cases to support the position taken up by the respondents we are unable to follow them. The result is that we allow the appeal. The question involved is one of law and we should have been prepared to dispose of it ourselves, but all the documents which have been relied on by the Court of first instance are not before us. We, therefore, allow the appeal and pass the order which we think the Court below should have passed, that is, to dismiss the appeal to the Court below for default. If the appellant wishes to restore the appeal, he must apply to the Court below and satisfy that Court that the appeal should be restored.

We make no order as to costs.

K. S. D. *Appeal allowed.*

(1) 69 Ind. Cas. 513; 45 M. 882; 43 M. L. J. 317; 16 L. W. 434; (1922) M. W. N. 604; (1923) A. I. R. (M) 13.

(2) 3 A. 519; A. W. N. (1881) 17; 2 Ind. Dec. (N. S.) 269.

(3) 8 A. 20; A. W. N. (1885) 321; 4 Ind. Dec. (N. S.) 1036.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 28, 1922.

Present:—Lord Phillimore, Sir John Edge, KT., Sir Lawrence Jenkins KT., and Lord Salvesen.

MAHOMED SOLAIMAN—PLAINTIFF—APPELLANT

versus

Kumar BIRENDRA CHANDRA SINGH, SINCE DECEASED, AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document — Kabuliyat — *Tenancy, commencement of—Evidence Act (I of 1872), s. 114, ills. (e), (f)—Accounts kept in Collector's Office—Presumption—Appeal to Privy Council—Findings on all points—Duty of Courts in India.*

The purchaser of an estate appointed a *Mukhtar* on 15th September 1862 to apply on his behalf to the Revenue Authorities for mutation of names in his favour. On 10th Novemer 1862 he gave to the Deputy Collector an acknowledgment of having received a *pattah* and on the same date he gave a *kabuliyat* which concluded with the following words:—

"I shall pay the rent year by year. Accordingly on receiving a *pattah* I execute this *kabuliyat*, 10th November 1862." It appeared from the accounts kept in the Collector's Office that the tenancy was for the Bengali year, and that on a certain date there was an arrear of Government revenue due from the estate for recovery of which the estate was sold:

Held, (1) that the date, 10th November 1862, entered in the *kabuliyat* was merely the date on which the *kabuliyat* was signed and did not determine the commencement of the tenancy; [p. 909, col. 2.]

(2) that the tenancy was for the Bengali year and the Government revenue became due at the end of the Bengali year; [p. 909. col 2.]

(3) that under section 114, illustrations (*e*) and (*f*), of the Evidence Act, the Court was entitled to presume that the accounts in the Collector's Office were correctly kept; [p. 909, col. 2.]

(4) that, therefore, the sale for arrears of revenue was valid and could not be questioned.

In cases in which an appeal lies to the Privy Council the Courts in India should, as far as may be practicable, pronounce their opinions on all the important points involved. [p. 910, col. 2.]

Tarakant Bannerjee v. *Puddomoney Dossee*, 10 M. I. A. 477 at p. 488; 5 W. R. P. C. 63; 1 Suth. P. C. J. 631; 2 Sar. P. C. J. 1841, 19 E. R. 1052, followed.

Consolidated appeals from a judgment, dated 25th May 1920, of the Calcutta High Court reversing that of the Subordinate Judge, Second Court of 24-Parganas.

Messrs. *Lowndes, K. C.*, and *Dube*, for the Appellant.

Messrs. *De Gruyther, K. C.*; *Wallach* and *K. Brown*, for the Respondents.

JUDGMENT.—These are two consolidated appeals from two decrees, dated the 25th May 1920, of the High Court at Calcutta, which reversed two decrees, dated the 31st January 1918, of the Subordinate Judge (Second Court) of the 24-Parganahs. The decrees from which these consolidated appeals have been brought were respectively made in suits numbered 19 and 20 of 1917. In each of these suits the present appellant was the plaintiff, and some of the present respondents were the defendants in one of the suits and others of the present respondents were the defendants in the other of the suits. The suits were tried together, as were the appeals to the High Court. The suits are suits by an auction-purchaser under Act XI of 1859 of lands for ejectment of under-tenants and for mesne profits.

The lands to which the suits relate are situate within the Collectorate of the 24-Parganahs, a permanently settled District of Bengal, to which Act XI of 1859 applies. On the 14th April 1915, the Collector of the District issued notice and proclamation under Act XI of 1859 that the holding No. 20A, which is the land now in question, would be sold under Act XI of 1859 for the realization of Rs. 6, 10 annas and 5 pies revenue in arrears from the year 1320 B. S. The holding was sold by auction on the 17th May 1915, and was purchased by the plaintiff, who subsequently received a sale certificate. The Government revenue for an arrear of which the holding was sold was the revenue for 1320 B. S. The defendants were at the date of the auction sale under-tenants of lands in the holding sold, and the plaintiff claims to be entitled to eject them.

The plaint and the written statement of Kumar Brindra Chandra Singh, a defendant in suit No. 19 of 1917, and the plaint and written statement in Suit No. 20 of 1917, are in the printed record.

In his plaints the plaintiff alleged that the Collector of the District, on the 17th May 1915, put the holding No. 20A up for sale by auction under the provisions of Act XI of 1859 for arrears of the Government revenue, and that he (the plaintiff), having purchased it at the sale, and having obtained the sale certificate, had, under section 37 of Act XI of 1859, acquired it free of all encumbrances, and had become entitled to annul all the subordinate rights, and to recover *khas* possession of the holding by ejecting the tenants holding any subordinate right, and claimed a decree for ejectment and mesne profits. The defence, so far as it is now material, was that there was no arrear of the Government revenue to recover which the Collector was entitled to sell the holding, and that in any case the defendants were within the exceptions of section 12 of Bengal Act VII of 1868; that section 37 of Act XI of 1859 did not apply; and that the plaintiff was not entitled to eject the defendants. The Subordinate Judge fixed five issues, of which issues Nos. (2) and (3) are now alone material. Issue No. (2) was as follows: "Is the sale valid and operative, and has the plaintiff acquired any title under the same by his purchase?" Issue No. (3) was: "Are the under-tenancies of the defendants protected under section 12 of Act VII of 1868, and whether they can be annulled?" Their Lordships will later have some observation to make as to issue No. (3).

The Subordinate Judge found that there was an arrear of the Government Revenue of Rs. 6, 10 annas, 5 pies for 1320 B. S. which entitled the Collector to sell the es-

tate and that the sale was good and that the defendants were not within the exceptions of section 12 of Bengal Act VII of 1868, and he gave to plaintiff a decree for possession and mesne profits in each suit. From these decrees the defendants in each suit appealed to the High Court. In the Memorandum of Appeal to the High Court, in Suit No. 19 of 1917, the 3rd ground of appeal was: "That the Court below should have held that there were no arrears due for which the sale could be held." The 17th ground of appeal was: "That the Court below ought to have held that the tenure of this defendant has been existing from the time of the Permanent Settlement," and the 20th ground of appeal was: "That at any rate the Court below should have held that the tenure of this defendant is protected under the provisions of section 12 of Act VII of 1860 (1868)." In the Memorandum of Appeal in Suit No. 20 of 1917 the 4th, 10th and 14th grounds of appeal were the same as the 3rd, 17th and 20th grounds of appeal in Suit No. 19 of 1917. The High Court on appeal found that there was no arrear of the Government revenue which entitled the Collector to sell the estate and by its decrees dismissed the suits. From these decrees of the High Court these consolidated appeals have been brought.

The first issue which their Lordships have to consider is--was there an arrear of the Government revenue for 1320 B.S., which entitled the Collector to sell the estate? That is an issue which depends upon the evidence in these suits and not upon the decision of the Board on the facts as found by the Board in *Haji Buksh Elahi* v. *Durlav Chandra Kar* (1), as the High Court apparently thought it did.

There was no evidence as to when the holding, of which the estate sold by the Collector in 1915, formed part was granted, but there is evidence that one Syed Abdul Ali, who had purchased the holding No. 20-1 in *Mauza* Paikpara from Srimati Dellorus Banu Begum on the 17th day of Bhadra 1269 B. S., appointed on 15th September 1862, *Mokhtars* to apply on his behalf to the revenue authorities for mutation of names in his favour, and that on 10th November 1862, he gave to the Deputy Collector the following acknowledgment of having received a *pottah*:—

"Holding No. 21-1.—Bounded as on the map and on the *pottah*.

"I, Syed Abdul Ali, do hereby acknowledge to have received a *pottah* for (17-5-4-2) of ground found by survey to be contained in the above holding and assessed at the rent of Company's Rs. 20-12-4 per annum and I give this document as my *kabuliyat*, consenting to pay the above annual *umma*. Dated the 10th day of November 1862.

"SYED ABDUL ALI.
"Through the pen of
"BIPRADAS BOSE,
"*Mokhtar*."

The *pottah* was evidence of his title to possession. In exchange for the *pottah* Syed Abdul Ali gave to the Deputy Collector on the 10th November 1862 a *kabuliyat* which so far as is material was as follows:—

"Holding No. 20-1.—Boundaries as shown on the *pottah* and map.

"This deed of *kabuliyat* is executed by Syed Abdul Ali to the following effect:—

"That I have got a permanent *mourasi pottah* in respect of lands measuring 17 *bighas* 5 *cottahs* 4 *chattaks* and 10 *gundaks* the particulars of which are stated above, acknowledging as yearly rent thereof at Company's Rs. 20, 12 annas 4 pies. I shall pay the rent year by year. Accordingly on receiving a *pottah* I execute this *kabuliyat*. Finis. The 10th November 1862."

Apparently, Syed Abdul Ali held direct from the Crown and not as an under-tenant, but whether his holding was recognised by the Government as an "estate" their Lordships do not know. Admittedly and obviously, the holding of Syed Abdul Ali of 1862 was subsequently partitioned and after that partition the yearly revenue of the partitioned part which was sold by the Collector was Rs. 6, 10 annas 5 pies.

By section 2 of Act XI of 1859, it is enacted that:—

"If the whole or a portion of a *kist*, or instalment of any month of the era-

(1) 16 Ind. Cas. 821; 39 I. A. 177; 39 C. 981; 16 C. W. N. 821; 23 M. L. J. 206; 12 M. L. T. 385; (1912) M.W. N. 1005; 14 Bom. L. R. 1063; 10 A. L. J. 452; 16 C. L. J. 620 (P. C.).

according to which the settlement and *kistbundee* of any *mahal* have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue."

By section 3 of that Act it is enacted so far as is material as follows:—

'Upon the promulgation of this Act, the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue and all demands which, by the Regulations and Acts in force, are directed to be realized in the same manner as arrears of revenue, shall be paid up in each District under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder."

According to the Notification of the Board of Revenue, in force at the date of the sale here in question, the 28th June 1914 was the day when the arrears of revenue which had become due for 1320 B. S. should be paid.

The *kabuliyat* given by Syed Abdul Ali in 1862 does not expressly state when the yearly revenue should be paid. The learned Subordinate Judge came to the conclusion that the letting was for the Bengali year, and having regard to Act XI of 1859 and the Notification of the Board of Revenue which was applicable at the time of the sale, he found that one year's revenue, Rs. 6,10 annas and 5 pies, was due on the 1st May 1914 and was in arrear on the 17th May 1915, and that the sale was consequently a valid sale.

The learned Judges of the High Court construed Syed Abdul Ali's *kabuliyat* of 1862 as a letting by which the yearly rent should be payable not at the end of the Bengali year but on the 10th November during the tenancy, and finding that, in that view of the case, there was no revenue in arrear at the date of the sale, for which the estates could be sold, they held that the sale was invalid and dismissed the suit.

In their Lordships' opinion the learned Judges of the High Court misconstrued the *kabuliyat* of 1862 in holding that by it the letting was a yearly letting from the 10th of November and not for the Bengali year, and incorrectly found that at the date of the sale there was no arrear of revenue for which the Collector could sell the estate. The 10th November 1862 was merely the date when Syed Abdul Ali signed the *kabuliyat*, he had in September 1862 taken over a then existing tenancy of the estate. It appears from the accounts in the Collector's Office that the tenancy was for the Bengali year. Although the accounts relating to this estate which were kept in the Collector's Office may not be in some matters easily understood by those who are not familiar with the system of keeping accounts in Collector's Offices in that part of India, it has not been proved that they were not correctly kept by the native clerk in the office who was under the supervision of the Collector, who would understand what those accounts showed, and their Lordships are entitled to presume, and do presume, under section 114, Illustrations (*e*) and (*f*), of the Indian Evidence Act of 1872, that they were correctly kept, and that there was a Government revenue of Rs. 6, 10 annas and 5 pies in arrear for 1320 B. S., to realize which the estate might have been and was, in fact, sold on the 17th May 1915, by the Collector.

There remains to be considered the issue as to whether the defendants were or were not protected by the Exceptions of section 37 of Act XI of 1859, or by the Exceptions of section 12 of Bengal Act VII of 1868.

The learned Subordinate Judge considered all the evidence in any way relating to the tenure of the defendants, and he found that none of those under tenures was shown to have existed at the time of the Permanent Settlement, and that none of the defendants was within the fourth Exception of section 12 of Bengal Act VII of 1868. With those findings their Lordships agree. It may, however, possibly be, as the plaintiff's case in his plaint apparently was, that this was the case of a sale of an estate under Act XI of 1859 and not of a tenure not being an estate under section 11 of Bengal Act VII of 1868, and consequently that the Exceptions to be considered were the Exceptions of section 37 of Act XI of 1859 and not the Exceptions of section 12 of Bengal Act VII of 1868. That question

has not been considered by either of the Courts below, and on the evidence before their Lordships they are unable to decide it. In these consolidated appeals, however, the question as to whether the defendants were within the Exceptions of section 37 of Act XI of 1859 or were within the Exceptions of section 12 of Bengal Act VII of 1868, is not substantially material, as it has not been proved that the third Exception of section 37 of Act XI of 1859 or the third Exception of section 12 of Bengal Act VII of 1868 applies to the defendants or to any of them, and the wording of the fourth Exception of section 37 of Act XI of 1859 and of the fourth Exception of section 12 of Bengal Act VII of 1868 are for present purposes practically the same, as it is not suggested that in any of these under-tenancies mines have been sunk, and the gardens of the fourth Exception of section 37 of Act XI of 1859 must mean permanent gardens. There was some evidence that there were wells on the lands, but they seem to have been very shallow and small wells, and not such wells as were meant by the fourth Exception, and it has not been suggested that this Exception would apply to them. The Subordinate Judge did not refer to the evidence of Baiju Nunia, who said that on one of these under-tenancies there was a two-storied *pucca* house. Probably the Subordinate Judge thought that that witness's evidence was not worth considering. In their Lordships' opinion it was worthless. No one else said that there was a *pucca* two-storied house on any of the holdings, and the witness, when he gave his evidence, was about 80 years of age and had been blind for 10 years.

Before concluding this judgment, their Lordships must allude to the fact that the learned Judges of the High Court, before whom the appeal to their Court was heard, did not express any opinion as to whether the defendants or any of them were protected from ejectment by any of the Exceptions of section 37 of Act XI of 859, or of section 12, Bengal Act VII of 1868. The issue on that subject was before them and they should have considered it and found upon it. Their Lordships will quote for the information of those learned Judges what Lord Justice Turner, in delivering the judgment of the Board in *Tarakant Bannerjee* v. *Puddomoney Dossee* (2), said as to the duty of High Court Judges to pronounce their opinions on all important issues in cases before them. The Lord Justice said:—"The cause has not been decided in either Court on the principal point—whether the lands formed part of the *jote* tenure or of the *talook*. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expenses of a second appeal as well as that of another hearing below It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points."

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed with costs, the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be resotred.

Appeals allowed.

Solicitors for the Appellant:—Messrs. *Watkins* and *Hunter*.

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.* and Messrs. *Pugh & Co.*

Z. K.

(2) 10 M. I. A. 477 at p. 488; 5 W. R. P. C. 63; 1 Suth. P. C. J. 631; 2 Sar. P. C. J. 184; 19 E.R. 1052.

MATHURA PRASAD *v.* ANANDI KUNWAR.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 386 OF 1922.
May 14, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

MATHURA PRASAD—DEFENDANT—APPELLANT

versus

Musammat ANANDI KUNWAR—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 41—Property sold in execution of decree against ostensible owner—Purchaser, position of—Property entered in name of judgment-debtor at instance of real owner—Real owner, whether can object—Estoppel.

Defendant purchased the property in dispute at an execution sale. Plaintiff who had, several years before, got the property entered in the name of the judgment-debtor, now sued defendant for a declaration that the property belonged to her and not to the judgment-debtor:

Held, (1) that there was nothing to put the defendant on enquiry and the judgment-debtor being the ostensible owner of the property, the principle underlying section 41 of the Transfer of Property Act was applicable to the case;

(2) that the plaintiff having deliberately by her own act got the name of the judgment-debtor entered as owner of the property, she was now estopped from pleading that she was the owner of the property:

Second appeal from a decree of the Additional Judge, Cawnpore.

Messrs. *Kamla Kant Verma* and *Badri Narain*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—In our opinion this appeal must succeed. The facts very briefly are as follows. Mathura Prasad, on the 20th November 1917, in execution of a simple money-decree held by Kashi Prasad against *Musammat* Jagrani Kunwar purchased the property now in suit which was recorded in her name. Two years subsequently this suit was filed by the plaintiff *Musammat* Anandi Kunwar for a declaration that Mathura Prasad had acquired no title by his purchase because the property did not belong to *Musammat* Jagrani Kunwar at all, but to herself the plaintiff. Mathura Prasad, among other pleas, pleaded that the plaintiff had held out that *Musammat* Sheorani Kunwar was the owner of an eight-anna share in *Mauza* Kaendipur in which the property in suit is situated and that her claim was barred "by the principle of estoppel and under section 41 of the Transfer of Property Act." Both Courts have decreed the suit.

The defendant Mathura Prasad appeals on the ground that, on the findings of fact, the suit should have been dismissed. The findings arrived at by the lower Court may be summarised briefly as follows:—That Bhairon Prasad was the last surviving male owner of the property in suit. During his life-time, however, his mother, *Musammat* Munna Kunwar and her two sisters were recorded as owners of ⅓rd each. He died in 1884, leaving *Musammat* Anandi Kunwar, his widow. Instead of her name being recorded, that of his mother, *Musammat* Munna Kunwar and two of her sisters remained recorded as owners of one-third each of the property. Both these sisters died before *Musammat* Munna Kunwar and she was eventually recorded as the sole owner. She died in 1907. Thereupon, a dispute arose between *Musammat* Sheorani Kunwar, the mother of *Musammat* Jagrani Kunwar, and the plaintiff in the mutation proceedings, and, ultimately, on the admission of *Musammat* Anandi Kunwar herself *Musammat* Sheorani Kunwar was recorded as owner of half the property. *Musammat* Sheorani Kunwar died in 1914 and then *Musammat* Jagrani Kunwar was entered as owner of the half in place of her mother.

This was the position of things when, in 1917, Mathura Prasad, who lived in another village and had no connection with the family, bought the property at the execution sale. It seems to us that there was really nothing to put him on inquiry. The property had been entered in the name of *Musammat* Jagrani Kunwar and her mother ever since 1907. If he had looked at the mutation proceeding he would have seen that *Musammat* Anandi Kunwar was a party to those proceedings. It seems to us that as there was nothing to put him on inquiry the principle underlying section 41 of the Transfer of Property Act would apply. But, in any case, we think it is not open to *Musammat* Anandi Kunwar, who

in 1907 deliberately by her own act got the name of *Musammat* Sheorani Kunwar entered as the owner of half the property, now to plead that she really was the owner of the whole property. In our opinion she is estopped from doing so. We, therefore, allow the appeal and dismiss the plaintiff's suit so far as it concerns the property entered as No. 1 in the schedule attached to the plaint, with costs in all Courts.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1424 OF 1922.
July 2, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

NATHSAHAI AND OTHERS—APPELLANTS
versus
IMAM REZA AND OTHERS—RESPONDENTS.

Legal representative—Application for substitution of names—Reasonable diligence—Affidavit—Patna High Court Rules, Chapter VI, r. 6.

In an application under Chapter VI, r. 6 of the Rules of the Patna High Court for an order that the Memorandum of Appeal to the High Court be amended by substituting for a deceased respondent her son who was her legal representative, it appeared that the death of the deceased occurred on the 18th November 1922 before the institution of the appeal. The process-server reported the death on the 23rd March 1923 and the application was made on the 10th May:

Held, that as the deceased respondent was a *purda nashin* lady it was well within probability that the appellant did not know of her death prior to the time when the peon went to serve the process on her;

(2) that the application was made with all reasonable diligence and should be allowed.

JUDGMENT—This is an application under Chapter VI, rule 6, for an order that the Memorandum of Appeal be amended by substituting for respondent No. 31 who is dead, her son who is her legal representative. The decree of the lower Appellate Court was pronounced on the 14th of September 1922 and the appeal was presented to this Court on the 13th December 1922. We are now informed that respondent No. 31, died on the 1st November 1922, that is to say, before the appeal was actually presented to this Court. The peon on the 23rd March 1923 reported that respondent No. 31 was dead and the present application was presented to this Court on the 10th May 1923. Respondent No. 31 is a *purda nashin* lady and it is well within probability that the appellant did not know of her death prior to the time when the peon went to the village to serve the processes on her.

The only other question is whether the appellant has complied with the provisions of Chapter VI, rule 6 which requires that he should file an affidavit showing that the application has been made with all reasonable diligence after the fact of the death of such person first came to the knowledge of the applicant or of the applicant's agent. It is quite true that the report of the peon is dated the 23rd March 1923 but the appellant did not come to know of it until very much later. In the circumstances of the case, we think that the application should be allowed and we order accordingly.

K. S. D. & W. C. A. *Application allowed.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS APPLICATIONS Nos. 9, 14, 16, 17, 18, 20, 22, 23, 25, 26, 27, 28, 29, 30 AND 36 OF 1923.

March 12, 1923.

Present:—Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Heald and Mr. Justice May Oung.

In the matter of CERTAIN FIRST GRADE ADVOCATES OF THE LATE COURT OF THE JUDICIAL COMMISSIONER OF UPPER BURMA.

Rangoon High Court—First Grade Advocate of Judicial Commissioner's Court, Upper Burma, status of—Stamp Act (II of 1899), Sch. I, Art. 30—Legal Practitioners Act (XVIII of 1879), Sch. II—"High Court", meaning of—Entry as Advocate or Pleader of Rangoon High Court—Fee payable.

The accident that persons, who were really First Grade Pleaders, should have been called First Grade Advocates in Upper Burma, gives them no right to be enrolled as Advocates of the Rangoon High Court. They should be enrolled as Advocates or First Grade Pleaders according to their qualifications. [p. 913, col. 2; p. 914, col. 1.]

The Court of the Judicial Commissioner of Upper Burma was not a "High Court" within the meaning of the exemption to Art. 30 of Schedule I to the Stamp Act, which refers to High Courts which enrol Legal Practitioners under the powers given by the Legal Practitioners Act. [p. 914, col. 1.]

The expression "High Court" in the entry in Schedule II to the Legal Practitiners Act refers to High Courts not established by Royal Charter and only to Pleaders authorised to practice in Courts subordinate to the High Court. [p. 914, cols. 1 & 2.]

First Grade Advocates of the Court of the Judicial Commissioner of Upper Burma must pay a fee of Rs. 500 under Art. 30 of Schedule I to the Stamp Act in order to be enrolled as Advocates or Pleaders of the Rangoon High Court. [p. 914, col. 1.]

JUDGMENT.—The applicants are First Grade Advocates and seek to be enrolled as Advocates of the High Court. On the creation of the High Court a Notification was issued calling upon First Grade Advocates of the Court of the Judicial Commissioner, Upper Burma, to submit applications for admission as Advocates or as First Grade Pleaders. In the opinion of the Judges, those who would be qualified under the rules to be Advocates of this Court would be admitted as Advocates, and those who were only qualified to be admitted as First Grade Pleaders would be admitted as First Grade Pleaders.

The applicants apply claiming to be entitled to be enrolled as Advocates and not as Pleaders. The grounds on which their applications are based appear to be, that having been known as Advocates for so long they should not, in the future, have to be called Pleaders, a term which signifies a lower status.

It is urged that clause 7 of the Letters Patent gives the Court an absolute discretion in the matter and that that discretion should be exercised generously in their favour. The position arising out of the fact that two Courts were being amalgamated into one High Court and that these Courts had different rules governing the enrolment of Advocates and Pleaders and that the qualifications required were by no means the same, raises questions of some nicety, and it is clear that this Court in dealing with the matter must endeavour to so deal with it that no class of Legal Practitioners shall be injured, nor can we show favour to one class to the detriment of any other class.

The Pleaders of the Chief Court—that is First Grade Pleaders—are, what are commonly called in India, Vakils, that is to say, they are Pleaders who can appear, plead and act in the High Court and the Courts subordinate thereto. The Advocates of the Chief Court, who are, in the main, persons who have been called to the Bar at Home, have a right of preaudience over Pleaders, and if, therefore, we were to enrol First Grade Advocates of Upper Burma as Advocates of the High Court, they would obtain seniority over all the Pleaders of the Chief Court who become Pleaders of the High Court.

The matter had been very carefully considered by the Judges and we came to the opinion, that Advocates of Upper Burma should be enrolled according to their qualifications. Most of the applicants in the present case are Vakils of Indian High Courts. As such, had they sought enrolment in the Chief Court, they could only have been enrolled as First Grade Pleaders. The accident that persons, who were really First Grade Pleaders, should be called First Grade Advocates in Upper Burma, gives them no right to be enrolled as Advocates of the High Court. It may be pointed out that, when the Burma Courts

Act, 1922, was encated the provision similar to sub-section (i) of section 40 of the Lower Burma Courts Act, was deliberately omitted, although it had appeared in the Bill as originally drafted. It may be that this provision was omitted because the Act did not deal with the High Court at all and it was thought that the provisions relating to the High Court should be contained in the Letters Patent; but the result of this provision in the Lower Burma Courts Act was that certain persons who would ordinarily not have been elegible to become Advocates of the Chief Court, automatically received promotion, and it may well be that it was not considered necessary or desirable that such a result should occur again on the creation of the High Court. But whatever be the reason, we are clearly of opinion that the sole rule that should guide us is that these Advocates should be enrolled according to their qualifications. None of them are entitled to be enrolled by virtue of being Barristers-at-Law. Had they applied in the ordinary way to the Court, the Court would only have enrolled them as First Grade Pleaders, and we are unable to see any ground whatever for enrolling them as Advocates at the present time.

So far as any fee on entry is concerned, those who have already been enrolled as Vakils of an Indian High Court will be exempt from payment of any fee. Those who have not been so enrolled will be enrolled as First Grade Pleaders on payment of the fee of Rs. 500, as required by Art. 30 of Schedule I of the Stamp Act. The Court of the Judicial Commissioner of Upper Burma is not a High Court within the meaning of this Article, which clearly refers to High Courts which enrol legal practitioners under the powers given by the Legal Practitioners Act. The Legal Practitioners Act did not extend to Upper Burma and, therefore, they do not come within the exception to Art. 30 unless they are Vakils of an Indian High Court who have already paid this fee.

Mr. Naidu argued that under the Second Schedule of the Legal Practitioners Act such Pleaders need not pay Rs. 500 but only an annual license fee of Rs. 50. The expression 'High Court' in the entry in the schedule refers to High Courts not established by Royal Charter and only to Pleaders authorized to practice in Courts subordinate to the High Court. The present applicants seek enrolment in a Chartered High Court and to them Art. 30 of the Stamp Act clearly applies.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1614 AND 1615 OF 1921.

April 17, 1923.

Present:—Mr. Justice Daniels.

DHIRJA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MITHAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 165, 177 (e)—Suit for profits—Question whether defendant entitled to share in profits, whether question of title—Appeal, whether lies—Revenue papers, entry in, value of—Alteration of entry after institution of suit, effect of.

The question arising in a suit for profits whether the defendant is a mortgagee of the proprietary right or has no right in the share in dispute is a question of title within the meaning of section 177 (e) of the Agra Tenancy Act and, therefore, an appeal lies in such a suit even where the value of the suit is below Rs. 100. [p. 915, cols 1 & 2.]

Kalyan Mal v. *Samad*, 18 Ind. Cas. 244; 35 A. 157; 11 A. L. J. 118, followed.

In a suit for profits the entry of the plaintiff's name in the Revenue papers as a proprietor must be taken as conclusive in his favour irrespective of the fact whether it does or does not correctly represent the mutation order on which it is based [p. 915, col. 1.]

Durga Parshad v. *Hajari Singh*, 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 (F. B.), followed.

Where the plaintiff in a suit for profits is a recorded co-sharer at the date of the institution of the suit, his right to a decree will not be taken away by an order subsequently passed by the Revenue Court removing his name from the *khewat* even though the order is based on a finding that the original entry was wrong. [p. 915, col. 2.]

Lachman Prasad v. *Shitaba Kunwar*, 59 Ind. Cas. 639; 43 A. 177; 18 A. L. J. 1008; 2 U. P. L. R. (A) 386, followed.

Second appeal against a decree of the District Judge, Agra, dated the 23rd of August 1921.

Mr. *N. P. Asthana*, for the Respondents.

DHIRJA v. MITHAN LAL.

JUDGMENT.—This is an appeal in a suit for profits under section 165 of the Tenancy Act. The plaintiffs are recorded in the Revenue papers as full owners of the share in respect of which they sued for profits. According to the defendants the plaintiffs merely owned the equity of redemption and the defendants are usufructuary mortgagees of the share. The entry, as it stands, was admittedly made by mistake. The Revenue Court ordered mutation to be made in the plaintiffs' favour of the equity of redemption only. This was in the year 1917. By some mistake the order was not carried out and the entry was made as stated above and has so remained down to the present time. Another curious complication in the case is that, according to the District Judge, the order of the Revenue Court was not in accordance with the Civil Court decision on which it was based and the learned Judge was of opinion that the entry though technically wrong was really in accordance with the rights of the parties. The learned Assistant Collector dismissed the suit. The learned District Judge, following the Full Bench ruling in *Durga Parshad* v. *Hajari Singh* (1), held that the entry of the plaintiffs' name in the Revenue Records raised a conclusive presumption in their favour and accordingly decreed the suit. In appeal by the defendants two points are raised,—

1. That no appeal lay to the Court below as no question of proprietary right was raised within the meaning of section 177 (*e*) and the value of the suit was below Rs. 100.

(2) That the Court below should have followed the mutation order in preference to the actual entry in the papers.

The first point is governed by the ruling in *Kalyan Mal* v. *Samad* (2) which has been followed in subsequent cases. There the question whether the defendant was a tenant or mortgagee of proprietary rights was held to amount to a question of proprietary right. Here the question is whether the defendants are mortgagees of proprietary right or have no right at all in the share in dispute. The cases are, therefore, indistinguishable in principle and, following the ruling cited, I hold that an appeal lay.

On the second point the learned District Judge is clearly right. The presumption is based on the entry in the records and it is impossible to accept an order which was never carried out in face of the entry in the papers which has stood unaltered for three years before the suit. The appellant has produced in this Court a certified copy of an order passed by the Collector directing the papers to be corrected in accordance with the original mutation order of 1917. This order was passed on 9th December 1922 long after the decision of the Court below and there is nothing to show whether it has yet been carried out. Even, however, if it has been carried out it is impossible in face of the ruling in *Lachman Prasad* v. *Shitaba Kunwar* (3) to give effect to it in this suit. That ruling lays down that where the plaintiff in a suit for profits was a recorded co-sharer at the date of the institution of the suit, his right to a decree will not be taken away by an order subsequently passed by the Revenue Court removing his name from the *khewat* even though the decrees based on a finding that the original entry was wrong. For these reasons I am unable to accept the appeal and I accordingly dismiss it. As the case is one of hardship to the appellants, I make no order as to costs in this Court.

Z. K. *Appeal dismissed.*

(1) 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 (F. B.).

(2) 18 Ind. Cas. 244; 35 A. 157; 11 A. L. J. 118.

(3) 59 Ind. Cas. 639; 43 A. 177; 18 A. L. J. 1008; 2 U. P. L. R. (A.) 386.

BIBBY BROTHERS *v.* CHARLES R. COWIE & CO.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 40 OF 1922.
March 19, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

BIBBY BROTHERS BY THEIR AGENTS MESSRS. STEEL BROTHERS & CO. LTD.—DEFENDANTS—APPELLANTS

versus

MESSRS. CHARLES R. COWIE & CO.—PLAINTIFFS—RESPONDENTS.

Carriage by sea—Bill of Lading—Damage to goods—Suit for damages—Burden of proof.

A Bill of Lading which states that the goods are shipped in good order and condition is a clean Bill of Lading and affords primary evidence that the goods, when shipped, were not damaged, and the burden of proving that the goods were damaged before being loaded lies on the ship-owners. If the goods are delivered in a damaged condition the ship-owners are liable for the damage in the absence of proof that the goods were loaded in a damaged condition but in a condition in which the ship-owners could not have discovered the damage by an external examination.

The Peter Der Grosse, (1876) 1 P. D. 414; 34 L. T. 749; 3 Asp. M. C. 195, relied on.

First appeal from the judgment and decree of the Original Side of the Chief Court of Lower Burma, dated the 12th January 1922, in Civil Regular Suit No. 458 of 1920.

Mr. *Leach*, for the Appellants.

Mr. *Paget*, for the Respondents.

JUDGMENT.—Messrs. Cowie & Co. shipped by the SS. "Derbyshire" 2,000 casks of cement under a Bill of Lading (Exhibit A), the goods being consigned to themselves. The Bill of Lading states: "Shipped in good order and condition . . . .and to be delivered . . . .in like good order and condition . . . at the Port of Rangoon . ." It is a clean Bill of Lading and affords primary evidence that the goods, when shipped, were not damaged. On arrival at Rangoon, 355 of these casks were landed wet and damaged, the cement being solidified and unmerchantable. It is not denied that they were so damaged, nor is it denied that the ship-owners are *prima facie* liable. It is, however, urged that they are at liberty to go behind the Bill of Lading and prove, if they can, that the goods were damaged before being loaded, and they seek to do this by showing that they were not, and could not have been, damaged while on board.

I need only refer to the case of *The Peter Der Grosse* (1). That was a case in which the Bill of Lading contained in the margin the words, "Weight, contents, and value unknown," and it was held that the Bill of Lading, fairly construed, and giving all due weight to the legal effect of the marginal note the result was "that apparently, and so far as met the eye, and externally, they were placed in good order on board this ship. Well, then if that be so if the plaintiffs have shown by *prima facie* evidence that, having put these bales and bags in good order on board the ship, they were taken out in bad order both externally and internally, I agree with the observation which was made that it is not incumbent on them to show either how or when the damage was done. It is for the defendants to displace the evidence, which certainly shows that it did not occur from any internal mischief inherent in the feathers or the down, and was not one which had any external appearance when they were put on board the ship."

The question for decision, therefore, is whether these casks, when loaded, were already damaged, and the onus of establishing that is on the ship-owners. There is no evidence, beyond the Bill of Lading as to the condition of these casks when loaded. They had been loaded under the supervision of a Mr. Green, who was then the Chief Officer of the ship. On arrival of the ship at Rangoon, the captain made a protest before a Notary Public that the ship had encountered very heavy weather both in the Atlantic and in the Mediterranean. The fact that these casks were damaged was known immediately and was reported immediately. There can be no doubt that the agents of the ship-owners had notice that a claim would be made in respect of them, and, presumably, they would have consulted the Captain and the ship's officers as to what defence there was to the claim. Whether they did so or not does not appear; but, on the claim being made, their Counsel stated that they could not advise on the materials then before

(1) (1876) 1 P. D. 414; 34 L. T. 749; 3 Asp. M. C. 195.

them whether or not the ship was liable. The letter (Exhibit G, dated the 25th March 1920) does remark that the Captain had made a protest, but that he unfortunately confined himself to stating that the ship had experienced very heavy weather in the Atlantic and Mediterranean. On the return of the vessel after its next voyage they wrote in Exhibit H, dated the 7th July 1920, that they had had an opportunity of interviewing the Captain of the ship and had ascertained that no damage, to the cement had occurred, during shipment, that whatever damage there was must have been caused before the cement was put on board, and that they, therefore, repudiated liability.

The evidence of Mr. Green, who supervised the loading of these casks, has not been taken, the reason being that he had since left the service of the ship-owners and his whereabouts were unknown. But there is no explanation as to why his evidence was not taken on commission or otherwise before he left the ship-owners' service.

It is not suggested that the casks were damaged owing to the very heavy weather that had been experienced early in the voyage; that was not put forward in the first instance and could not well be put forward later. And the suggestion made now is that these casks were loaded at Tilbury, that they were loaded from barges, which have very little free-board; and that, as the Thames is often rough and choppy, it is possible that, in bringing them to the ship, the barges shipped salt-water which caused the damage which now exists.

It is said by the Captain that casks which have been thus wetted would dry very quickly in a dry atmosphere, and that they would show no external marks of having been wetted if not loaded very shortly after arrival at the ship, and it is suggested that had they been damaged in this way, they might thus have easily been accepted as "in good order and condition." So far as this suggestion is concerned, it is to be noted that this is little more than a suggestion. It is only a bare possibility. There is no proof that the casks met with any rough weather in the Thames or that the barges shipped water, and it must remain a mere suggestion and cannot amount to proof of any sort that these casks were damaged in this way before being loaded.

There is evidence, no doubt, that the hold of the ship in which these casks had been stowed was perfectly dry on the arrival of the ship at Rangoon; and, further, that there was a considerable quantity of powdered cement lying perfectly dry at the bottom of the hold. There is evidence that the hold was tested regularly and in the ordinary course, and that no report was made that there was any water in it. The paper inside the casks was chemically tested and was found to have been wetted by salt-water. It is not even shown to any degree of certainty in what part of the hold and in what manner, these casks were loaded. It is said that they were in a compartment by themselves, separated from the rest of the hold by the casing of the engine shaft, and it may be accepted as proved that the damaged casks were in the two bottom tiers; the whole consignment being stowed in five tiers. But it is not all the casks in the two bottom tiers that are damaged, and it is not shown what was the position of the damaged casks in these two lower tiers.

There is no question, and the evidence for the ship owners themselves shows, that when the casks were taken out, they were stained; that staining was obvious; that anybody could see the staining looking at the casks; and that the stains were damp stains; and, in writing to the ship-owners, Mr. Mathew described the cement as "landed externally wet." The suggestion is that having been wetted before being loaded, these casks would begin sweating when unloaded in the damp atmosphere of Rangoon. They were landed in February.

It is suggested that it was the casks near the top of the barges that were damaged and the fact that these topmost casks would be stowed at the bottom of the hold, and that the two last tiers alone contained damaged casks, supports the suggestion that they were wetted while in the barges.

Mr. Russell, Marine Surveyor, in his Survey Report stated that the casks were all more or less damaged with water, and

the Survey Report by Lloyd's Agents is to the effect that the casks were all more or less outwardly damaged, apparently by water.

Considering, therefore, the evidence as a whole, we are unable to find that the ship-owners have discharged the burden that was on them. In our opinion, the evidence merely sets up theories which do not displace the onus. The ship had encountered very bad weather and, on the face of the clean Bill of Lading and the total absence of any evidence as to the condition of the casks when loaded, we do not think that the suggestions put forward amount to any proof that the casks were loaded in a damaged condition, but in a condition which the sihp-owners could not have discovered by any external examination.

The decree of the Court below will be confirmed, and this appeal must stand dismissed with costs throughout.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 54 OF 1923.
June 19, 1923.
Present:—Mr. Justice Daniels.
MITHU LAL AND ANOTHER—PLAINTIFFS—APPLICANTS
versus
SRI LAL—DEFENDANT—OPPOSITE PARTY.

Oaths Act (X of 1873), ss. 8, 9—Agreement to abide by oath of opponent, validity of—Ordinary oath—Court, whether can go behind agreement—Revision.

An agreement by a defendant in a suit to abide by the oath of one of the plaintiffs is binding, and the fact that the oath to be taken is in the ordinary form and is not specifically covered by sections 8 and 9 of the Oaths Act does not affect its validity. [p. 918, col. 2.]

Muhammad Asghar Ali Khan v. *Muhammad Imtiaz Ali*, A. W. N. (1898) 200, *Kesho Ram* v. *Peare Lal*, 71 Ind. Cas. 761; 21 A. L. J. 209; (1923) A. I. R. (A.) 443, followed.

In a suit on a pro-note, the defendant agreed to abide by the oath of one of the plaintiffs. The required oath was taken and, on the basis of this evidence, the Munsif decreed the suit. On appeal the District Judge remanded the case for further evidence on the facts;

Held, that the District Judge acted illegally and with material irregularity in entering into evidence on the question of consideration and in setting aside the decree of the Munsif. [p. 919, col. 1.]

Civil revision from an order of the Additional District Judge, Aligarh, dated the 3rd January 1923.

Mr. *Panna Lal*, for the Applicant.

Mr. *N. C. Vaish*, for the Opposite Party.

JUDGMENT.—This is an application for revision under the following circumstances. The suit was one on a pro-note. In the course of the suit defendant agreed to abide by the oath of one of the plaintiffs Mithu Lal. On a subsequent date, before the oath could be administered, he wished to withdraw from his application on the ground that Mithu Lal had been won over by the other plaintiff, his son, to swear a false oath. A witness was put in to prove this fact, but both the Courts below have concurred in rejecting his evidence as false. The plaintiff, Mithu Lal, took the required oath and on the basis of his evidence the learned Munsif decreed the suit. The defendant appealed to the District Judge. The District Judge agreed with the Munsif as to the worthlessness of the evidence of collusion but remanded the case to the Munsif to take further evidence on the facts. On the basis of this evidence the learned Judge came to the conclusion that in reality there was no consideration for the pro-note and that the statement made by Mithu Lal on oath was false. From this he came to conclusion that there must have been collusion between the two plaintiffs. Such a procedure on the part of the District Judge cannot be supported. It has the effect of entirely nullifying the agreement made by the defendant to abide by Mithu Lal's oath. The oath to be taken was in the ordinary form and may not be specifically covered by sections 8 and 9 of the Oaths Act. There is authority of this Court in the cases of *Muhammad Asghar Ali Khan* v. *Muhammad Imtiaz Ali* (1) and *Kesho Ram* v. *Peare Lal* (2), that this does not affect the validity of the agreement. If the Court, notwithstanding such an agreement, is to be at liberty to enter into evidence as to the

(1) A. W. N. (1898) 200.
(2) 71 Ind. Cas. 761; 21 A. L. J. 209; (1923) A. I. R. (A.) 443.

truth or falsehood of the statement made, the effect in substance is to wipe out the agreement altogether; it might not as well have been entered into. When a party agrees to abide by the oath of the other party or of any particular witness he clearly takes the risk of the witness swearing falsely. What he says in effect is, "Whatever this witness states on oath I am prepared to accept as true and to have the case decided on the basis of it." The Court below has in this case acted illegally and with material irregularity in entering into evidence on the question of consideration and in setting aside the decree of the Munsif. I accordingly allow the present application and setting aside the decree of the learned District Judge restore the decree of the Munsif. Under the special circumstances of the case, I make no order as to costs in this Court.

Application allowed.

K. S. D. & W. C. A.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 112 OF 1922.
April 4, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Beasley.

OFFICIAL ASSIGNEE—APPELLANT
versus
MOHAMED E. NAIKWARAH—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 52 (2) (c), applicability of—Goods in possession of insolvent—Consent of true owner, withdrawal of—Equitable mortgagee, whether true owner.

The pertinent words of section 52 (2) (c) of the Presidency Towns Insolvency Act are "by the consent and permission of the true owner." So long as the reputed owner is in possession with that consent and permission, and if he is so at the time of his insolvency, the goods will pass to the Official Assignee for the benefit of all the creditors of the insolvent. But if, prior to the insolvency, the true owner withdraws that consent and communicates that withdrawal to the insolvent, the goods can no longer be said to be in the possession, order, or disposition of the reputed owner so as to pass them to the Official Assignee. [p. 921, col. 2.]

If the true owner *bona fide* demands possession of the goods from the reputed owner, before the latter's insolvency, with a view to taking possession of the goods, though from no fault of his own he fails to get it, the goods are no longer in the possession of the insolvent with his consent. But a mere intention to demand the goods and to get possession of them is not sufficient, there must be a demand communicated to the insolvent. [p. 920, col. 2.]

(Indian and English Authorities discussed).

An equitable mortgagee of goods is the "true owner" of the goods within the meaning of section 52 (2) (c) of the Presidency Towns Insolvency Act. [p. 921, col. 2.]

Ex parte Union Bank of Manchester, In re Jackson, (1871) 12 Eq. 354; 40 L. J. Bk. 57; 24 L. T. 951; 19 W. R. 872, relied on.

First civil appeal against the judgment and decree of the late Chief Court of Lower Burma, passed in its Original Jurisdiction.

Mr. *Das*, for the Appellant.

Mr. *Leach*, for the Respondent.

JUDGMENT.

Robinson, C. J.—The present appeal deals with the right interpretation of section 52, (2) (c), of the Presidency Towns Insolvency Act. By this clause, there are included in the property of the insolvent "all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."

It is not contested before us that the insolvent is not to be regarded as the reputed owner of these goods, nor that the respondent must not be regarded as the true owner of them. The question that is argued before us is whether, in fact, these particular goods were in the possession, order, or disposition of the insolvent by the consent and permission of the true owner at the time the former was adjudicated insolvent.

The question is, whether, by making a demand for possession of the goods which was refused, and in particular by the letter of the 7th of June 1921, these goods did not cease to be in the possession, order, or disposition of the insolvent with the consent of the true owner.

We have been referred to a large number of English Authorities, but it is only necessary to deal with those which relate to goods. In *Smith* v. *Topping* (1) the

(1) (1833) 110 E. R. 939; 5 B. & Ad. 674; 2 N. & M. 421; 3 L. J. (N. S.) K. B. 47; 39 R. R. 616.

plaintiff was the true owner of three pipes and three hogsheads of wine. This wine had been deposited by the plaintiff in the cellars of the bankrupt and had remained in his possession as the reputed owner with the consent and permission of the plaintiff, the true owner. Hearing that the insolvent was in difficulties, the plaintiff's clerk went to the respondent's house and demanded the wine. The insolvent was at the time absent, but later in the day, the clerk made a further demand from the insolvent himself. The insolvent refused to give possession of the wine, and on the following day, he committed an act of bankruptcy. It was held that his demand for possession was sufficient to establish that thereafter the wine did not remain in the possession of the reputed owner by the consent and permission of the true owner. In *In re Eslick, Ex parte Phillips* (2), Eslick carried on business in Dean Street and resided in Seymour Street. He executed a bill of sale of his stock-in-trade in his shop and his furniture in his dwelling house to secure a debt. An agent of the bill-of-sale holder took possession of the stock-in-trade just before the debtor filed a liquidation petition, but he did not take possession of the furniture until after he had received notice of the filing of the petition. It was held that the taking possession of the stock-in-trade was sufficient to show that the consent of the true owner to the furniture remaining in the possession of the reputed owner had been withdrawn, and that, therefore, the property was not part of the property of the insolvent. In *Ex parte Ward, In re Coulston* (3), one *W* bought from *C* whisky in bond, to remain in bond to *C's* order rent-free for twelve months, after which warehouse rent was to be paid. The whisky lay to *C's* order at a dock warehouse. On the 19th of February 1872, *W* wrote to *C* directing him to forward a specified hogshead of the whisky, and enclosing a cheque of sufficient amount to pay duty and clear the whisky. On the 26th *C* filed a petition for liquidation, having retained the cheque, without paying the duty or in any way complying with *W's* directions. In the course of the judgment, Sir G. Mellish, L. J., said: "The question then is, was it at the time of the bankruptcy within the order and disposition of the bankrupts with the consent of the true owner? It is clear law, as laid down in *Smith* v. *Topping* (1) and other cases, that if the true owner *bona fide* demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not within the possession of the bankrupt with his consent." In *Brewin* v. *Short* (4) it was held that a mere intention to demand the goods and to get possession of them is not sufficient. But if, before the date of the fiat, and before notice of an act of bankruptcy, the true owner had *bona fide* demanded possession of the goods and communicated with the bankrupt, he had done that which would show that the goods did not remain in the bankrupt's possession, order, or disposition, with his consent and permission.

The provisions of the English Bankruptcy Law are *verbatim* the same as the section with which we have to deal. We have been referred to certain Indian rulings, and it has been argued that the reason for this provision of the Bankruptcy Law is that, where a man allows another to be in possession of his property, so that he would be regarded as the owner thereof, and thereby enables him to obtain credit, he must bear the loss of his property in favour of those who have been led to give the insolvent credit. And it is urged that a mere letter of demand which would be known to no one but the true owner and the reputed owner, is not sufficient to justify the true owner retaining his property and depriving those who have been led to give credit on the strength of the reputed ownership of the benefits of the proceeds thereof. In *In re Murray* (5) the facts were very different to those in the case before us. No reference was made to these English Authorities, but the case is clearly distinguishable in that it was held that the

(2) (1877) 4 Ch. D. 496; 46 L. J. Bk. 30; 35 L. T. 912; 25 W. R. 231.

(3) (1873) 8 Ch. 144; 42 L. J. Bk. 17; 27 L. T. 502; 21 W. R. 115.

(4) (1855) 119 E. R. 466; 5 El & Bl. 227; 24 L. J. Q. B. 297; 1 Jur. (N.S.) 798; 103 R. R. 450.

(5) 3 C. 58; 2 Ind. Jur. 255; 1 Ind. Dec. (N. S.) 629.

insolvent there was not only the reputed but also the real owner of the chattels in question. This provision of the law, therefore, could not apply. But, in any case, I must say, with the greatest respect, that I should hesitate, without much further consideration, in agreeing with this decision, in view of what is undoubtedly the interpretation placed upon this provision of law by the Courts in England. The facts in *In the matter of T. H. Marshall* (6) were also entirely different. That decision proceeded merely on the ground that the property was in the order and disposition of the insolvent; and that it would be unjust to apply the proceeds of these goods to satisfy the assignment to Mr. Boileau, which, he himself says, was kept secret. In *In the matter of Ambrose Summers* (7), where a letter of hypothecation, very similar to Exhibit A in the present case, had been executed but without hypothecating any future goods that might be bought, the true owner actually attempted to take possession of the goods but was resisted by the insolvent; he then placed *durwans* at the entrance of the insolvent's business premises. And it was held that enough was done to show that the business or stock-in-trade of the insolvent was not in the order and disposition of the insolvent at the date of his insolvency with the consent of the true owner. It was further held that the charge could only take effect upon the existing assets of the business at the time it was made.

The action by the true owner in this case was certainly more than that taken by the true owner in the appeal before us, but in other respects the authority follows the English decisions.

In *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar* (8) it was held, that a charge-holder is as much the substantial owner of, and has as substantial an interest in, the goods and chattels as a mortgagee thereof, and that it, either allows the mortgagor or the person creating the charge to remain in possession, under circumstances which will lead to his being the reputed owner and to his being enabled to command credit thereby he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee. And, further, that a debt is taken out of the order and disposition of an insolvent if a suit be brought to enforce a charge upon the debt prior to his adjudication.

The Indian Authorities, therefore, are not of great assistance in the decision of the present appeal. That an equitable mortgagee is the true owner to the extent of his interest was laid down in *Ex parte Union Bank of Manchester, In re Jackson* (9). In *In re Esdick, Ex parte Phillips* (2) it was pointed out that the pertinent words of the section are "by the consent and permission of the true owner." So long as the reputed owner is in possession with that consent, and permission, and if he is so at the time of the insolvency, the goods will pass to the Official Assignee for the benefit of all the creditors. But if, prior to the insolvency, the true owner withdraws that consent and communicates that withdrawal to the insolvent, the goods can no longer be said to be in the possession, order, or disposition of the reputed owner so as to pass them to the Official Assignee.

In the present case, the consent which had originally been given was expressly withdrawn, and a suit had been filed before the insolvency or simultaneously with it. And on the authorities referred to above, I am clearly of opinion, that it must be held that section 52 (2) (*c*) does not apply to the case.

The decision of the Court below was correct and must be confirmed, and this appeal is dismissed with costs throughout.

Beasley, J.—I concur.

Z. K. *Appeal dismissed.*

(6) 7 C. 421; 3 Ind. Dec. (N. S.) 820.
(7) 23 C. 592; 12 Ind. Dec. (N. S.) 394.
(8) 25 M. 408; 12 M. L. J. 282.
(9) (1871) 12 Eq. 354; 40 L. J. Bk. 57; 24 L. T. 951; 19 W. R. 872.

SRI RAM *v.* MANI RAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 154 OF 1922.

May 3, 1923.

Present:—Mr. Justice Kanhaiya Lal.

SRI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easements Act (V of 1882), s. 15—Easement, right of, how established—Alternative claims of ownership and easement, whether maintainable—Pleadings.

The enjoyment necessary to qualify for a right of easement, is different from actual user. [p. 923, col. 1.]

Koylash Chunder Ghose v. *Sonatun Chung Baroote*, 7 C. 132 at p. 135; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur. 642; 3 Ind. Dec. (N.S.) 635, relied on.

In order to establish a right to an easement, the enjoyment of it must continue for 20 years; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of 20 years. [p. 923, col. 1.]

Budhu Mandal v. *Maliat Mandal*, 30 C. 1077, *Ghasiram Mondal* v. *Asirbad Mahto*, 9 Ind. Cas 69; 13 C. L. J. 670; 15 C. W. N. 259, relied on.

Hollins v. *Verney*, (1884) 13 Q. B. D. 304; 53 L. J. Q. B. 430; 51 L. T. 753; 33 W. R. 5; 41 J. P. 580, distinguished.

A suit is not liable to be dismissed because the plaintiff claims, in the alternative, over the same plot of land both rights of ownership and of easement. [p. 923, col. 2.]

Narendra Nath Barari v. *Abhoy Charan Chattopadhya*, 34 C. 511; 4 C. L. J. 437; 11 C. W. N. 201; 1 M. L. T. 364 (F. B.), followed.

Second appeal from a decree of the District Judge, Meerut, dated the 1st December 1921.

Mr. *Hamid Hasan*, for the Appellants.

Mr. *S. D. Sinha*, for the Respondents.

JUDGMENT.—The question for consideration in this appeal is whether the plaintiffs have acquired by prescription a right to irrigate from the wells in dispute. Their allegation was that the wells in question had been constructed by the defendants jointly with them but they failed to prove that they had contributed to the expenses of the construction of those wells. The Courts below found that they have been irrigating certain fields from those wells partly from 1304 and partly from 1307 Fasli, that is, for a period of twenty years prior to the suit, whenever irrigation was needed, and that they had acquired a prescriptive right to irrigate those fields from those wells. It is urged on behalf of the defendants-appellants, that the plaintiff ought not to have been granted any relief on a ground not set up on the plaint and that the evidence adduced was insufficient to establish that there was a continued enjoyment for twenty years prior to the suit. In the plaint, the allegation put down by the plaintiff undoubtedly was that they were the joint owners of the wells in question, but they had also mentioned that they had all along irrigated the plots owned and possessed by them from the wells in dispute since the time of their construction without any obstruction or interference on the part of any of the defendants. They referred in support of their statement to the entries in the Revenue Records wherein the said enjoyment of the right of irrigation is said to have been noted. They further averred that they had legally acquired a right of irrigation from the wells aforesaid. Their suit was thus based practically on two different gounds, of which only the latter found favour with the Courts below. As observed in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1), a suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of land both rights of ownership and of easement.

As regards the period during which the right of irrigation has been enjoyed a statement was prepared by the Trial Court showing that certain plots enjoyed the benefits of irrigation from 1304 and 1307 Fasli. The Revenue Records for all the subsequent years were not filed; but from the entries made in such records of which copies were filed. The Courts below came to the conclusion that the rights of irrigation was enjoyed without any interruption or obstruction for the requisite period. The lower Appellate Court observed that it was not shown that if there were any temporary cessation, it was due to any action on the part of the defendants, and that it may well be that omission to take water may have been due to the fact that there may have been no need for it. Explanation II of section 15

(1) 34 C. 511; 4 C. L. J. 437; 11 C. W. N. 201; 1 M. L. T. 364 (F. B.).

of the Indian Easements Act of 1882, lays down that nothing is an interruption within the meaning of that section unless there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant. As held in *Koylash Chunder Ghose* v. *Sonatun Chung Baroole* (2) the enjoyment necessary to qualify for a right of easement is some- thing very different from actual user. In order to establish a right to an easement the enjoyment of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it, when necessary. In *Budhu Mandal* v. *Maliat Mandal* (3) it was similarly held that an easement may be established in respect of a right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation by means of embankments erected on the dominant tenement. It is immaterial whether the exercise of the right was continuous, provided it was excercised for the statutory period, during seasons of draught, when it could be taken advantage of. In *Ghasiram Mondal* v. *Asirbad Mahto* (4) it was similarly held that if the water of a tank was always used for irrigating the defendants' lands and there was a user by the defendants whenever it was necessary for a period of more than twenty years, the right to irrigate from the tank would be deemed to have been substantially enjoyed for the requisite period.

The decision in *Hollins* v. *Verney* (5) is not applicable, because there the question related to a right of way and there was evidence to show that between certain intervals the way was occasionally stopped up.

The defendant have failed to show that there has been an actual interruption in the exercise of the right of irrigation or that the plots in dispute were during certain years irrigated from other sources. There may have been no irrigation because of excessive rainfall or because of the land in question having been allowed to be fallow in certain yeras. In any case, in the absence of any proof of interruption, the plaintiffs are entitled to a prescriptive right to irrigate their lands from the wells in question, as they have been doing since 1304 and 1307 *Fasli*. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

M. A. A.

(2) 7 C. 132 at p. 135; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur. 612; 3 Ind. Dec. (N. S.) 635.
(3) 30 C. 1077.
(4) 9 Ind. Cas. 69; 13 C. L. J. 670; 15 C. W. N. 259.
(5) (1884) 13 Q. B. D 304; 53 L. J. Q. B. 430; 1 L. T. 753; 33 W.R. 5; 48 J. P. 580.

PATNA HIGH COURT.

CIVIL REVISION NO. 152 OF 1923.
July 3, 1923.
Present:—Mr. Justice Foster.

FIRM JUGAL KESHWAR-BHOLANATH —PETITIONERS

versus

FIRM KISHORI LAL-BEHARI LAL—OPOPOSITE PARTY.

Contract Act (IX of 1872), s. 119—Order for specified goods—Portion of goods delivered to defendant — Second consignment containing more than remaining portion—Defendant, whether justified in refusing to take delivery.

Plaintiff sued for recovery of money due on a balance of account in respect of the price of oil-cake supplied to defendant. It was pleaded that the agreement was for the sale of 500 bags that 250 had already been received; that the second consignment was of 290 bags, and that the defendant had the legal right to refuse this consignment:

Held, (1) that the contract was governed by section 119 of the Contract Act and the defendant was justified in refusing a consignment which contained more than the ordered goods;

(2) that a second offer made by the plaintiff's agent could not alter the rights and liabilities of the parties.

Civil revision from an order of the Subordinate Judge; Patna, dated the 17th February 1923.

KESHO DASS *v.* HANUMAN PANDAY.

Messrs. *G. S. Prasad* and *T. N. Sahai*, for the Petitioners.

Mr. *S. Dayal*, for the Opposite Party.

JUDGMENT.—This was a small cause tried by the Subordinate Judge of Patna. The plaintiff sued for recovery of money due on the balance of an account in respect of the price of oil-cake supplied to the defendant by the plaintiff. The defendant's answer was, that he had refused the oil-cake on several grounds, one of which was, that the agreement having been for the sale of 500 bags of oil-cake, and 250 bags having been already sent to and received by the defendant, the defendant had the legal right to refuse a second consignment which was not of 250 bags, but of 290 bags. The defence has been accepted and the suit has been dismissed. The plaintiff has come in revision and it is urged on his behalf that the Court entirely misunderstood the terms of the contract between the parties. In my opinion, the meaning of the contract could have been reasonably construed in more than one manner though of course only one can be correct. The construction put upon the contract by the learned Subordinate Judge was a reasonable construction based upon the correspondence which passed between the parties. Having found the contract to be for 500 bags the Court had the right to apply the terms of section 119 of the Indian Contract Act, which was the defence taken by the defendant. It is urged further that a witness who was examined on commission gave some evidence which, if accepted, would have altered the decision. That witness deposed that the plaintiff's agent came to the place to which the oil-cake had been consigned, and took delivery after the defendants had refused it and thereupon the plaintiff's agent offered to reduce the consignment to 250 bags. I am not persuaded, that his evidence has been overlooked and in any case I do not see how a second offer made by the plaintiff's agent could have altered the rights and liabilities of the parties. The petition is dismissed with costs. Hearing fee two gold *mohurs*.

Petition dismissed.

W. C. A.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1773 OF 1921.

May 16, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Babu KESHO DASS—DEFENDANT—APPELLANT

versus

HANUMAN PANDAY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 4, 158—"Land," meaning of—Proprietary rights, whether can be acquired in groves.

"Land," as defined in section 4 of the Tenancy Act, is limited to land which is let or held for agricultural purposes, and does not include areas covered by groves. [p. 925, col 1.]

Kesho Parsad Singh v. *Sheopargash Ojha*, 64 Ind. Cas. 248; 19 A. L. J. 749; 44 A. 19; 3 U. P. L. R. (A.) 117; (1922) A. I. R. (A.) 301 (F. B.), followed.

Section 158 of the Tenancy Act has not application to groves, and proprietary rights therein cannot be acquired.

Second appeal from a decree of the District Judge, Ghazipur, dated the 13th of June 1921.

Mr. *Harendra Krishna Mukerji*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This was a suit under section 158 of the Tenancy Act for a declaration that the plaintiffs had acquired under-proprietary rights under that section on the ground that the land in suit had been held rent-free for over 50 years and by two successors of the original grantee. The suit has been decreed by both the Courts below. The land is admittedly covered by a grove and the contention of the appellant is that Chapter X of the Agra Tenancy Act in which section 158 occurs does not apply to groves.

The land in suit is said to have been granted to the predecessor of the plaintiffs under a written *danpatra* about 100 years ago. Both the Courts have found that the grant is genuine. The terms on the grant are re-produced in paragraph 1 of the plaint. They give the grantee the right either to use the land for cultivation or to plant it with a grove. The grantee did in fact plant a grove on it. Both in the plaint and the written statement the land is described as grove, and the finding of the Court below is that the land is admittedly grove land and has been held as such from the time of the last revision

of records, which was between 30 and 40 years ago.

Land as defined in section 4 of the Tenancy Act is limited to land which is let or held for agricultural purposes, and it has been held in several decisions of this Court that this definition does not include areas occupied by groves. It is unnecessary to refer to the earlier decisions as the question has been finally set at rest by the Full Bench decision in *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (1).

The learned District Judge gets out of this difficulty very summarily. He says that the land was not let to be turned into a grove but was let for agricultural purposes and, therefore, it is "land." It is difficult to see how the learned Judge could say this in face of the express terms of the title-deed which is the basis of the plaintiffs' claim and of the plaintiffs' own admission in paragraph 1 of the plaint. But even if it had been correct it would not dispose of the case. As soon as the *zemindar* allowed the grantee to convert the land into grove it would cease to be land held for agricultural purposes within the meaning of the definition. But assuming that we hold that on the pleadings and the plaintiffs' title-deed it was not open to the District Judge to come to this finding, the respondents are prepared to support the decree on the ground that the restricted definition of "land" contained in the present law was not to be found in the Rent Act of 1881. Under that Act "land" included groves. They rely on section 30 of that Act and contend that they had acquired under-proprietary right under clause (*d*) before the present Tenancy Act came into force. This is a new case put forward for the first time in second appeal and the answer to it is that in order to succeed under section 30 (*d*) of the Rent Act of 1881 it was necessary for the plaintiffs to show that the land had been held rent-free and by at least two successors to the original grantee for 50 years prior to the 22nd December 1873. It has not been found by either Courts that this was the case and we have not been referred to any evidence on which such a finding could be based. We think, therefore, that the appeal must succeed and it is not necessary to go into the further point urged by the appellant that even on the finding of the Court below the land is not really held rent-free. It is no doubt shown in the papers as grove not assessed to rent (*bila lagani*) but it is also found by the Court below that according to the *wajib-ul-arz* all groves not assessed to rent pay half their produce to the proprietor. There is on the record a judgment of this Court in Civil Revision No. 31 of 1912 between the defendant and the father of the plaintiffs upholding a decree in favour of the former for a claim to produce of the grove by way of rent.

We allow the appeal and setting aside the decree of the Court below dismiss the suit with costs in all Courts.

Appeal allowed.

M. A. A. & W. C. A.

(1) 64 Ind. Cas. 248; 19 A. L. J. 749; 44 A. 191; 3 U. P. L. R. (A) 117; (1922) A. I. R. (A) 301 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 368 OF 1920.

April 6, 1922.

Present:—Mr. Justice Cuming and Mr. Justice Panton.

KRISHNADAS ACHARJEE CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAMSAN ALI SHEIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, competency of—Order of Special Judge refusing to set aside abatement of an appeal—Bengal Tenancy Act (VIII of 1885), ss. 105, 109 A.

An appeal lies to the High Court from an order of a Special Judge refusing to set aside the abatement of an appeal pending before him and arising out of a suit under section 105 of the Bengal Tenancy Act.

Appeal against an order of the Special Judge, Mymensingh, dated the 13th August, 1920.

Babus *Jogesh Chandra Roy* and *Prokash Chunder Majumdar*, for the Appellants.

Babu *Ramendra Mohan Majumdar*, for the Respondents.

JUDGMENT.—A preliminary objection was made that no appeal lies to this Court. The argument put forward was that this is an order passed by the Special Judge. The only section which applies to appeals from Special Judge is section 109A of the Bengal Tenancy Act, and that as section 109A applies only to appeals from appellate orders, and as this is not an appeal from appellate order but from an order no appeallies; and in support of this contention he has relied on the rulings in *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose* (1), and *Mathura Nath Roy* v. *Basanta Kumar Chakravarti* (2). As against this the appellant has relied upon the ruling in *Manmotha Nath Dey* v. *Gadadhar Manna* (3). This latter case is similar in many respects to the present case. In view of this authority we are of opinion that the appeal does lie in the present case.

This is an appeal from an order refusing to set aside the abatement of an appeal. The facts appear to be these. The plaintiffs, who are the appellants before this Court, brought a suit under section 105 of the Bengal Tenancy Act before the Assistant Settlement Officer. This suit was dismissed and the plaintiffs appealed to the Special Judge. While the appeal was pending on the 15th May the Pleader for the respondents Nos. 22 and 25 informed the Court that the respondent No. 1 had died in the month of Pous and respondent No. 5 died in the month of Aghran. On the 15th June the appellants put in an application for substitution of certain persons in the place of respondent No. 1 and respondent No. 5 and the learned Special Judge passed the following order: "No. 5 died in Aghran last; six months having elapsed the appeal abates in respect of respondent No. 5. Respondent No. 1 was reported to have died in Pous last. Substitution be made in his place." Against the order of abatement in the case of respondent No. 5 the appellants moved the Special Judge and the Special Judge passed the following order on the 13th August 1920: "Heard the Pleaders. It is argued that appellant had sufficient ground under section 5 of the Limitation Act for not substituting the respondent. But I find in fact that they let two dates fixed for hearing pass after they had been informed of the death before they attempted to make the substitution. The application is rejected."

We think on looking at the facts of the case that the order of abatement was improperly made and the learned Special Judge should have granted the application to set aside the order of abatement. There was no material before the Court to justify the Court in holding that the appeal had abated against the respondent No. 5. There was no evidence to show and no allegation as to what date in Aghran the respondent No. 5 died. Had respondent No. 5 died in the last date of Aghran which corresponds to 16th December the application for substituton of his heirs which was made on the 15th June would be within time. The learned Special Judge was not justified in assuming that the respondent did not die on the last date of Aghran.

The appeal will, therefore, succeed and the order of the 13th August 1920 refusing to set aside the abatement will be set aside and the abatement will be set aside and the appeal will be restored and the heirs of the deceased respondent No. 5 will be substituted in his place.

The appellants are entitled to their costs in both Courts. We assess the hearing fee in this Court at one gold *mohur*.

B. N. *Appeal allowed.*

(1) 7 C. W. N. 440.
(2) 2 Ind. Cas. 572; 36 C. 512.
(3) 41 Ind. Cas. 751; 45 C. 638; 28 C. L. J. 155.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 309 OF 1922.

May 23, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

BETI MAHALAKASHMI BAI AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

Chaudhari BADAN SINGH AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145, object of—"Personally," meaning of—Liability of surety, whether limited—Security, how enforced.

The object of section 145, Civil Procedure Code, is to provide that where a person has become liable as a surety for the performance of a decree or for the restitution of any property taken in execution of a decree or for the payment of any money or for the fulfilment of any condition imposed in any suit or proceeding the party for whose benefit the security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety has been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. [p. 927, col. 2]

The word "personally" in section 145 of the Civil Procedure Code does not limit the enforcement of the security to a personal liability of the surety. [p. 928, col. 1.]

A security bond executed in favour of a Court for the performance of a decree can be enforced by the Court in the same way as a decree.

Execution first appeal from a decree of the Subordinate Judge at Mainpuri, dated the 24th of April 1922.

Dr. *K. N. Katju* and Mr. *Ladli Prasad Zotshi*, for the Appellants.

Messrs. *Kumuda Prasad* and *Gajadhar Prasad*, for the Respondents.

JUDGMENT.—This is an appeal from an order refusing to enforce a security bond, filed under O. XLI, r. 5, Civil Procedure Code, by an execution proceedings. In the course of an appeal pending in this Court an order for the stay of execution of a decree for costs was obtained by the judgment-debtor pending the decision of that appeal and a security bond executed by him and his surety Chaudhri Badan Singh was filed whereby the latter agreed to stand security for Rs. 15,000 and hypothecated certain property for the payment of the same in case the money which may be found due under the decree was not realised from the judgment-debtor. The security bond stated: "We the executants willingly give security for Rs. 15,000 and after hypothecating the property specified below agree that if the Appellate Court affirm the decree of the Court of first instance, then I Rao Narsing Rao will duly carry out the decree of the Appellate Court and whatever costs may be allowed under the said decree on account of the costs of the Trial Court and of the Appellate Court shall be paid by me (Rao Narsing Rao) with interest irrespective of the above mentioned security for Rs. 15,000. If Rao Narsing Rao does not do so, then the sum which may be due under the decree may be realised from the hypothecated property of the executants."

The Court below has found that no personal liability was undertaken by the surety under the above deed and that the only remedy of the decree-holder was to enforce the mortgage security by a separate suit for sale. Section 145, Civil Procedure Code, provides that where any person has become liable as a surety for the performance of any decree or any part thereof or for the restitution of any property taken in execution of a decree or for the payment of any money or for the fulfilment of any condition imposed in any suit or proceeding, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees, and such person shall, for the purposes of the appeal, be deemed a party within the meaning of section 47. The object of this section is to provide that, where a person has become liable as a surety, for the performance of a decree or for any of the pruposes above specified, the party for whose benefit the security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perfrom the obligation undertaken by him. Section 253 of the old Code of Civil Procedure was limited to cases where a security bond was filed for the performance of a decree and authorised the enforcement thereof against the surety to the extent

to which he had rendered himself liable in the same manner as a decree could be executed against the defendant. In the clause "to the extent to which he has rendered himself liable" the word "personally" was added by the present Code of Civil Procedure, but by the addition of that word it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms Nos. 2,3 and 4 of Appendix G appended to the Code of Civil Procedure provide for the hypothecation of property to secure the performance of the obligation undertaken by the surety. The personal or individual liability of the surety under the security bond may not, always, be as extensive as that of the judgment-debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond. Beyond a statement that the surety willingly gave security for Rs. 15,000, there was nothing in the terms of the present bond to indicate that he undertook a personal liabil ty. On the other hand, there was a clear indication that the money which may be found due on the decree passed in appeal would be realizable in the first instance from the judgment-debtor, and that if the judgment-debtor did not pay the same it would be recoverable form the property hypothecated by the surety. There was no personal covenant by the surety to pay the same in case the hypothecated property was found to be insufficient. The only question for consideration in these circumstances is whether section 145, Civil Procedure Code, is applicable and whether the security bond can be enforced by an application for the execution of the decree. The security bond does not purport to have been executed in favour of the decree-holder. It contains an undertaking given to an Appellate Court which granted the stay of execution subject to the production of such security, and as held in the case of *Janki Kuar* v. *Sarup Rani* (1) such a bond can be enforced by the Court below in the same way as a decree. In the case of *Mukta Prasad* v. *Mahadeo Prasad* (2) a similar view was taken. In the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (3), their Lordships of the Privy Council allowed the security bond to be enforced in somewhat similar circumstances against the hypothecated property without a separate suit for sale.

The Court below refers to the decision in the case of *Amir* v. *Mahadeo Prasad* (4), but in that case the equity of redemption in the hypothecated property had passed from the surety to a third person who could not be treated for the purposes of section 145, Civil Procedure Code as a party to the decree and against whom the security could not have been enforced except by a separate suit for sale. In the case of *Shyam Sundar Lal* v. *Bajpai Jainarayan* (5), and in the case of *Subramania Chettiar* v. *Rajeswara Sethupathi* (6), security bonds hypothecating immoveable property as security for the due performance of a decree have been allowed to be enforced by execution without a separate suit being considered necessary. Where the equity of redemption is still held by the surety the surety is the primary person from whom the amount of security can be recoverd, and section 145, Civil Procedure Code, is intended to enable the enforcement of such security. The appeal is, therefore, allowed with costs in this Court on the higher scale and the order of the Court below set aside and the case is remanded to that Court with a direction to re-instate it under its original number and to proceed with the disposal of the matter in accordance with law.

K. S. D. & W. C. A. *Appeal allowed*

(1) 17 A. 99; A. W. N. (1895) 191 8 Ind. Dec. (N. S.) 389.

(2) 33 Ind. Cas. 982; 38 A. 327; 14 A. L. J. 385.

(3) 55 Ind. Cas. 550; 42 A. 158; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 46 I. A. 228; 13 L. W. 82 (P. C.).

(4) 38 Ind. Cas. 33; 39 A. 225; 15 A. L. J. 76.

(5) 30 C. 1060; 7 C. W. N. 914.

(6) 43 Ind. Cas. 187; 41 M. 327; 6 L. W. 762; (1917) M. W. N. 872; 34 M. L. J. 84.

HEMENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DATTA.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 222 AND 223 OF 1921.

March 2, 1923.

Present :—Mr. Justice C. C. Ghose and Mr. Justice Panton.

HEMENDRA LAL SINGH DEO—DEFENDANT—APPELLANT

versus

FAKIR CHANDRA DATTA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 4, 12, O. XXXIV, rr. 4, 5—Mortgage suit—Compromise decree—Preliminary and final decree—Death of plaintiff and defendant—Abatement—Execution proceedings.

During the pendency of an appeal preferred against a mortgage decree the parties agreed that the plaintiff should get a decree for a sum very much less than that payable under the decree of the Trial Court, that the said sum should be paid by the defendant within two years, and that in default of payment within two years, the amount would be realised by sale of the properties mentioned in the plaint. A decree was passed in accordance with this agreement. No payment was made by the defendant within the period of two years specified in the decree. After the expiry of this period the plaintiffs applied for execution of the decree. In the meantime, the defendant and one of the plaintiffs had died and no application had been made, within limitation, to bring their legal representatives on the record. On the objection of the legal representatives of the defendant that the suit had abated:

Held, (1) that the intention of the parties, so far as it could be gathered from the compromise decree, was that in consideration of the decretal amount having been reduced and a longer period than six months allowed for payment, the defendant had waived the advantage of the rule of law requiring a preliminary decree to be made final before execution could be levied, and that immediately on the expiration of two years from the date of the decree, the plaintiffs would be competent to realise the moneys due to them by the sale of the properties mentioned in the plaint; [p. 931, col. 1.]

(2) that the compromise decree was not, therefore, a preliminary decree which required to be made final, but had put an end to the suit; [p. 931, col. 1.]

(3) that there being no suit pending after the compromise decree there could be no abatement by reason of the death of the defendant and of one of the plaintiffs;

(4) that the provisions of O. XXII, rr. 3 and 4 of the Civil Procedure Code were not applicable to execution proceedings and no question of abatement could, therefore, arise with respect to the plaintiffs' application for execution.

Appeals against orders of the Subordinate Judge, Bankura, dated July 20, 1921.

Dr. *Dwarkanath Mitter* (with him Babus *Hamendra Nath Sen*, *Bankim Chandra Mukherjee* and *Sukhamay Chatterjee*), for the Appellant.

Babus *Ram Chandra Majumdar* (with him Babu *Nagendra Ghosh*), for the Respondent.

JUDGMENT.—The defendant is the appellant before us and the facts which have given rise to this appeal, shortly stated, are as follows. On the 17th April 1913 the plaintiffs obtained a preliminary decree in a mortgage suit for Rs. 1,08,964-9-5 against the defendant in the Court of the Subordinate Judge of Bankura. An appeal was carried against the said decree to this Court, being Appeal No. 39 of 1914, by the defendant, Raja Mahendra Lal Singh Deo. This appeal came on for hearing before Mr. Justice Fletcher and Mr. Justice Shams-ul-Huda on the 10th January 1918 when a petition was put in on behalf of both parties to the effect that it had been agreed between the parties that the plaintiffs would get a decree for Rs. 70,000 inclusive of all costs and interest up to the said date, and that the said amount would be paid by the defendant, Raja Mahendra Lal Singh Deo, within two years therefrom with interest at the rate of Rs. 4-8-0 per cent. per annum till realization, and that in default of payment within the said period of two years, the said amount of Rs. 70,000. with interest at the said rate till realization, would be realized by the sale of the properties mentioned in the plaint. Thereupon, it was ordered that the said petition should be filed as of record and that the defendant and the plaintiffs should give effect to and be bound by the terms thereof. The plaintiffs were not paid any portion of the moneys due to them under the decree of this Court dated the 10th January 1918, within two years from that date, but it appears that one of the plaintiffs, Prayag Chandra Dutt, died on the 26th Jaistha, 1326 B. S., corresponding with the 9th June 1919, leaving him surviving his sons, Radha Raman Dutt, Sham Sundar Dutt and Jalad Baran Dutt, as his heirs and legal representatives and that the defendant

Raja Mahendra Lal Singh Deo died on the 3rd December 1920, leaving him surviving his son Hamendra Lal Singh Deo as his heir and legal representative. On the 3rd June 1921 the plaintiffs applied for an order for the substitution on the record of the heirs of the deceased plaintiff and of the heir of the deceased defendant. The heir of the deceased defendant who was sought to be substituted on the record opposed the application on the ground that it was barred by limitation, but on the 20th of July 1921, the learned Subordinate Judge by his order of that date held that, having regard to the terms of the decree of this Court which finally disposed of the suit instituted by the plaintiffs, there was no pending suit in which the application for substitution of the heir of the deceased plaintiff and of the heirs of the deceased defendant was entertainable. The learned Subordinate Judge further held that the plaintiffs might execute the decree by making proper substitution in an application for execution of the decree. Thereupon, the plaintiffs applied for execution of the decree in question and it was ordered on that application that after the necessary substitutions had been made notices should issue under O. XXI, r. 22 of the Code of Civil Procedure.

Against the last mentioned order the Appeal No. 222 has been preferred, while against the order previously referred to, Appeal No. 223 has been preferred. There is also a connected rule, being Rule No. 539 of 1921, under which further proceedings have been stayed. On behalf of the appellant it has been contended before us that the decree made on the 10th January 1918, by Mr. Justice Fletcher and Mr. Justice Shams-ul-Huda was in substance and in form a preliminary decree in a mortgage suit and that a final decree had still to be made in the suit before the plaintiffs could realise the moneys due to them by the sale of the properties mentioned in the plaint and that, inasmuch as the deceased plaintiff's heirs had not been brought on record within a period of six months from the date of the death (that being the period under the Limitation Act before the last amendment), and the deceased defendant's heir had not been brought on record within three months from the date of the death (that being the period under the present Limitation Act), the plaintiffs' remedies, if any, were barred. It is argued that, assuming that a final decree had to be made if the heir of the sole judgment-debtor was not brought on the record within the time limited by law, O. XXII, r. 4 of the Code of Civil Procedure applies and the mortgage suit abates, and in support thereof reference is made to the case of *Bhutnath Jana* v. *Tara Chand Jana* (1). Our attention has also been invited to the case of *Dakoju Subbarayudu* v. *Mustl Rama Dasu* (2) as to the effect of the deceased plaintiff's heirs not having been brought on the record within the time limited by law. It is further argued that if the application of the 3rd June 1921, referred to above, is treated as an application for execution of the decree, then time ran from the date of the decree made by this Court and not from the expiration of two years from that date, and in support thereof the judgment of their Lordships of the Judicial Committee in case of *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (3) was referred to, the contention being that the application was barred under the three years' rule. A further point was taken on behalf of the appellant that, having regard to the language of section 45 of the Indian Contract Act, one plaintiff having died and his heirs not having been substituted, the entire suit had abated. On behalf of the respondent it has been argued that the decree, made by this Court on the 10th January 1918, was in no sense a preliminary decree in a mortgage suit as contemplated by O. XXXIV, r. 4, of the Code of Civil Procedure; it was in no sense a conditional decree, and that the rule that the decree-holder in a mortgage

(1) 59 Ind. Cas. 177; 33 C. L. J. 115; 25 C. W. N. 595.

(2) 68 Ind. Cas. 942; 45 M. 872; 15 L. W. 309; 42 M. L. J. 301; 30 M. L. T. 202; (1922) M. W. N. 375; (1923) A. I. R. (M) 237.

(3) 74 Ind. Cas. 660; 49 C. 203; 48 I. A. 335; 4 U. P. L. R. (P. C.) 57; 30 M. L. T. 96; 24 Bom. L. R. 659; (1922) M. W. N. 338; 26 C. W. N. 858; (1922) A. I. R. (P. C.) 187 (P. C.).

suit ought not to be ordinarily allowed without previous notice to the judgment-debtor to take out execution on the allegation that the condition or contingency has been fulfilled, was excluded in this case by the consent of the parties. It was further contended that having regard to the terms of the compromise decree and having regard to the provisions of O. XXII, r. 12, Civil Procedure Code; it was unnecessary in execution proceedings to apply for substitution of the heirs of the deceased plaintiff and of the deceased defendant and that it was open to the plaintiffs to proceed to levy execution immediately on the expiration of two years from the date of the compromise decree.

The question really depends upon the view which may be taken of the nature of the decree made by this Court on the 10th January 1918. If it was merely a preliminary decree in a mortgage suit then, obviously, it follows that before execution could be levied, an order under O. XXXIV, r. 5, Civil Procedure Code, making the preliminary decree final had to be obtained and in that view of the matter the plaintiff would no doubt be in considerable difficulty, having regard to the events which had happened. If, however, the ingredients of a preliminary decree in a mortgage suit are absent from the compromise decree in this case, if for the consideration of a reduction of interest from 12 per cent. to 4½ per cent. and of the principal and interest from Rs. 1,40,758 to Rs. 70,000 and for the further consideration of an unusual extension of the period of grace from six months to two years for the re-payment of the principal and interest due on the mortgage-bond, the defendant chose to waive the advantage of the rule of law requiring preliminary decrees to be made final before execution could be levied, then does it lie in the mouth of the present appellant to argue that, without more, the compromise decree is incapable of execution? We are of opinion that the intention of the parties, as far as the same can be gathered from the compromise decree, was that immediately on the expiration of two years from the date of the decree, the plaintiffs would be competent to realize the moneys due to them by the sale of the properties mentioned in the plaint. If that is so, it follows that, under the provisions of O. XXII, r. 12, Civil Procedure Code, it was unnecessary to apply in the suit, which had come to an end, for substitution of the heirs of the plaintiff and of the deceased defendant and we think that the orders passed by the Subordinate Judge on the 26th July 1921, allowing the execution to proceed cannot be seriously objected to. In this view of the matter, it becomes unnecessary for us to discuss at any length the questions raised in the elaborate argument on behalf of the appellant. We will content ourselves by remarking that in the special circumstances of this case the question of limitation in the form in which it was raised in the case of *Saohindra Nath Roy* v. *Maharaj Bahadur Singh* (3) has no application.

The result, therefore, is that these appeals fail and must be dismissed with costs which we assess at 5 gold *mohurs* in each appeal.

The Rule also fails and is accordingly discharged.

The records will be returned to the lower Court without delay.

Z. K.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1579 OF 1921.
May 28, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

JAGESOR PANDE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DEO DAT PANDE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by manager of joint family—Co-parceners, whether can contest—Reversioner, right of, to challenge alienation.

An alienation by the manager of a joint Hindu family without necessity is not void but voidable only at the instance of persons whose interests are affected by it, namely, the co-parceners in the property.

Subbe Goundan v. *Krishnamachari*, 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922)

JAGESOR PANDE *v.* DEG DAT PANDE.

A. I. R. (M) 112, *Ramaswami Aiyar* v. *Subramania Aiyar*, 74 Ind. Cas. 804; 46 M. 47; 16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M) 147, *Sheo Ghulam* v. *Badri Narain Lal*, 19 Ind. Cas. 560; 11 A. L. J. 798, relied on.

A reversioner has no right to challenge an alienation made by a father as manager of a joint Hindu family which the son, who had a right to challenge it, did not challenge during the father's life-time.

Second appeal from a decree of the Subordinate Judge, Basti, dated the 9th of July 1921.

Mr. *N. Upadhia*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This case has been referred to a Bench because the precise point has not been previously decided. The question is whether the reversioner has a right to challenge an alienation made by the father as manager of a joint Hindu family which the son, who had a right to challenge it, did not challenge it during the father's lifetime. The facts are these. Mahabir Pande and his minor son, Bansgopal, constituted a joint Hindu family. Mahabir Pande, on 2nd February 1917, made a gift of the suit property to his wife, *Musammat* Ramraji. The deed of gift purported to constitute her full owner of the property. Mahabir died shortly after making the gift. Bansgopal died in November 1917. On 3rd May 1920 *Musammat* Ramraji executed a deed of conditional sale in favour of the defendant for a sum of Rs. 316. The plaintiff, who is the next reversioner, sues, on the assumption that *Musammat* Ramraji held only the estate of a Hindu widow or a Hindu mother, for a declaration that the deed of conditional sale is not binding on him after *Musammat* Ramraji's death.

The question, therefore, is whether the plaintiffs are entitled to challenge the deed of gift. If *Musammat* Ramraji had a good title under the deed of gift, she was entitled to deal with the property as she liked. If the plaintiffs can claim the same right as Bansgopal had to challenge the gift, then the defendant will have to justify it on the ground of legal necessity. It has been found by the Court below that there was legal necessity to the extent of Rs. 259 out of Rs. 316, but both the Courts below have dismissed the suit on the ground that the plaintiffs are not entitled to challenge the deed. With this finding we agree. No authority for the right claimed by the plaintiffs has been shown to us either in the Hindu texts or in the decided cases. There is ample authority for the view that an alienation by the manager of a joint Hindu family without necessity is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely, the co-parceners in the property. This has been held in two recent Madras cases [*Subbe Goundan* v. *Krishnamachari* (1) and *Ramaswami Aiyar* v. *Subramania Aiyar* (2).] The point was of importance, as on it depended whether the persons setting aside the alienation were entitled to mesne profits from the date of the alienation, or only from the date of repudiation. There is authority of this Court to the same effect in *Sheo Ghulam* v. *Badri Narayan Lal* (3).

The interests of the plaintiffs were in no way affected by the deed of gift when it took place. They had no right in the property whatever during the lifetime of either Mahabir or his son. It would be giving a great and unwarranted extension to the rights of reversioners as hitherto understood to allow them the right to challenge an alienation under the circumstances found in the present case. In our opinion the decision of the Courts below is correct, and we accordingly dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112.

(2) 74 Ind. Cas. 804; 46 M. 47; 16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M) 147.

(3) 19 Ind. Cas. 560; 11 A. L. J. 798.

MAUNG PO MAUNG v. MA PYIT YA.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 192 OF 1921.

April 4, 1923.

Present:—Mr. Justice Heald and Mr. Justice Lentaigne.

MAUNG PO MAUNG AND ANOTHER—PLAINTIFFS—APPELLANT

versus

MA PYIT YA (*alias*) MA THEIN TIN—DEFENDANT—RESPONDENTS.

Chinese Buddhist Law—Custom—Succession—Widow, position of—Chinese Buddhist widow marrying Burman, death of—Inheritance—Rule applicable—Marriage—Chinese Buddhist widow, whether can re-marry—Cohabitation—Presumption.

A Chinese widow can marry again after the period of mourning for her first husband has elapsed. [p. 934, col. 1.]

Cohabitation over a period of years where there is no impediment to marriage raises a presumption of marriage. [p. 934, col. 2.]

Succession to the estate of a Chinese Buddhist widow who subsequently married a Burman is governed by the Chinese Customary Law.

According to the Chinese Customary Law the rule of inheritance is that, when a man dies his property is equally divided among all his sons; daughters succeed only when there are no sons, and the widow succeeds only when there are neither sons nor daughters. If there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests in the children and not in the widow. [p. 934, col. 2.]

Case-law discussed.

Under the Chinese Customary Law property which a woman brings to the marriage or which she acquires during the marriage belongs to her husband. [p. 936, col. 1.]

First appeal against the judgment and decree of the District Court, Pegu, in Civil Regular No. 56 of 1920.

Mr. *Ba Si*, for the Appellant.

Sir *Robert Giles*, for the Respondent.

JUDGMENT.

Heald, J.—Appellant's case was that Ma Sonna, a Chinese woman, who was the widow of a China-man by whom she had one child, the respondent, became a Burmese Buddhist and married the first appellant who is a Burmese Buddhist, that the second appellant was the child of that union, that disputes had arisen between the parties and had been referred to arbitration, that as a result of the arbitration a deed of partition had been executed, that respondent had dishonestly and fraudulently taken possession of the properties left by Ma Sonna, and refused to recognise the arbitration and partition, that appellants had applied unsuccessfully to have the arbitrator's award, which was verbal, filed in Court, and that they were entitled either to have a decree in accordance with the award or the partition-deed, or else to have Ma Sonna's estate administered by the Court and to receive their shares of that estate.

Respondent, who is a girl of eleven years of age, represented by a guardian *ad litem*, filed a written statement denying that her mother ever became a Burmese Buddhist or married the first appellant and claiming that she was Ma Sonna's sole heir. She alleged that the first appellant had dishonestly and fraudulently taken possession of certain properties belonging to Ma Sonna's estate. She denied that there was any arbitration or partition such as appellants alleged, but she admitted that appellants had attempted to get an alleged award filed in Court and said that even on appellants' case that award was invalid and would be detrimental to her interests.

It was common ground that Ma Sonna's previous husband was a China-man who followed the Buddhist religion as practised by Chinaman, and that Ma Sonna was a Chinese woman who, at any rate while she was married to her Chinese husband, followed the same religion.

The Court found that Ma Sonna was a Chinese Buddhist up to the time of her death and that she never became a Burmese Buddhist. It found, nevertheless, that there was a valid marriage between the first appellant and Ma Sonna and that appellants were entitled to share with respondent in the property left by Ma Sonna. It found further that of the property which came to Ma Sonna from her Chinese husband the second appellant was entited to one-third and respondent to two-thirds and that of property subsequently acquired by Ma Sonna appellants were entitled to one-third each and respondent to one-third.

Respondent applied for a review of judgment and on that review the Court altered its finding and held that respondent was entitled to the whole and not to only

two-thirds of the property which came from the Chinese husband.

The Court then proceeded to enquire which properties came from the Chinese husband and which belonged to Ma Sonna he self, and in the result gave appellants a decree for Rs. 1,000 and respondent a decree for po sess on of a house and a safe.

Appellants appeal on the ground that Ma Sonna was a Burmese Buddhist at the time of her death and that under Burmese Buddhist Law they were entitled to seven-eights of her estate or if Chinese Law should be appl ed the first appellant, being her husband, should get the whole of it, that Ma Sonna was ent tled to inherit all her Chinese husband's property, that the alteration in its judgment which the Court made on review was mistaken, that its decision, that respondent was entitled to the whole of the property which came from her father was wrong, that the second appellant's interest in the various properties was not properly considered and that the decision was unfair to her, that the appellants' classification of the property should have been accepted, and that a money decree ought not to have been given.

Respondent filed a cross-objection to the Court's find ng that Ma Sonna was the first appellant's wife, and to the money decree in his favour.

The appeal has been argued in this Court almost entirely on the question of what law ought to be applied, but it is necessary to cons der also what are the facts to which that law is to be appl ed.

It cannot be contested that a Chinese widow can marry again (*a*), at any rate, after the period of mourning for her husband has elapsed, and it is not suggested that Ma Sonna married the first appellant within three years of her Chinese husband's death. There was, therefore, no impediment on her side to a legal marriage with the first appellant, and no impediment on his side has been alleged. Cohabitation over a period of years where there is no impediment to marriage raises a presumption of marriage and in th s case such cohabitation is admitted and although Ma Sonna may have been ashamed of her connection with the first appellant, second marriages of widows being regarded by the Chinese as disreputable, I am of opinion that the lower Court was right in finding on the evidence that there was a legal marriage.

The lower Court was also right in finding that it was not proved that Ma Sonna, who was Chinese by birth and was admittedly already a Buddhist by relig on, ever became a Burmese Buddhist. Being already a Buddhist, there was no reason why she should change her religion, and I know of no authority for the suggestion that the mere fact of her mar iage to a Burman altered her nationality from Chinese to Burmese.

It appears from the works of Jernigan and Alabaster (*b*) that, according to the Chinese Customary Law, the rule of inheritance is that when a man dies his property, real and personal, is equally divided among all his sons, that daughters succeed only when there are no sons, and that the widow succeeds only when there are neither sons no daughters. If there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it and a cla m on the estate for provision for her funeral, but the property vests not in her but in the children.

But the rule that the widow does not inherit has not hitherto been adopted in the Courts in this country.

The latest decision on the subject is the case of *Ma Si* v. *Hoke Hu* (1) where the widow received a one-third share of the husband's estate, but in that case the right to that share was not cons dered but was assumed w thout argument for the purposes of the appeal, presumably on the strength of the earlier ruling in

(*a*) Parker, Comparative Chinese Family Law (1879), p. 18; Alabaster, Notes and Commentaries on Chinese Criminal Law (1899), p. 182; Jernigan, China in Law and Commerce (1905), pp. 118, 122; Broadbent's Mollendorpt (1921), p. 28.

(1) 57 Ind. Cas. 888; 13 Bur. L. T. 9.

(*b*) Jernigan, *op. cit.*, pp. 144-146; Alabaster, *op. cit.*, pp. 578, 584, 582.

MAUNG PO MAUNG v. MA PYIT YA.

Ma Thein Shin v. *Ah Shein* (2), where it was said that there appeared to be no written law on the subject of inheritance among Chinese Buddhists and that the case had to be decided according to the somewhat meagre oral evidence produced in the case, and the actual decision of the Court was in the following words: "In the absence of definite evidence I think we may proceed according to justice, equity and good conscience and we shall not be far wrong in awarding the widow a third share which is the share she would have received if the Indian Succession Act were the law applicable to the case." It is clear that that ruling was not a decision that, under Chinese Customary Law, the widow's share is one-third. It merely said that in the absence of definite evidence as to the Chinese Law of Inheritance the Courts might be guided by justice, equity and good conscience and that under the circumstances the principles of division laid down in the Indian Succession Act might suitably be followed. It does not appear that the authorities on Chinese Customary Law which have been cited above were brought to the notice of the Court, and if they had been I have little doubt that the Court would have followed them. There seems to be no reason to doubt that under Chinese Customary Law the widow, in a case where there are children, is not entitled to any actual share in the husband's estate, and I would hold that in the present case where both parties to the first marriage were Chinese and were subject to Chinese Customary Law, Ma Sonna was not entitled to any share of the property left by her Chinese husband and that the respondent was entitled to the whole of that property subject of course to her mother's claims to administer the estate and to be maintained and buried at its expense, which claims cannot now arise since the mother is dead and buried and as the estate was in her possession she was presumably in her lifetime maintained and at her death buried at its expense.

(2) 24 Ind. Cas. 367; 8 L. B. R. 222; 7 Bur L. T. 246.

There remain the questions of the property which was acquired by Ma Sonna after the Chinese husband's death and before the marriage with the first appellant and of the property acquired during that marriage.

As for property belonging to Ma Sonna which she brought to the marriage with the first appellant, it seems clear that if she had married a China-man it would normally have become the property of her husband, though special provision might have been made for it in the marriage contract (c). But she did not marry a China-man, and it is necessary to decide what law should be applied to the case.

The case of *Hong Ku* v. *Ma Thin* (3) concerned the estate of a China-man who died in Burma, but it does not help us because in that case it was held that it was not proved that the deceased was a Buddhist, while in the present case it is admitted that Ma Sonna was a Buddhist.

In *Fone Lan* v. *Ma Gyee* (4) which was a suit by a person who alleged herself to be the adopted daughter of a Chinese Buddhist who had married a Burmese Buddhist woman, it was held that the law to be applied was the law applicable to Chinese Buddhists, "in accordance with the principle of the decisions of the Courts in India to accord to the oriental whose estate is in question the rules of succession applicable to one of his class dying in his own country." In that case also, I may note, it was admitted that the widow was entitled to share in the husband's inheritance, but it was also said that there does not appear to be any written law on the subject of succession in China and, therefore, the law applicable would be the Customary Law, which apparently at that time was unknown.

The case of *Pai Beng Teng* v. *Ko Maung* (5) concerned the estate of a Burmese woman who had married a Chinese husband, but the China-man was not a Buddhist and it was doubtful whether or not

(3) S. J. L. B. 135.
(4) 2 L. B. R. 95.
(5) 2 L. B. R. 261.

(c) Jernigan, p. 120; Broadbent, pp. 19, 20.

the Burmese woman was. In that case it was said that, because the deceased was either a Muhammadan or a Buddhist, succession to her estate would not be governed by the provisions of the Succession Act unless those provisions become applicable by reason of the marriage, and that apparently they would not so become applicable, and the case was decided on the reasoning that, whether the decision had to be according to justice, equity and good conscience, or according to what evidence there was of Chinese Customary Law, or according to Buddhist Law, the widow, where there was no child, would succeed to her husband's whole estate. That ruling is not of much assistance in the present case where there are children of two marriages.

In the case of *Ma Thein Shin* v. *Ah Shein* (2), which has already been mentioned, the son of the Burmese Buddhist first wife of a Chinese Buddhist, sued the Burmese Buddhist second wife and her daughter by the Chinese husband for his father's estate, and was given a decree for two-thirds of the estate, the widow getting one-third. In that case no question of the widow's subsequent acquisitions arose.

The case of *Maung Sein Kyi* v. *Ma E* (6) is interesting not so much for the actual decision as for a remark made by the learned Chief Justice, that in the case of a marriage between a China-man and a Burmese Buddhist woman there is *prima facie* no reason why the Customary Law of the man should be applied in determining the validity of the marriage, and the Customary Law of the woman utterly disregarded at any rate up to and at the time of marriage.

If in the present case the Customary Law of the woman is to be applied to her property at the time of the marriage, then by the marriage her property would ordinarily become the first appellant's property.

The case of *Ma Pwa* v. *Yu Lwat* (7) affirmed the principle that where the parties are Chinese Buddhists, as in the present case Ma Sonna and her Chinese husband admittedly were, the law to be applied to their property is the Customary Law of Chinese Buddhists so far as that law can be ascertained, and the same principle was affirmed again in the case of *Kyin Wet* v. *Ma Gyok* (8).

From these rulings it would appear that the law to be applied to Ma Sonna's estate would be the Customary Law of Chinese Buddhists and according to that law the first appellant as her husband would be entitled to all the property which belonged to her at the time of the marriage and to all which was acquired after the marriage, while the respondent would be entitled to the whole of the property which came from the Chinese father.

I would, therefore, hold that the first appellant was entitled to the whole estate of Ma Sonna, and that respondent was entitled to the property left by her father.

The appellants alleged in their appeal that their statement of the properties left by the Chinese husband should have been accepted but the only item of property mentioned in argument as having been wrongly allotted was a house which Ma Sonna is said to have bought after her marriage with the first appellant, but put into her name and that of the respondent. The lower Court held that the fact that the house was put into respondent's name, although she had already borne the second appellant to the first appellant, was an indication, that Ma Sonna herself regarded the house as part of the Chinese husband's estate and as belonging to respondent and with that reasoning I entirely agree. The same consideration would apply to the land, which was similarly bought by Ma Sonna and put into respondent's name. I, therefore, see no reason to hold that the lower Court's decision on these points was mistaken and I would confirm it.

It is now necessary to consider what decree should be passed.

I have read carefully through the record and I am of opinion that so far as most of the moveable property is concerned it is impossible after this lapse of time to determine whether or not it is still in

(6) 34 Ind. Cas. 159; 8 L. B. R. 399; 9 Bur. L. T. 179.

(7) 34 Ind. Cas. 99; 8 L. B. R. 404; 9 Bur. L. T. 187.

(8) 47 Ind. Cas. 148; 9 L. B. R. 179; 12 Bur. L. T. 21.

existence or what property represents it now. I do not doubt that the moveable properties found by the lower Court to have been left by the Chinese husband were so left, but the money into which they were converted was doubtless partly used by Ma Sonna for her own maintenance and for that of her children and partly invested in the immoveable property which the lower Court found to be part of the Chinese husband's estate.

I would, therefore, make no order as to the various articles of jewellery mentioned in the schedules, but would leave them in the possession of the parties who at present hold them, directing at the same time that respondent be entitled to redeem any jewellery pledged by Ma Sonna which has not yet been redeemed.

As for the other debts now due by and to Ma Sonna I would direct that the first appellant pay and recover them.

As for the immoveable property there is a garden (described as Holding No. 41 of 1919-20) which was admittedly the property of the Chinese husband and is in the possession of respondent I would give her a declaration that it belongs to her. There is also a two-storyed house and its site (Holding No. 52 of 1919-20) which seems to have been bought by Ma Sonna before her marriage with the first appellant, and which has been found to belong to the Chinese husband's estate. That property is admittedly in the possession of the first appellant, and I would give respondent a declaration of her title and a decree for possession as against the appellants.

There is, further, a piece of paddy land (Holding No. 8 of 1919-20) which the lower Court has found to belong to the estate of the Chinese husband. I would accept that finding and give respondent a declaration of title to the land.

As for the other holding of paddy land (No. 16 of 1919-20) I would accept the Trial Court's finding and give the first appellant a declaration of title to it.

The Trial Court apparently found that another house and site (Holding No. 49 of 1919-20) belonged to the Chinese husband's estate and I would confirm that finding and give respondent a decree declaring her title to it.

Appellant seems to have made no claim in respect of the paddy land (Holding No. 8 of 1919-20) which is in the possession of respondent, and no decree is necessary in respect of it.

There are an iron safe and an almirah which were admittedly the property of the Chinese husband, and respondent should get a decree for possession of them as against appellants.

As a result of these findings, I would pass a decree declaring the first appellant's title to Holding No. 16 of 1919-20 in Bwetkyi East Kwin, Sabachon Circle, and declaring the respondent's title to Holding No. 41 of 1919-20 in Dayami Kwin, Daiku East Circle; Holding No. 8 of 1919-20 in Kali North Kwin, Pyuntaza East Circle, Holding No. 49 of 1919-20 in Zewaing Quarter, Daiku Town, and Holding No. 52 of 1919-20 in Zewaing Quarter, Daiku Town, together with any houses or buildings thereon; requiring the appellants to deliver up to respondent possession of the said Holding No. 52 of 1919-20 together with the houses and buildings thereon and also of the iron safe and almirah which were admittedly the property of her father and declaring that the first appellant has the right to recover all debts due to Ma Sonna and is liable to pay all debts due by her except debts due on pledges of jewellery and that respondent is entitled to redeem and keep all jewellery pledged by Ma Sonna which has not yet been redeemed.

As each side has been partly successful in the litigation I would order each side to pay its own costs throughout.

Lentaigne, J.—I concur.

Order accordingly.

Z. K.

BIBI NASIBAT *v.* EKNAM NARAYAN SINGH.

PATNA HIGH COURT.

CIVIL REVISION PETITION No. 179 OF 1923.
July 13, 1923.
Present:—Mr. Justice Foster.
Musammat BIBI NASIBAN—DEFENDANT—PETITIONER
versus
EKNAM NARAYAN SINGH—PLAINTIFF—OPPOSITE PARTY.

Bond—Money payable on certain date—Suit instituted prior to that date—Decree, whether legal—Revision—Provincial Small Cause Courts Act (IX of 1887), *s.* 25.

In an appeal against a decree for a sum of money due on a bond, it appeared that according to the bond the money was made payable on a certain date and the suit was instituted before the due date:

Held, (1) that the bond being the basis of the plaintiff's claim no decree could be given because neither party contemplated any performance of the contract before the due date;

(2) that the decree given by the lower Court being illegal the High Court could interfere in revision.

Civil revision from a decision of the Subordinate Judge, Gaya, dated the 23rd March 1923.

Messrs. *B. P. Jamuar* and *Kailashpati*, for the Petitioner.

Mr. *A. B. Mukherji*, for the Opposite Party.

JUDGMENT.—The petitioner was defendant in a suit which was decreed in the Small Cause Court of the Subordinate Judge at Gaya. On the date fixed for filing written statement she applied for time, but it was refused and the suit proceeded in her absence. The suit was for a sum of money due upon a bond executed by the husband of the petitioner, who was also (by another wife) father of two minors who were also defendants. These minors appeared through their guardian *ad litem* who examined one witness on behalf of the defence. The petitioner has put forward several grounds for urging that the decision is contrary to law, one of which was that the bond was insufficiently stamped. This contention was an oversight, for in the order-sheet we see that the stamp duty and penalty were realised and the document was admitted. The only ground on which this petition is seriously maintained is the ground that the suit is premature. The bond was executed on the 15th *Chait* 1329 *Fasli* for Rs. 374, and the due date of payment was mentioned therein as the 30th *Jeth* 1331 *Fasli*. So the suit which was instituted on the 27th January 1923 was *prima facie* prior to the due date, and that due date should be ordinarily the date of the cause of action. This matter is adverted to in the plaint where the plaintiff states that the entry of the date of re-payment was wholly illegal and could not bind the plaintiff. Moreover, it was stated, that the defendants are making away with the property of the deceased Sheikh Sharfuddin who executed the bond and took the advance.

Curiously enough the evidence was taken and arguments heard and the suit decided without any reference to this fact, which appeared on the face of the pleadings that the suit was premature. The cause of action given in the plaint is dated the same as the bond and the advance of money. It is obvious that if the bond is to be taken as the basis of the plaintiff's claim no decree can be given, for the simple reason that neither party contemplated any performance of the contract on the part of the debtor before the 30th *Jeth* 1331 *Fasli*. The contract was admittedly committed to writing and if the plaintiff wished to show that he had been defrauded in any way or that for some reason or other he could escape the provisions of sections 91 and 92 of the Indian Evidence Act, it was for him to state the reasons in his plaint and to prove the facts in evidence. The minor defendants had, as we see, denied any liability to the debt. This fact is to be found mentioned in the judgment and it behoved the learned Subordinate Judge to consider the pleadings especially when he was passing a judgment *ex parte* against one defendant and contested against two minors. It appears to me, therefore, that the petitioner-defendant has been subjected to a liability to which she was not subject legally, and that the judgment is, therefore, contrary to law. For these reasons I set aside the judgment and allow costs in both Courts. The suit will be dismissed with costs in this Court to the petitioner. Hearing fee one gold *mohur*.

The whole decree is set aside though, no doubt, I have not been moved by or on behalf of the minor defendants. In

my opinion, the decree being found to be an illegal decree the exercise of revisional jurisdiction in this matter is subsidiary to the jurisdiction with which I am invested by the petition itself read with the terms of section 25 of the Small Cause Courts Act.

K. S. D. *Decree set aside.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 238 OF 1922.
December 12, 1922.
Present :—Mr. Justice LeRossignol.
TIKKAN RAM—PLAINTIFF—PETITIONER
versus
LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Evidence Act (I of 1872), s. 92—Acknowledgment of debt in writing unstamped—Parol evidence, admissibility of, to prove debt.

A written acknowledgment of a debt is a mere piece of evidence, it is a collateral, not a primary document and parol evidence is admissible to prove a debt, acknowledged in writing by the debtor, when such acknowledgment being unstamped is inadmissible in evidence.

Revision against a decree of the Senior Sub-Judge, Jhang, dated the 23rd November 1921.

Mr. *M. L. Puri*, for the Petitioner.

JUDGMENT.—These proceedings are *ex parte* against respondents who refused service. The question involved in this case is whether parol evidence is admissible to prove a debt, acknowledged in writing by the debtor, when such acknowledgment being unstamped is inadmissible in evidence.

I think the answer must be in the affirmative, for an acknowledgment is a mere piece of evidence, it is a collateral not a primary document. It does not record the terms of the contract, if it does, it ceases to be a mere acknowledgment and becomes an agreement.

The Court below must, therefore, entirely exclude the acknowledgment and decide on the parol evidence.

The rule is quite clear that, when the written document is the cause of action, the transaction which it records cannot be referred to, if the document is inadmissible but acknowledgment, in this country at any rate, is not accounted a cause of action.

I accept the petition, set aside the decrees of the Courts below and remand the case for re-trial to the first Court.

Costs to follow final event.

N. H. *Petition accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1602 OF 1921.
February 21, 1923.
Present :—Mr. Justice Banerji and Mr. Justice Gokul Prasad.
MAHABIR PRASAD—DEFENDANT—APPELLANT
versus
Musammat PARSANDI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 62—Rent recovered by person not entitled thereto—Suit by real owner—Limitation.

Where rent of certain property is recovered by a person who is not entitled in law to recover it, he must be deemed to have realised the money for the real owner's use, and limitation for a suit by the latter to recover the amount of the rent from the former would commence to run from the date of realisation of the amount by him. The mere fact that a suit for rent by the real owner would have been barred by limitation on the date of realisation or that the defendant was, owing to his minority, able to recover rent for a longer period than the real owner would have been able to do, would not disentitle the latter from recovering from the former the amount realized by him.

Second appeal from a decree of the Additional District Judge, Meerut.

Dr. *K. N. Katju* and Mr. *S. A. Haider*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—The facts which have given rise to this appeal are shortly as follows. One *Musammat* Badamo was the original owner of this property. She made a gift of it to her daughter's son, Roshan Lal, who was at that time a minor. Her property was being managed by her son-in-law, Fakir Chand, who continued to do the same for his minor son, Roshan Lal, the donee. Roshan Lal died in 1900 and was succeeded by his widow, *Musammat* Parsandi, the present plaintiff. On the 22nd of June 1911 *Musammat* Parsand made a gift of the said share to her daughter, *Musammat* Rattan Mati. It seems that there was some litigation about this shop between *Musammat* Rattan Mati aforesaid and some other persons who claimed the property as the heirs of Fakir Chand mentioned above. This led to a suit which was brought in the year 1914 by *Musammat* Rattan Mati for a declaration of her title against the present defendant, Mahabir Prasad, and the other persons who laid claim to the estate of Fakir Chand. The present defendant, Mahabir Prasad, is a son of Fakir Chand by a wife other than the daughter of *Musammat* Badamo. This suit for declaration of Rattan Mati's title was decreed by the First Court on the 8th of March 1915. The defendants went up in appeal and the learned Judge of the lower Appellate Court dismissed the suit holding that it was barred by section 42 of the Specific Relief Act. The then plaintiff went up in second appeal and this Court, by order of the 4th of June 1918, held that the suit was not so barred and remanded it to the lower Appellate Court for disposal according to law. This suit of *Musammat* Rattan Mati was eventually decreed by the lower Appellate Court against all the defendants; in other words, it was held that she was the owner of the share in dispute by virtue of the gift made in her favour by *Musammat* Parsandi. This was on the 12th of April 1919.

In the meanwhile, soon after the aforementioned suit had been dismissed by the lower Appellate Court as barred by section 42 of the Specific Relief Act, the present defendant, Mahabir Prasad, brought a suit on the 29th of May 1916, against Moti Lal, the tenant of the shop, for recovery of rent for the period between the 8th of October 1906 and the 25th of May 1916. The suit was based on a *keralnama* executed by Moti Lal aforesaid in favour of Fakir Chand, the father of Mahabir Prasad. This suit was decreed by the First Court on the 21st of December 1916 and the decree of the First Court was affirmed by the lower Appellate Court in 1917. Moti Lal deposited the decretal amount on the 4th of August 1917 and it was withdrawn by the present defendant on the 31st of July 1919, that is about 3 months after the decision of the question of title in favour of *Musammat* Ratan Mati. The present suit was then brought on the 9th of February 1920 by *Musammat* Parsandi for recovery of the amount so realized by Mahabir Prasad, namely, rent for the period between the 8th of April 1908 and the 21st of June 1911, that is for a period little over three years before the date of her gift to Ratan Mati. The defence put forward by Mahabir Prasad was that the property having been gifted in favour of Ratan Mati, the plaintiff had no right to sue. No further questions were raised in the First Court. The First Court decreed the claim. The defendant, Mahabir Prasad, then went up in appeal and raised the further defence that the suit was barred by limitation. This was based on the ground that, at the time when Mahabir Prasad brought the suit, any claim by *Musammat* Parsandi for recovery of the same amount of arrears would have been barred by time. The learned Judge of the lower Appellate Court has repelled this contention and affirmed the decree of the Court of first instance holding on the question of title in favour of the plaintiff just as the First Court had done.

The defendant comes here in second appeal and the first question argued on his behalf was that the present suit was barred by limitation. The present suit, being one to recover monies realized by the defendant on the 31st of July 1919 to which the plaintiff was entitled as owner of the property, having been brought within three years of the date of such realization is not *prima facie* barred by time, but the argument advanced by the learned Advocate for the appellant is that this money was not realized by the defendant for the

plaintiff's use because on that day the plaintiff's claim to this money was barred by time.

The real question which we have to decide in this case is who was entitled in fact and law to the rent for the period in dispute. There can be no doubt that this money was payable to *Musammat* Parsandi she being the owner during the period for which the rent was claimed. The defendant could only be deemed to have realized this money for the plaintiff. Fakir Chand, the father of the defendant, was the manager of the property for his mother-in-law, *Musammat* Badamo, and subsequently for his son, Roshan Lal. As Badamo had gifted the property to Roshan Lal who was then a minor, Fakir must be deemed to have been acting for him and after him for his widow and to have obtained the rent deed as their agent. This case is similar to the case of a *benamidar*, getting a decree for money really due to the beneficial owner. In such a case it has been held that the money which the *benamidar* realises in the decree in his favour is money had and received for the beneficial owners of the house (See *Sundar Lal* v. *Fakir Chand* (1). The principle of the ruling in *Mahomed Wahib* v. *Mahomed Ameer* (2) also aplies to the present case. That case was approved of in *Amina Bibi* v. *Najm-un-nissa Bibi* (3). The mere fact that the defendant could recover rent for a longer period by reason of his minority does not affect the present question. No doubt the money could not have been realized for the full period now claimed if the suit had been brought by *Musammat* Parsandi. But since the defendant chose to bring a suit for rent which was in reality payable to the plaintiff and he could obtain a decree for that rent by reason of his minority that does not disentitle the plaintiff from getting the money which has in fact been received by the defendant for the use of the plaintiff.

We, therefore think, that the decree of the Court below was right and dismiss this appeal with costs, including fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 25 A. 62; A. W. N. (1902) 185.
(2) 32 C. 527; 1 C. L. J. 167.
(3) 27 Ind. Cas. 718; 37 A. 293; 13 A. L. J. 251.

PATNA HIGH COURT.

CIVIL REVISION PETITION NO. 310 OF 1922.

April 17, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Kulwant Sahay.

FIRM OF JAINARAIN RAMJASH—APPELLANT—PETITIONER

versus

SITARAM MARWARI AND OTHERS—RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17—Appeal—Appearance, what amounts to—Pleader unable to argue—Dismissal for default, legality of.

In order to constitute an appearance by a Pleader within the meaning of r. 17 of O. XLI, of the Civil Procedure Code, it is necessary to show that the Pleader was ready to place materials before the Court upon which the Court could apply its judicial mind. [p. 942, col. 2.]

Satish Chandra Mukerjee v. *Ahara Prasad Mukerjee*, 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329 (F. B.), *Muhammad Bakar Ali* v. *Chulhai Mahton*, 52 Ind. Cas. 290; 4 P. L. J. 712, relied on.

The hearing of an appeal was adjourned at the request of the appellant's Pleader. One day before the adjourned date of hearing an application by the appellant's Pleader for a further adjournment was refused. On the date of hearing a junior Pleader appeared for the appellant and filed an application for time; the application was refused and he was called upon to argue the appeal, but this, he said, he was unable to do, whereupon the Court passed an order dismissing the appeal for default:

Held, that in the eye of the law there was no appearance on behalf of the appellant, and the order dismissing the appeal for default was, therefore, perfectly correct. [p. 942, col. 2.]

Civil revision from an order of the District Judge, Manbhum, dated the 20th July 1922.

Messrs. *A. B. Mukharji* and *B. B. Mukherji*, for the Petitioner.

Mr. *P. N. Sinha*, R. B., for the Opposite Party.

JUDGMENT.

Mullick, J.—The suit out of which this application arises was brought by Sitaram Marwari and 3 others in the Court of the Additional Subordinate Judge of Dhanbad against Jainarain Ramjash for recovery of *khas* possession of surface rights of some lands and for the issue of a permanent injunction and for Rs. 1,000 on account of damages for subsidence. On the 28th February 1922 the Additional Subordinate Judge decreed the suit in full and on the

28th March following the defendants appealed against his decree to the District Judge of Manbhum. The hearing of the appeal was fixed for the 21st April 1922, when it was again adjourned till the 6th June. On the 6th June, in consequence of a telegram received from the appellants' Vakil, the appeal was postponed to the 20th July. On the 19th July, which was a Wednesday, the appellants' Vakil again sent a telegram asking that the case should be postponed till the following Monday. This the District Judge declined to do and he directed that the parties should be ready on the following day which was the adjourned date fixed for the hearing. On the 20th July, Babu Chandra Sekhar Patra, the junior Pleader engaged by the appellants, filed a petition for time on the ground that his senior, Babu Lalit Kumar Mitra, was still unable to appear and that he had been endeavouring to engage another senior Pleader but had not been successful. The District Judge refused to grant any further adjournment and called upon the junior Pleader to argue the appeal. This, the junior Pleader said, he was unable to do. The Court thereupon passed the following order: "Pleader for appellant states that he cannot argue the appeal. Vakil for respondents ready. The appeal is dismissed for default with costs."

On the 23rd October the present application was made for the exercise of the Court's revisional jurisdiction under section 115, Civil Procedure Code.

It is contended that, in the circumstances, the District Judge had no jurisdiction to make an order under O. XLI, r. 17, Civil Procedure Code dismissing the appeal for default and that he had jurisdiction only to write a judgment and to dispose of the appeal on its merits. I very much doubt whether this is a case in which any question of jurisdiction is involved; but, apart from that preliminary objection, I think on the merits the petitioners have no case.

In the first place, in my opinion, the learned Judge was quite right in treating the case as one of non-appearance. Babu Chandra Sekhar Patra, when asked to argue the appeal, declined to do so on the ground that the case was too difficult for him. He was certainly present in Court; but that was not sufficient; whether he was instructed to apply for an adjournment only or whether his instructions were to argue the appeal if he felt himself capable of doing so is immaterial, the legal position would not have been different if he had been unable to argue by reason of illness and in law there was no appearance by him. Although the decisions on this point in the various High Courts are not uniform, I think the Full Bench of the Calcutta High Court laid down the correct rule in *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (1), and I think that, in order to contstitute appearance by a Pleader, it is necessary to show that the Pleader was ready to place materials before the Court upon which the Court could apply its judicial mind. See *Muhammad Bakar Ali* v. *Chulhai Mahton* (2). It follows that the question in every case will turn upon the facts and in the present case I am satisfied that there was no appearance within the meaning of O. XLI. That being so, the order of dismissal for default was right.

Whether the learned Judge was right in the circumstances in refusing further time is a question which does not arise in an application under section 115, Civil Procedure Code, but looking at the fact placed before us I cannot see what else the learned District Judge could have done. The senior Pleader was unable to attend on the 6th June because he had another engagement and the case was adjourned at his request till the 20th. On the 19th the Judge refused a prayer for further adjournment and warned the parties that the case would be taken up the following day. The junior Pleader had full notice and I am altogether unable to understand why he did not make some effort to argue the case. In any event, the appellant had ample opportunity after the 6th June for engaging a practitioner who would have sufficient leisure and capacity to appear in the case.

The application, therefore, fails and is dismissed with costs: hearing fee two gold *mohurs*.

Kulwant Sahay, J.—I agree.

Z. K. & W. C. A. *Application dismissed.*

(1) 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 1231; 11 C. W. N. 329 (F. B.).

(2) 82 Ind. Cas. 290; 4 P. L. J. 712.

PARSHADI LAL v. LAIQ SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 446 OF 1922.

June 29, 1923.

Present :—Mr. Justice Daniels.

PARSHADI LAL—DEFENDANT—APPELLANT

versus

Thakur LAIQ SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1, object of—Suit by prior mortgagee—Subsequent mortgagee not impleaded—Suit whether liable to be dismissed—Procedure.

The object of O. XXXIV, r. 1 is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party not impleaded. The provision is expressly made subject to other provisions of the Code which include O. I, r. 9. Wherever, therefore, it is possible for the Court to do justice as between the parties before it, it should do so, and should not make O. XXXIV, r. 1 a ground for dismissing the entire suit. [p. 914, col. 1.]

Shivubai Rajaram Shete v. *Shiddheswar Martand Hedge*, 61 Ind. Cas. 590; 25 B. 1009; 23 Bom. L. R. 405, *Sital Prasad* v. *Asho Singh*, 69 Ind. Cas. 677; 2 Pat. 175; (1922) Pat. 326; (1922) A. I. R. (Pat) 651, followed.

Where, therefore, in a suit for sale of mortgaged property on the basis of mortgage the plaintiff omits to implead a subsequent mortgagee the suit ought not to be dismissed entirely; the plaintiff is entitled to any relief that can be given to him without prejudicing the right of the subsequent mortgagee. [p. 914, col. 1.]

Second appeal from a decree of the Subordinate Judge, Budaun, reversing a decree of the Munsif, West Budaun.

Mr. *Panna Lal*, for the Appellant.

Mr. *Pearl Lal Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff, Thakur Laiq Singh, for sale of the mortgaged property on the basis of his mortgage. The mortgage was executed by Sumer Singh, the original owner of the property, as far back as the 1st June 1904. Sumer Singh subsequently sold his equity of redemption. The defendant-appellant, Parshadi Lal, brought a pre-emption suit on the basis of this sale and was successful. He is, therefore, the owner of the property subject to the plaintiff's mortgage. He himself subsequently, on 22nd October 1908, executed a mortgage in favour of one Ram Prasad who is not before the Court. The sole question for decision in this appeal is, whether the whole suit should have been dismissed on account of the plaintiff's failure to implead Ram Prasad.

Both Courts have relied on the ruling in *Alam Singh* v. *Gokal Singh* (1). That was a case in which the plaintiff-mortgagee omitted to implead a subsequent mortgagee who held a mortgage of part only of the mortgaged property. The Court held that it was not necessary to dismiss the entire suit but gave a decree against that portion of the property which was not covered by the subsequent mortgage. The Trial Court considered that it necessarily followed from this ruling that if the subsequent mortgage covered the entire property the entire suit must be dismissed. In the Appellate Court the plaintiff relied on the principle that O. XXXIV, r. 1, which directs that all persons having an interest in the mortgaged property must be joined as parties, is subject to O. I, r. 9 which says that no suit shall be dismissed merely on the ground of non-joinder of parties. If, therefore, relief could be given to the plaintiff without prejudicing the right of Ram Prasad who had not been joined, O. XXXIV, r. 1 did not necessarily stand in the way of such relief being granted. The learned Judge considered that if this object could be effected in one way it could also be effected in another according to the circumstances of the particular case. In the case cited it was effected by passing a decree for sale of part of the mortgage only. In the present case, in order that the rights of Ram Prasad should not be prejudiced, the plaintiff offered to give up his priority and to accept a decree subject to the mortgage in favour of Ram Prasad which should be treated as having preference over his own. The learned Judge of the Court below has passed a decree in these terms. The decree under appeal does full justice as between the parties to the suit. The appellant is in no way prejudiced by it. He was bound to pay the plaintiff's mortgage. He was bound also to pay the mortgage in favour of Ram Prasad. So far as he is concerned, the respective priority as between these two mortgagees is a matter of comparative indifference. He has in fact tried to take advantage of the technical

(1) 21 Ind. Cas. 271; 35 A. 484; 11 A. L. J. 749.

ground of non-joinder of Ram Prasad in order to escape liability for paying the plaintiff's mortgage altogether. Unless the provisions of law very clearly require it, this contention ought not on the ground of justice and equity to be accepted.

In my opinion the reasoning of the Court below is sound. The object of O. XXXIV, r. 1 is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include O. I, r. 9, and it has been laid down many times that where it is possible for the Court to do justice as between the parties before it, it should do so and should not make O. XXXIV, r. 1 a ground for dismissing the entire suit. The Bombay High Court recently in the case of *Shivubai Rajaram Shete* v. *Shiddheswar Martand Hegde* (2) refused to allow a redemption suit to be dismissed altogether because certain heirs of the original mortgagees had not been joined. But the case which is most directly parallel to that before me is that of *Sital Prasad* v. *Asho Singh* (3). The facts of that case were exactly on all fours. The plaintiff was suing on his mortgage and had failed to implead a subsequent mortgagee. The contention was, as here, that the entire suit should be dismissed in consequence. The Court went farther than it is necessary to do in this case and held that a decree could be passed in favour of the plaintiff without making any condition as to the absent defendants, on the ground that the decree could not, in any case, be allowed to operate to the prejudice of the subsequent mortgagee who was no party to it. In the present case the decree passed by the Court below does substantial justice between the parties and, in my opinion, the provisions of O. XXXIV, r. 1, which must be read subject to those of O. I, r. 9, do not have the effect of rendering it illegal. I accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

K. S. D. & W. C. A. *Appeal dismissed.*

(2) 61 Ind. Cas. 590; 45 B. 1009; 23 Bom. L. R. 405.

(3) 69 Ind. Cas. 677; 2 Pat. 1751 (1922) Pat. 261; (1922) A. I. R. (Pat.) 681.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 312 OF 1922.

April 4, 1923.

Present:—Mr. Justice Coleridge.

Sri Raja SOBHANADRI APPA RAO BAHADUR, ZEMINDAR GARU, OF NUZVID—PETITIONER

versus

THE GOVERNMENT PLEADER—OPPOSITE PARTY.

Madras Civil Rules of Practice, rr. 32 to 36—Inspection of proceedings by party—Liability for payment of fees.

Under rule 36 of the Madras Civil Rules of Practice, fees are payable not only in cases of inspection of documents by a stranger under rules 33 to 35, but also in cases of inspection of proceedings by a party under rule 32.

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Bhimavaram, dated the 23rd September 1921, in S. C. S. No. 771 of 1911.

Mr. *T. Ramchandra Rao*, for the Petitioner.

The Government Pleader, for the Government.

JUDGMENT.—The petitioner applied under section 32, Civil Rules of Practice, for search of documents and was ordered to pay the fee prescribed under sectoin 36. He objects that there is no fee for section 32 and that section 36 applies only to sections 33 to 35 as these sections come under a separate heading, "Inspection of documents by a stranger" and that this heading covers sections 33 to 35 and not 32 which is under the heading, "Inspection of Proceedings by a party."

I cannot agree, for if so when he had put in his memorandum under section 32 there the matter would end, for the section does not say what is to happen thereafter. It is section 36 that says "If leave is granted the following fees shall be paid" and this must govern all the sections where leave is being asked.

I dismiss the petition with costs.

V. N. V. *Petition dismissed.*

MADRAS HIGH COURT.
FULLB ENCH.

CRIMINAL REVISION CASE NO. 691 OF 1922.
(CRIMINAL REVISION PETITION NO. 580 OF 1922).
April 24, 1923.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Justice Sir Francis Oldfield, Kt., Mr. Justice Ramesam, Mr. Justice Devadoss and Mr. Justice Coleridge.

PONNUSAMI ODAYAR AND OTHERS—ACCUSED NOS. 2, 3, 6 AND 7—PETITIONERS

versus

RAMASAMI THATHAN—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342, applicability of—Summons-cases—Procedure.

The provisions of section 342 of the Criminal Procedure Code are inapplicable to summons-cases; but there is no objection to a Magistrate questioning the accused generally for the purpose of enabling him to explain the circumstances appearing in the evidence against him, and in complicated cases, especially where the accused is not represented by Counsel, it is a desirable course, notwithstanding that it is not obligatory. [p. 947, col. 1.]

(Case-law reviewed.)

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Mayavaram, in Criminal Appeal No. 21 of 1922, preferred against the judgment of the Court of the Stationary Second Class Magistrate, Mayavaram, in Calendar Case No. 275 of 1921.

This case came on for hearing on the 3rd April 1923 in pursuance of the order of the Court (Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Odgers), dated 15th March 1923 that it be posted before a Full Bench of five Judges.

Messrs. *K. Bhashyam Ayyangar* (with him *P. J. Kuppanna Rao*), for the Petitioner.—The provisions of section 342 are applicable to summons-cases and the accused must be generally questioned in the case after the witnesses for the prosecution have been examined.

The provisions of section 342 are general in their nature and apply to all enquiries and trials. (See Chapter XXIV). Chapter XX of the Criminal Procedure Code relating to the trial of summons-cases is not complete in itself and there is no provision for the examination of the accused as mentioned in section 342.

There is nothing in section 342 to exclude its application in the trial of summons-cases; nor do the provisions relating to the trial of summons-cases exclude its application. The words "before he enters on his defence" in section 342 do not in any way indicate that the procedure laid down in section 342 is confined to warrant and Sessions cases.

See *Fernandez* v. *Emperor* (1); *Emperor* v. *Gulabjap* (2), *Raghu Bhumij* v. *Emperor* (3), *Gulam Rasul* v. *Emperor* (4), *Muhammad Bakhsh* v. *Emperor* (5), *Parmeshwar Lal Miller* v. *Emperor* (6).

The Public Prosecutor, for the Crown.—Chapter XX provides for a complete procedure and there is no room for this application and section 342. The words "before he enters on his defence" in section 342 clearly show that the section was intended to apply only in warrant and Sessions cases.

They have a definite meaning under the Code. See section 451 and hence the section could not apply to summons-cases.

Messrs. *T. V. Muthukrishna Aiyar* and *M. S. Venkatarama Aiyar*, for the Respondent.

OPINION.

Schwabe, C. J.—This criminal revision case has been referred to the Full Bench on the question whether in summons-cases the provisions of section 342 of the Code of Criminal Procedure, are to be applied, that is, is the Court

(1) 59 Ind. Cas. 129; 22 Bom. L. R. 1040; 22 Cr. L. J. 17; 45 B. 672.
(2) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 290.
(3) 58 Ind. Cas. 49; 5 P. L. J. 430; 1 P. L. T. 241; 21 Cr. L. J. 705.
(4) 61 Ind. Cas. 715; 6 P. L. J. 174; 22 Cr. L. J. 427; 2 P. L. T. 390.
(5) 65 Ind. Cas. 618; 23 Cr. L. J. 154; 4 L. L. J. 230; (1922) A. I. R. (L.) 45.
(6) 67 Ind. Cas. 616; 3 P. L. T. 347; 23 Cr. L. J. 440; (1922) A. I. R. (Pat.) 296.

bound, for the purpose of enabling the accused to explain the circumstances appearing in the evidence against him, to question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The inconvenience of this course is manifest in view of the provisions of section 364 of the Code of Criminal Procedure which require the taking down of any such question in full in the language in which the accused is examined, or, where that is not practicable, in the language of the Court or in English, and that the record shall be shown or read to him and, if necessary, interpreted. The great majority of summons-cases are of a petty nature and a strict application of the section must necessarily involve a consumption of a large amount of judicial time. We are reliably informed that it would involve a considerable increase in the Magistracy and that, in fact, the section has in practice in this Presidency not been treated as applying to summons-cases. In Madras there is no authority on the point except that in two recent cases Single Judges have felt themselves bound to hold that the section does apply by reason of the decisions of the Benches of other Courts referred to below. In other Courts there is considerable weight of judicial authority in favour of the application of the section. In *Fernandez* v. *Emperor* (1), Shah and Crump, JJ., gave a direct decision on the point, and it was followed in *Emeperor* v. *Gulabjap* (2) by Macleod, C. J., and Shah, J., the former pointing out the inconvenience and suggesting legislation as a remedy. In *Raghu Bhumij* v. *Emperor* (3) in which the point was unnecessary for decision as it was a Sessions case, Sultan Ahmed, J., held that the application of section 342 was obligatory in Sessions cases and expressed his opinion that it did not apply to summons-cases for reasons which I will refer to later. Mullick, J., holding that the section was not obligatory in Sessions cases, stated that he failed to see any difference between warrant and summons-cases. On this case being referred to Jwala Prasad, J., he held that it was obligatory in Sessions cases and was clearly of opinion that it applied to summons-cases. In *Gulam Rasul* v. *Emperor* (4) Adami and Bucknill, JJ., held that the section applied to summons-cases. *Fernandez* v. *Emperor* (1) had been reported in the meantime and the Court simply followed that decision. This case has also been followed by Single Judges in Lahore in *Muhammad Bakhsh* v. *Emperor* (5), and in Patna in *Parmeshwar Lal Mitter* v. *Emperor* (6). It is open to this Bench to take a different view, and we have to consider the matter for ourselves, of course, giving due weight to the authorities quoted above. Section 342 is one of the general provisions as to inquiries and trials, contained in Chapter XXIV, and, being a general provision, it must be applied to all cases, unless the special sections dealing with particular cases indicate that it is not intended to apply to them, or unless the words of the section itself give such indication. In my judgment, both these grounds of exception are to be found in respect of summons-cases. Looking at section 342, it is a condition that the questioning directed is to take place before the accused is called on for his defence. The calling on the accused for his defence has a definite meaning both in Sessions and warrant-cases under sections 289 and 256, but when examining Chapter XX containing the provisions applying to summons-cases, the expression is not used. The prisoner in these cases does not "enter on his defence" but the Magistrate is bound "to hear the accused." That this distinction in phraseology is deliberate is clear from an examination of section 451 relating to the trials of European British subjects which refers, in summons-cases, to a time before he is heard in his defence under section 244 and, in warrant-cases, to a time before he enters on his defence under section 256. [See on this point the judgment of Sultan Ahmed, J., *Raghu Bhumij* v. *Emperor* (3)]. In my judgment, the proper interpretation to be put upon section 342 by reason of these words is that it is to apply only to those cases where under other sections of the Code the prisoner is to be called on for his defence. Again, Chapter XX provides a complete procedure for the hearing of summons-cases. Under section 242 the accused is asked if he has any cause

to show why he should not be convicted; but there is no sort of prelim nary enquiry before framing a charge, as is the case in warrant-cases, and before a case is comm t-ted to Sessions. Then under section 244 the Magistrate must hear the complainant and take all such evidence as may be produced in support of the prosecution and also hear the accused and take all such evidence as he produces in his defence. Under section 245, after taking this evidence and such further evidence (if any) as he may cause to be produced, and (if he thinks fit) examining the accused, he must give his decision. It is difficult to see where in these sections a formal examination under section 342 is to come in. It would have to be read in somewhere in section 244 and it would be remarkable that, if section 342 was intended to be applied to summons-cases, the Legislature should not have said at what stage in the application of sections 242, 244 and 245 this further formal exam nation is to take place. I do not feel bound to read the provisions of section 342, as intervening in the middle of the operation of these sect ons, and in my judgment, it has no application to summons-cases. It is perhaps worth observing that in summons-cases there is no objection to a Magistrate questioning the accused generally for the purpose of enabling him to expla n the circumstances appearing in the evidence aga nst him, and in complicated cases, especially where the accused is not represented by Counsel, it is a desirable course notw thstanding that it is not obligatory.

As to the other points raised, this criminal revis on case with this direction will be referred to the Referring Bench for disposal.

Oldfield, J.—I agree. The authorities referred to in the judgment just delivered seem to me to proceed, implicitly or explicitly, on two assumptions, which with all respect I cannot follow:—That the entry by the accused on his defence, referred to in section 342 of the Code of Criminal Procedure is identifiable with the hearing of the accused, referred to in Chapter XX, and that the language used in the sect on is applicable if at all to summons-case procedure. With all deference to my Lord, I am not sure that the separate references in section 451 to accused be ng heard in summons-cases and enter ng on his defence in warrant-cases ass st the argument. For it is not clear that they correspond with more than the draftsman's adherence in 1884, when that part of the Code was amended, to the wording of the other port ons now under construction. It is, however, in my opin on suffi cient that the distinction to be inferred from the different wording used in each of those portions can eas ly be drawn; the hearing of the accused under section 244 referring to the general hearing, to which he or his Vakil on his behalf is entitled in the course of the trial. His entry on his defence under summons-case procedure takes place earlier, when, under section 242, after the particulars of the offence have been stated to him, he is asked if he has any cause to show why he should not be convicted. But, as the witnesses for the prosecution have not then been examined, there can be no question then or later of the requirements of section 342 having been fulfilled.

Ramesam, J.—I agree with the judgment of the learned Chief Justice.

Devadoss, J.—I agree with the judgment of the learned Chief Justice.

Coleridge, J.—I agree.

V. N. V. *Order accordingly.*
W. C. A.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 149 OF 1923.
April 17, 1923.
Present:—Justice Sir John Bucknill, KT.
BENI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 257—Witnesses, attendance of—Accused, right of—Duty of Court.

There is no reason why, within all reasonable limits, an accused person should not be entitled to obtain the assistance of the Court in bringing

before it all such persons as he may think are necessary in order to protect himself against the accusation and charge which has been brought against him in connection with any criminal offence. Mere technicalities as to whether he applies to the Court for enforcing the attendance of his witnesses at one moment or a little later should not deprive him of his right. It does not matter in the least to the Tribunal or to the administration of justice, whether there is or is not a trifling delay in the operation and conduct of proceedings. The only important thing from a fundamental point of view is that the Tribunal should ascertain what is the truth of the accusation which has been brought against the accused. [P. 949, col. 1.]

Criminal revision from an order of the District and Sessions Judge, Bhagalpur, dated the 20th January 1923.

Messrs. *Ali Imam, A. Sharfuddin* and *Sultanuddin Husain*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in Criminal Revisional Jurisdiction in connection with a decision of a Magistrate of the First Class of Bhagalpur by which, on the 20th December last, that Magistrate convicted the applicant of an offence against the provisions of section 420 of the Indian Penal Code, that is to say, cheating, and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs. 150 in default of payment of which he was to undergo rigorous imprisonment for 30 days in addition. From this decision there was an appeal to the Sessions Judge of Bhagalpur, who, on the 20th January 1923, confirmed the conviction and sentence.

Now, the matter has been brought up to me on a very small but at the same time on a not unimportant point. I need not here go into all the circumstances which led up to the initiation of the charge against the present accused. The short facts are as follows:

The appellant, whose name is Beni Chamar and who is a resident of Patna, has been convicted of cheating the complainant Lachman Chamar, who now lives in Bhagalpur, but who formerly lived in Patna, *i.e.*, of swindling him by obtaining from him under false pretences the sum of Rs. 150. It was said that the accused came to the complainant and told him that he was expecting a large consignment of leather valued at some Rs. 2,000 from Calcutta which was to be delivered to him in Bahagalpur; he suggested to the complainant, that if he (the complainant) would advance to him Rs. 200 he (the complainant) should have the pick of the consignment and that the rest should afterwards be sold for whatever it would fetch in the ordinary course of trade. He is said to have showed a paper to the complainant which indicated that there really had been a transaction with regard to this question of leather. The complainant is said to have given the accused the sum of Rs. 150 as an advance. The accused and the friend who was with him then left and did not return, and subsequently a charge was made against the accused by the complainant.

Now, one of the principal points which was put forward on behalf of the defence was that he had not in fact been present on this occasion at the time when it was alleged that he had made these propositions to the complainant which had been accepted by the complainant; in other words, that he could show a clear *alibi*. The accused, at an early stage of the proceedings, put forward the names of several witnesses whom he proposed to call to give testimony on his behalf. Amongst these were certain persons whose names were Munshi Sheonandan Lal, Budhoo and Digamber. But on the 14th December, out of the numerous witnesses whom he had called, these three did not attend. It would appear that on the same date the accused asked the Magistrate to issue a warrant ordering the third of these three witnesses, Digamber, to attend on a future date to give such testimony as he could on behalf of the accused. The Magistrate accordingly complied with this request. It would appear from the explanation which has now been (second hand) given by the Magistrate that at that moment no application was made to the Court that the other two witnesses, namely, Munshi Sheonandan Lal and Budhoo should also have warrants issued against them to compel their attendance. But it is agreed that a little later on the same date, the accused again applied asking that warrants against these two men (the other two absent witnesses) should also be issued. This, for some reason or other, which I must confess, inexplicable,

was not granted. The case appears to have continued four days after this order had been refused.

So far as I can see from the order sheet, it does not seem that there was anything in the District Magistrate's note, which shows that this matter was then actively taken up, and, indeed, it is also apparently fairly clear that, although the matter may, as is stated at the Bar here, have been brought to the attention of the Sessions Judge, he did not pay any attention to the question, or if he did, did not think it worth mention. The question, however, has been brought now before this Court, and on this ground a Rule was obtained from the Chief Justice and Mr. Justice Mullick on the 22nd March 1923 under which it was ordered that this application should be heard and that the applicant should be admitted on bail to the satisfaction of the District Magistrate.

I have no hesitation in thinking that there has been some unfortunate mistake here. I can see no reason why, within all reasonable limits, an accused person should not be entitled to obtain the assistance of the Court in bringing before the Court all such persons as he may think are necessary in order to protect himself against the accusation and charge which has been brought against him in connection with any criminal offence. Mere technicalities as to whether he applies at one moment or a little later do not seem to me to be very material. It does not matter in the least to the Tribunal or to the administration of justice whether there is or is not a trifling delay in the operation and conduct of proceedings. The only important thing from a fundamental point of view is that the Tribunal should ascertain what is the truth of the accusation which has been brought against the individual. In those circumstances, I have no hesitation whatever in admitting this application. The matter must go back to the proper Tribunal for hearing *de novo*, and the order of the conviction and sentence of the Deputy Magistrate of the 20th December last and the affirmation of the Sessions Judge of the 20th January last will both be set aside.

Z. K. *Application admitted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 774 OF 1922.
CRIMINAL REVISION PETITION No. 651 OF 1922.

March 23, 1923.

Present:—Mr. Justice Spencer.

ARUNACHALAM CHETTY—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (1) (h), 199—Penal Code (Act XLV of 1860, s. 498—Complaint and statement of complainant, nature of—Enticing away married woman—Complaint, contents of.

The sworn statement and the complaint of a complainant may be read together for the purpose of ascertaining what the nature of the complaint in any particular case is, as oral allegations are also included in the definition of "complaint" contained in section 4 (1) (*h*) of the Criminal Procedure Code.

In re Pedda Anjinigadu, 64 Ind. Cas. 282; (1921) M. W. N. 514; 22 Cr. L. J. 762; (1922) A. I. R. (M.) 353; 13 L. W. 695, followed.

Where in a complaint of an offence of enticing away a married woman there is no allegation either in the complaint or in the sworn statement of the complainant, that the accused's purpose was to have illicit intercourse with her, there is no "complaint" of an offence under section 498 of the Penal Code so as to give a Magistrate jurisdiction to take cognizance of that offence as provided by section 199 of the Criminal Procedure Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sessions Judge, Trichinopoly, in Criminal Appeal No. 32 of 1922 preferred against an order of the Court of the Treasury Deputy Magistrate, Trichinopoly, in Calendar Case No. 1 of 1922.

Mr. *C. Madhavan Nair*, for the Accused.
The Public Prosecutor, for the Crown.

ORDER.—The complaint in this case was of the offences of kidnapping a minor girl and theft of her jewels. It is contended that there was no complaint of an offence of enticing away a married woman for the purpose of having illicit intercourse with her (section 498, Indian Penal Code) so as to give the Magistrate jurisdiction to take cognizance of that offence, as provided by section 199 of the Code of Criminal Procedure.

I am of opinion that the objection is sound and must prevail. I agree with the observations of Ayling, J., in *In re Pedda Anjinigadu* (1) to the effect that the sworn statement and the written complaint of a complainant may be read together for the purpose of ascertaining what the nature of the complaint in any particular case was. As "complaints" include oral allegation under the definition in section 4 (1) (*b*), it would otherwise be necessary to say that there was no complaint in cases where the complainant had no paper or was unable to write or get anyone to write for him when he came to the Magistrate, and if the Magistrate took down his complaint in writing (as he would be bound to do), it would be impossible to say where the complaint ended and the sworn statement began.

I do not feel bound by the contrary opinion of Wallis, C.J., and Coutts-Trotter, J., in *In re Pedda Anjinigadu* (1), as they differed in the result of that case.

But in the present case there was no allegation even in the sworn statement of complainant that the accused's purpose was to have illicit intercourse with her daughter.

There is not even the statement as to puberty that there was in *In re Pedda Anjini gadu* (1). Thus, there was no complaint of an offence under section 498, Indian Penal Code, so as to give the Magistrate jurisdiction to try and convict the accused of such an offence.

The conviction is quashed and the 1st accused is directed to be released from his bond and to be entitled to receive a refund of the fine if paid to him.

V. N. V. *Conviction quashed.*

W. C. A.

(1) 64 Ind. Cas. 282; (1921) M. W. N. 514. 22 Cr. L. J. 762; (1922) A. I. R. (M.) 353; 13 L. W. 695.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 639 OF 1922.

March 7, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

ERAN KHAN AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 301, 303, 307—Trial by Jury—Verdict, incomplete—Judge, power of, to put questions to Jury—Several charges—Procedure—Judge, disagreeing with verdict—Reference to High Court—Discretion.

In a case in which the accused were being tried on several charges, the Judge directed the Jury to return a verdict in respect of each charge with reference to each accused. The Jury returned a unanimous verdict which made no reference to some of the charges. The Judge then put some questions to the foreman of the Jury in order to ascertain precisely what the verdict of the Jury was as regards those charges:

Held, that the course adopted by the Judge was quite legitimate and in accordance with the provisions of section 303 of the Criminal Procedure Code. [p. 951, col. 1.]

Where a Sessions Judge disagrees with the verdict of a Jury, section 307 of the Criminal Procedure Code gives him a discretion to submit the case to the High Court; it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, that he is bound to do so. if he is not clearly of that opinion, his failure to submit the case to the High Court is not a subject for interference by the High Court on appeal. [p. 951, cols. 1 & 2.]

Per *Sanderson, C. J.*—In a case in which there are more than one accused and there are several charges it is a convenient course for the Judge to take the verdict of the Jury upon each charge separately. [p. 951, col. 2.]

Appeal against an order of the Additional Sessions Judge, Faridpur, dated the 2nd December 1922.

Babu *Dasarathi Sanyal* (with him Babu *Asita Ranjan Ghose*), for the Appellants.

Mr. *Orr*, Deputy Legal Remembrancer, (with him Babu *B. M. Sen*), for the Crown.

JUDGMENT.

Panton, J.—This appeal is preferred by seven persons, all of whom have been convicted under section 326, read with section 149, three under section 148 and four under section 147 of the Indian Penal Code. These offences are alleged to have been committed in connection with a riot which occurred at what has been described as a 6-*sottah* plot which one Hossain Mridha

was engaged in ploughing. Hossain Mridha, according to the evidence, was struck on the head, and received injuries from which he subsequently died.

The first point which has been urged by the learned Vakil for the appellants is that the learned Sessions Judge was wrong in putting certain questions to the Jury at the time he was ascertaining their verdict. In leaving the case to the Jury the learned Judge said: "I shall want you to give me a clear verdict in respect of the offences under sections 147, 148, 304, 326 and 225 for each of the accused." When the Jury returned from a consideration of their verdict, the first question put to them was 'Are you unanimous"?, to which the reply was 'Yes." The second question was 'What is your opinion?," to which the reply was 'We find that Abdul Gani Khan, Ramjan Khan, Baher Khan and Sadulla Sheikh are guilty under section 147. Eran Khan, Dulal Khan and Matbar Khan are guilty under section 148; and none of them are guilty under section 149." Having regard to what the learned Judge had said to the Jury, before they retired for the consideration of their verdict, th answer given by the Foreman of the Jury was, in my opinion, an incomplete verdict, and it was necessary that the learned Judge should put further questions to the foreman in order to ascertain precisely what the verdict of the Jury was as regards the other offences which the learned Judge had mentioned, that is to say, as regards sections 304, 326 and 325. The learned Judge, as I have said, did put further questions and in the result he ascertained that the real opinion of the Jury was that these appellants were not guilty of the offence under section 304, but that they were guilty of the offence under section 326 by the operation of section 149 of the Indian Penal Code. In my opinion, the questions put by the learned Judge were quite legitimate and were in accordance with the provisions of section 303 of the Code of Criminal Procedure.

The next point urged is that the learned Judge was wrong in not referring the case to this Court under the provisions of section 307 of the Criminal Procedure Code. It is true that he expresses the opinion that he does not agree with the unanimous verdict of the Jury: but section 307 quite clearly gives to the Judge a discretion in the matter; and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit th case to the High Court that he shall so submit it. If he is not clearly of that opinion, his failure to submit the case is not a subject for interference by this Court on appeal.

The third point urged by the learned Vakil is that the summing up of the learned Sessions Judge was defective, inasmuch as he should have more clearly insisted upon his view that the evidence of the prosecution witnesses was defective. It may be that the learned Judge might have expressed himself in stronger language in his charge to the Jury; but at the same time, having read this charge and having been taken through some of the evidence given in the case, my opinion is that it was an adequate and a fair charge, and that we should not be justified in interfering with the unanimous verdict of the Jury upon this ground. For these reasons, in my opinion, th appeal must be dismissed.

Sanderson, C. J.—I agree. I desire to add a few words, not with regard to our decision upon this appeal, for my learned brother has already dealt fully with that matter, but from a general point of view and, that is, with regard to the manner in which the verdict of the Jury was taken in this case. The first question put was, "Are you unanimous"? The answer was "Yes." The second question was "What is your opinion?" Then the Foreman of the Jury endeavoured to give the result of their deliberations, and the decision at which they had arrived: and, as my learned brother has pointed out, in our opinion, it was an imperfect and incomplete verdict.

In my judgment, in a case like this, where there are more than one accused and where there are several charges, it would be a convenient course, if the officer of the Court were to take the verdict of the Jury upon each charge separately. Section 301 of the Criminal Procedure Code provides "When the Jury have considered th ir verdict the foreman shall inform the Judge

what is their verdict, or what is the verdict of a majority." In this case, as my learned brother has pointed out, the learned Judge said, "I shall want you to give me a clear verdict in respect of the offences under sections 147, 148, 304, 326 and 325 for each of the accused." In my opinion all the difficulty in this case, with regard to the verdict of the Jury, would have been obviated if, after ascertaining that the Jury were unanimous, the officer of the Court had put the question "What is your verdict with regard to each of the accused as regards the charge under section 147." He would then get a clear answer upon this charge. Then he would ask: "What is your verdict with regard to each of the accused as regards the charge under section 148?" He would get a definite answer to that question. Then he would proceed in the same way and ask "What is your verdict with regard to each of the accused as regards the charge under section 304?" and so on. This is the practice which, in my experience, is always adopted at the Original Criminal Sessions of this Court, and I do not understand why such an obviously simple procedure should not be followed in the trial of cases in the *Moffussil*. If this procedure had been adopted in this case, there would have been no difficulty whatever in ascertaining the real verdict of the Jury.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

REFERRED TRIAL No. 6 OF 1923 AND CRIMINAL APPEAL No. 94 OF 1923.

April 4, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Oagers.

IN REFERRED TRIAL NO 6 OF 1923.

In re AYARVALI POKKER AND OTHERS—PRISONERS NOS. 1, 2 AND 4.

IN CR. APP. NO. 94 OF 1923.

PANAKKAT HODAN ALAVI—PRISONER NO. 3—APPELLANT.

Malabar (Restoration of Order) Ordinance (I of 1922), ss. 10, 11, 16—Criminal Procedure Code (Act V of 1898), ss. 57, 503—Refusal to issue process to witness in warrant-case—Powers of Special Judge to issue commission—Illegality—Failure of justice.

Under section 257 of the Criminal Procedure Code in trials of warrant-cases, if the accused, after he has entered upon his defence, applies to the Magistrate to issue process for examination of witnesses, the Magistrate is bound to comply with the request unless he is satisfied that the application should be refused, on the ground that it is made for purpose of vaxation or delay or for defeating the ends of justice in which case he is bound to record his reasons. [p. 952, col. 1.]

The accused's right to have his defence witnesses examined by the Judge or the Magistrate who disposes of the case is one which has been secured for him by the Code and where the action of the Court has deprived him of this right, it must be held that a failure of justice is the natural result of the irregularity. [p 954 col. 1.]

In a trial under the provisions of the Malabar (Restoration of Order) Ordinance I of 1922, the Special Judge refused to issue process for the attendance of certain material defence witnesses but examined them by commission without assigning any reason. In reply to a reference by the High Court the Judge reported that he did so on the ground that to obtain the witnesses from distant places would entail unreasonable delay, expense and inconvenience:

Held, (1) that the Special Judge was wrong in refusing to issue process for the attendance of the witnesses as by virtue of section 10 of the Ordinance, he was bound to follow the procedure laid down in section 257 of the Criminal Procedure Code; [p. 954, col. 1.]

(2) that inasmuch as the powers of a Special Judge under section 10 of the Ordinance were confined to those of a "Magistrate" and did not include those of a District Magistrate or a Presidency Magistrate the issue of a commission by him under section 503, Criminal Procedure Code was *ultra vires*; [p. 954, col. 1.]

(3) that the irregularity in procedure could not be held to have been cured by the provision contained in section 16 of the Ordinance, which was analogous to section 537 of the Criminal Procedure Code, as the natural result of the illegal action of the Judge was a failure of justice. [p. 954, col. 1.]

IN REFERRED TRIAL No. 6 OF 1923.

Trial referred by the Court of the Senior Special Judge, Calicut, for confirmation of the sentences of death passed upon the said Prisoners Nos. 1, 2 and 4 in Case No. 146 of 1922.

IN CRIMINAL APPEAL No. 94 OF 1923.

Appal against the sentence of the Court of the Senior Special Judge, Calicut, in Case No. 146 of 1922.

In re AYARVALI POKKER.

Mr. *V. L. Ethiraj*, for the Accused.

The Public Prosecutor, for the Crown.

JUDGMENT.—The four accused in this case have been convicted of offences under sections 302 and 149, Indian Penal Code, murder committed in the course of rioting, and have been sentenced three of them to death, and the fourth to transportation for life. The learned Counsel who argued the case for the accused Nos. 1, 2 and 4, who have been sentenced to death draws our attention at the inception of the hearing to the fact that the Sessions Judge has illegally declined to summon three defence witnesses cited by the 1st accused and has instead issued a commission for their examination, purporting to act under the provisions of section 503, Criminal Procedure Code. He argues that this procedure is illegal, that the accused have been materially prejudiced, and that for this reason the convictions cannot stand.

The trial was held under the provisions of Malabar (Restoration of Order) Ordinance No. 1 of 1922, section 10 of which provides that "in the trial of cases under this Ordinance the Court shall follow the procedure laid down in the Code of Criminal Procedure, 1898, for the trial of warrant-cases and shall have the powers conferred by the said Code on a Magistrate in regard to the issue of processes to compel an appearance and to compel production of documents and other moveable property." Turning to the provisions of the Criminal Procedure Code for trial of warrant cases by Magistrates contained in Chapter XXI of the Code, we find that under section 257 "If the accused after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness" the Magistrate is bound to issue the process "unless he considers that such an application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice." Such ground has to be recorded by him in writing. This section was binding on the Special Judge, who tried the case now under appeal.

We have ascertained from the Special Judge that, on accused being asked to name their witnesses, the first accused named three witnesses, Challil Pocker, Challil Mokari and Kunyi Moyi, meaning that they should be orally examined in Court; and under the section already quoted it was his duty to issue processes for the attendance of these witnesses unless he chose to refuse the request on the ground that the application was made for the purpose of vexation or delay or for defeating the ends of justice. In the latter case he was bound to record his reasons.

The witnesses in question are witnesses whose evidence, if true, would be of the utmost importance in the case. They were cited to prove that one of the murders charged against the accused, that of Kunhi Kannan Nair was the work not of accused Nos. 1, 2 and 4, as alleged by the prosecution, but of another man altogether, one Kunhamad, who is said to have since committed suicide. The Special Judge appears to have nowhere in the course of the trial recorded his reasons for refusing to issue processes to these witnesses, but in reply to a reference from this Court, he has reported that he examined them by commission according to his practice during these trials, as "to obtain witnesses from Coimbatore, Trichinopoly and Bellary and even Andamans seemed to entail unreasonable delay, expense and inconvenience." We are not concerned here with the attendance of witnesses from the Andamans or even from Trichinopoly and Bellary, but only from Coimbatore; and we do not think that the inconvenience and expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut could be treated as so serious that an application for the attendance of these witnesses should be deemed to be made for the purpose of vexation or delay or defeating the ends of justice. It seems to us that it was the duty of the Special Judge, in a case of this character involving a capital charge, and in view of the importance which the evidence of these witnesses would possess, it believed, to take the usual steps to enforce the attendance of these witnesses.

The issue of a commission, on the other hand, was, in our opinion, illegal. Under section 503, the power to issue a commission is limited to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court, and the Special Judge

comes under none of these categories. His powers are regulated by section 10 of Ordinance I of 1922 above referred to and, as already pointed out, are limited to the powers conferred by the same Code on "a Magistrate". We cannot accept the suggestion of the learned Public Prosecutor that the powers thus conferred include powers which, under the Criminal Procedure Code, are confined to a Disrtict Magistrate. The omission to clothe a Special Judge with such powers may have been accidental, but we are not concerned with that. Reading section 10 of the Ordinance with section 503 of the Code of Criminal Procedure we can only conclude that the issue of the commission by the Special Judge was *ultra vires*.

The next question is, what is the effect of the Special Judge's illegal action? We have been referred by the Public Prosecutor to section 16, Ordinance I of 1922, which says that, "no sentence, finding or order ... shall be invalid by reason ... of any error, omission or irregularity in any of the proceedings before or during the trial unless such error, omission or irregularity has in fact occasioned a failure of justice." We do not think thrt we can decline to interfere with the conviction relying on this Ordinance. The accused's right to have his defence witnesses examined by the Judge or the Magistrate who disposes of the case is one which has been secured for him by the Code of Criminal Procedure, and where the action of the Court has deprived him of this right, we think it must be said that a failure of justice is the natural result of the irregularity and this is the way in which the words of section 537 of the Criminal Procedure Code, which are exactly the same as the words of section 16 of the Ordinance, have been invariably interpreted We do not think that this is affected by the fact that the accused finding that they could not have their way and that the Court would not summon the witnesses made the best of a bad job by putting interrogatories. We think the illegality is such, that the only course we can take is to set aside the conviction.

Lastly, we are confronted with the question of what further order we should pass. The Court of the Special Judge of South Malabar has ceased to function from the 25th February 1923 and we cannot, therefore, even if we would, order a re-trial by that Tribunal. It has been suggested by the Public Prosecutor that section 4 of Act I of 1923, would empower us to direct a re-trial by the Court of Sessions Judge of South Malabar, but the section in question is somewhat obscure and we entertain grave doubts as to whether in itself it would authorise such action. On the other hand, under section 11 of Ordinance I of 1922, which gives us jurisdiction to hear the present appeal, we possess all the powers conferred on an Appellate Court under section 423 of the Criminal Procedure Code and this includes the power in reversing a conviction to direct a committal for trial. In the exercise of this power, we accordingly set aside the convictions and the sentences passed on the appellants and direct their committal to the Sessions Court of South Malabar on the charge framed against them by the Special Judge in this case. At the same time, we order that the case against them on this charge shall be transferred for disposal to the Sessions Court of Coimbatore.

Convictions set aside.

V. N. V.
Z. K. & W. C. A.

RANGOON HIGH COURT.

CRIMINAL APPEAL NO. 1132 OF 1922.
March 8, 1923.
Present:—Mr. Justice May Oung.
U DAMADAYA—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 124A—Sedition—Construction of speech—Duty of Court.

In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt or disaffection, it should be viewed from the standpoint of the type of persons to whom it is primarily addressed. On the one hand, their limitations, if any, must be taken into account; on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which should be considered. The Court ought not to

U DAMADAYA *v.* EMPEROR.

look to a sentence or an isolated expression, but should take the speech as a whole and give due weight to every part of it and undue weight to none, and give it a full, free and generous consideration. [p. 955, col. 2; p. 956, col. 2.]

Criminal appeal against an order of the Sessions Judge, Myaungmya, dated the 29th November 1922, passed in Sessions Trial No. 57 of 1922.

Mr. *Ba Si*, for the Appellant.

Mr. *Shaw*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The appellant, a Buddhist monk, was convicted at the Myaungmya Sessions on two charges, under section 124A of the Indian Penal Code and sentenced to suffer, in the aggregate, rigorous imprisonment for the period of two years. This appeal is laid on the grounds that the alleged offences were not made out and that the sentences were unduly severe.

The subject-matter of the charges is to be found in the reports of two speeches delivered by the appellant at the town of Wakema in the Delta on the 28th and 30th of June 1922. A Sub-Inspector of the Criminal Investigation Department, Maung Maung, was present on both occasions and recorded the appellant's remarks in shorthand. On the following day he transcribed his notes and submitted them without delay to the proper authorities and, in due course, the Local Government ordered the appellant's prosecution.

It is necessary, in the first place, to note that the meetings at which the speeches complained against were made do not appear to have been convened for religious purposes or for any definite religious function. The appellant was a peripatetic lecturer on questions of the day and had, it seems, undertaken the task of going round the districts in order to rouse the people of the countryside to a sense of their rights and responsibilities as citizens. His object was avowedly political and his main theme was that most nebulous of human aspirations—Freedom. This "Freedom,' said he, would come with the attainment of "Home Rule." In his first speech he referred to the fact that his brother had been imprisoned for what were held to be seditious utterances and hinted that the latter's mantle had fallen on him, in his second speech, as appears from his own version, he expressed in graphic terms his realization that he was himself in imminent danger of going to jail on account of his preaching. "When I smell my own flesh," he declares, "I obtain the odour of prison." It is thus patent that his audiences were not invited to listen to purely religious discourses such as are usually delivered by Buddhist monks, and that the appellant was fully aware of the risk he was taking in dealing with matters not strictly germane to his ordinary avocations.

Next must be considered the point of view from which the appellant's utterances should be regarded. The learned Assistant Government Advocate treats the speeches as if they had been logically arranged, the various arguments and sequences carefully thought out and a single sinister thread running through the whole fabric. His is the angle of vision of the English reader of a written oration translated from the original. Consciously or otherwise, he expects it to conform to the standard of a similar effort by an English writer and, though fairly well acquainted with the language in which it was pronounced, fails, possibly, to realise how it would affect the mind of the Burman hearer who merely listens to the speaker during a short space of time. On the other hand, the learned Counsel for appellant, himself, well versed in modern politics and the method of constitutional agitation, cannot apparently see any harm in words, phrases and sentiments which are but the common stock-in-trade of the demagogue, but which, addressed to gatherings composed mainly of rustics, unaccustomed to the language of politicians and apt to construe literally whatever they hear, may assume far greater significance. In my opinion, in order to decide whether or not a speech constitutes an attempt to excite hatred, contempt or disaffection it should be viewed from the standpoint of the type of persons to whom it was primarily addressed. On the one hand, their limitations, if any, have to be taken into account; on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which should be considered.

The appellant's speeches are fully set

out in the judgment of the Court below, and there seems to be no advantage in giving them further publicity by reproducing them here. I have read them several times and have applied to them the test indicated above.

The result, as regards the first of the two speeches, is that I am not satisfied that the charge has been made out. The learned Sessions Judge observes that there is very slight corroboration of Maung Maung's version of the speech. In outline, his version and the appellant's are practically identical, but it is admitted by the prosecution that the former is incomplete, though the omissions are, with one exception, comparatively unimportant. I agree in the finding that the report was a substantially correct one. I am unable, however, to read into it the meanings which have been deduced by the Court of Session. The speaker denounces in scathing terms the education that is imparted in modren public schools and exhorts the people to support "National" schools with a view to obtaining "Home Rule." He complains that the Buddhist priesthood is no longer supported by the State in the same way as it was under indigenous rule, whereas the Anglican Church is liberally supported by the Government. He then advises his hearers to reject the form of Government commonly known as diarchy and condemns the high rates of taxes and duties which result in the high prices of commodities, such as salt. Then comes a statement in Maung Maung's version that the present Government is unjust and bad. According to the accused himself, he said that they should not characterise the present bureaucratic administration as unjust and rotten, because, whatever grievances the Burmans may be suffering from, they were due to their own inability to represent matters. It is possible that the stenographer missed the full force of this argument and, in the absence of corroboration on this point, I must give the appellant the benefit of the doubt. The speech winds up with the cryptic remark that no one can make the Government hated but the Government itself. It is possible to read into this an innuendo but, in my view, this is one of those instances in which, though the statement by itself appears to be objectionable, the Court must not look to a single sentence or an isolated expression, but take the speech as a whole and give it a full, free and generous consideration.

As remarked by the learned Counsel for the Crown, the appellant in his first speech appears merely to have been feeling his way and trying to gauge the temper of his audience with a view to leading up on a subsequent occasion to something more. Reading the speech as a whole, and giving due weight to every part of it and undue weight to none, I must hold that the words uttered on this occasion by the appellant do not clearly reveal any intention on his part to excite feelings hostile to the Government in the minds of those who heard him. He is, therefore, not guilty on the first charge.

The speech of the 30th June stands on an entirely different footing. Here he appears to have got into his stride, as it were, and brings forward instance upon instance of poverty and distress among the people which, according to him, is directly due to a Government which is like a Government in the hands of base, evil, intriguing and thieving rulers and is, therefore, the people's enemy. He then exhorts them to bear patiently with the enemy and to cultivate the four kinds of strength, *viz.*, wealth, knowledge, courage and unity. He then next quotes a stanza from a Buddhist work which enjoins patience until a suitable opportunity occurs when they should rise up and strike like a viper or cobra. Another prominent feature of this speech is a parable concerning a crow that pretended piety but, when opportunity offered itself, committed depredations. The prosecution urge that the crow here is meant for the British Government but the reference is ambiguous, and, according to Maung Kan Tha, the principal witness cited to corroborate Maung Maung, "The accused *phongyi* warned the audience not to allow persons like this crow in their associations; otherwise the associations would be wrecked." In this particular instance also, I am bound to hold that no offence against the Government was intended. In the rest of the speech the speaker rambles from topic to topic, but one important injunction appears over and over again, *viz.*,

the fostering of the four kinds of strength which, when acquired, will enable the people to strike a strong blow in order to get over their misfortunes. Counsel for the appellant urges that the action thus advocated by the lecturer was nothing more than constitutional agitation, but it is here that the Court must look to the natural and probable effect of the words in the minds of those who actually heard them; and, since every man is presumed to intend the ordinary consequences of what he does or says. I must hold that in his second speech the appellant intended to rouse feelings of hatred, contempt or disaffection towards the Government, and in particular to advise his hearers to strike a blow for political freedom. He is, therefore, guilty on the second charge.

As to the sentence that should be passed on him, though the appellant's profession cannot save him from the consequences of his offence, due regard must be paid to the fact that rigorous imprisonmen for any appreciable period is in itself a severe penalty for a person accustomed to sedentary habits and an easy and comfortable monastic life. At the same time, it must be admitted that simple imprisonment has no terrors for one who has dedicated himself to a life of seclusion and austerity; and the fact that this species of offence, unknown in Burma in the past, appears in recent years to have become fairly common, calls for a deterrent sentence, though the term of imprisonment should not necessarily be as lengthy as might be the case where simple imprisonment is awarded.

I reverse the conviction and sentence on the first charge, and while confirming the convict on on the second charge, direct that the sentence be reduced to one of nine months' rigorous imprisonment.

Z. K. & W. C. A. *Order accordingly.*

PATNA HIGH COURT.

CRIMINAL REVISION PETITION No. 178 OF 1923.

April 30, 1923.

Present :—Justice Sir John Bucknill, Kt.

NAND KISHORE MISSIR—PETITIONER

versus

KALIKA MISSIR AND OTHERS—OPPOSITE PARTY.

Procedure—Petition to Police reported false—Subsequent petition to Magistrate—Magistrate, duty of.

When a charge made by a person is designated in a Police report as false, he is entitled to file a petition before a Magistrate impugning the correctness of the report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement must be recorded on oath and his complaint dismissed. [p. 958, cols. 1 & 2.]

Jogendra Nath Mookerjee v. *Emperor*, 33 C. 1; 10 C. W. N. 158; 2 C. L. J. 228; 2 Cr. L. J. 615, followed.

Appeal from an order of the Sessions Judge, Arrah, dated the 7th February 1923, confirming that of the Sub-Divisional Officer, Buxar, dated the 30th January 1923.

Mr. *G. C. Pal*, for the Petitioner.

Messrs. *P. Dayal* and *Mahabir Prasad*, for the Opposite Party.

JUDGMENT.—This is an application made in criminal revisional jurisdiction on behalf of one Nand Kishore Missir. The circumstances under which this application is made appear to me to be somewhat peculiar. On the 30th January last the Sub-Divisional Officer of Buxar dismissed the complaint of the applicant that he had been assaulted. The applicant applied to the Sessions Judge asking for further enquiry; but his motion was rejected on the 7th February last. It is these orders which the applicant now asks should be set aside.

Now, there is no doubt that there was a somewhat serious affray and there is also no doubt that the complainant was somewhat severely injured. It is said that he received no less than seven injuries including two punctured wounds on the arm

ALAGA PILLAI v. EMPEROR.

and on the chest. He made a complaint to the Police and the Police submitted a lengthy report. It would seem that although the Police fully thought that there had been an attack made on the applicant, yet they considered that some part of the story which he put forward and in particular with regard to the locality at which the affair occurred was not true; and, so far as I can see, on this ground, the Police Officer writes at the close of his report: "The Sub-Inspector supervised the enquiry on January 3, 1923, and ordered me to submit final report false and hence I am submitting the final report false." Now, when the complainant became aware of the attitude which the Police had taken up he wrote a long petition to the Magistrate which was in effect an indictment of what the Police had done. He asked that this petition should be treated as a definite complaint, that he should be examined on oath and that proper enquiry should be made into the matter as required by law. But the Magistrate did not take any such steps. All that he seems to have done was to have visited the locality where the affair is said to have taken place and to have come to the conclusion that, for some reason or other which he does not give, "there could not possibly have been any *mar pit* on the disputed field." It is very difficult to say how it was possible definitely to arrive at such a conclusion; but I gather from the Police report that there must have been no signs of disturbance on the land where the complainant said he had been injured. That matter, however, appears to me to have been somewhat prematurely decided. The Magistrate then dismissed this petition. In the case of *Jogendra Nath Mookerjee* v. *Emperor* (1) it is clearly laid down that where a person having made a charge against another finds that the Police report designates his charge as false, he is entitled to file a petition before the Sub-Divisional Officer impugning the correctness of the Police report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement, (that is to say, the complainant's statement) must be recorded on oath and his complaint dismissed.

I think, therefore, that the order in this case made by the Magistrate is probably in law bad; but, even if it was not so, I should still be strongly inclined, under the circumstances of this case, to interfere and to direct that further enquiry should take place. I think the circumstances are such that it certainly is desirable that this case should be further enquired into; and, therefore, I direct that the order of the Sub-Divisional Officer of Buxar of the 30th January 1923 and that of the Sessions Judge of Shahabad of the 7th February last be set aside. I further direct that the petition of the 29th January last of the complainant be treated as a formal complaint and that the enquiry shall proceed upon that complaint in accordance with law.

Inquiry ordered.

K. S. D. & W. C. A.

(1) 33 C. 1; 10 C. W. N. 158; 2 C. L. J. 228; 2 Cr. L. J. 615.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 706 OF 1922.
(CRIMINAL REVISION PETITION No. 591 OF 1922.)

March 22, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

ALAGA PILLAI—COMPLAINANT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 39—Opium Act (I of 1878), s. 3—"Special empowering," what amounts to.

DHARMA SINGH *v.* EMPEROR.

A Notification of the Local Government empowering Second Class Magistrates of certain places in the Presidency mentioned in a list appended to the Notification, by virtue of their office to try cases under the Opium Act, amounts to a "special empowering" within the meaning of section 3 of the Opium Act.

Mahomed Kasim v. *Emperor*, 28 Ind. Cas. 156; 17 M. L. T. 191; 2 L. W. 233; (1915) M. W. N. 269; 16 Cr. L. J. 268, referrred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Madura Town, in Criminal Appeal No. 60 of 1922, preferred against the judgment of the Court of the Second Class Magistrate, Tirumangalam, in Calendar Case No. 323 of 1922.

Mr. *V. N. Venkatavaradachari*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The only point raised in this Criminal Revision Case is, that the Magistrate who tried the case, the Second Class Magistrate of Thirumangalam, has not been empowered to try cases under the Opium Act, 1 of 1878, as required by section 3 of the Act. We are referred to a Notification of Government published in the *Fort St. George Gazette* under date 4th June 1915 which empowers the Second Class Magistrates mentioned therein by virtue of their office to try cases under the Opium Act. The Second Class Magistrate of Thirumangalam is mentioned in the list appended to the Notification. We entertain no doubt whatever that this is a 'special empowering' of the person holding that office in virtue of his office within the meaning of section 39 of the Criminal Procedure Code and would satisfy the requirements referred to by the learned Judges in *Mahomed Kasim* v. *Emperor* (1).

The petition is dismissed.

V. N. V. *Petition dismissed.*

(1) 28 Ind. Cas. 156; 17 M. L. T. 191; 2 L. W. 233; (1915) M. W. N. 269; 16 Cr. L. J. 268.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 894 OF 1922
CRIMINAL REVISION PETITION NO. 747 OF 1922.

April 24, 1923.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Justice Sir Francis Oldfield, Kt., Mr. Justice Ramesam, Mr. Justice Devadoss, and Mr. Justice Coleridge.

DHARMA SINGH—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342 (1), Chapter XXII—Summons-case tried summarily—S. 342, applicability of.

The provision contained in section 342 of the Criminal Procedure Code is inapplicable to summons-cases whether tried summarily or in the ordinary manner.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated the 16th November 1922, of the Court of the Bench of Magistrates, First Class, Coimbatore, in S. C. No. 182 of 1922.

Messrs. *V. L. Ethiraj* and *M. C. Sridharan*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—This case raises the same point as Criminal Revision Case No. 691*, the only difference being that it was tried summarily under Chapter XXII. In our judgment, there is no difference between summary trials of summons-cases and the ordinary trials of summons-cases. This petition must be dismissed. The sentence is light but, in the circumstances, as he has already been released and only has a few more days to serve, we reduce the sentence to 11 days.

V. N. V.

Z. K. *Sentence reduced.*

*Page 945 of this Vol. *ante*.—[*Ed.*]

EMPEROR *v.* ANNAWDIN.

RANGOON HIGH COURT.

CRIMINAL REVISION PETITION No. 24-B OF 1923.

March 15, 1923.

Present :—Mr. Justice May Oung.

EMPEROR—PROSECUTOR

versus

ANNAWDIN—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 225B—Offering resistance or obstruction to lawful apprehension, what constitutes—Absconding, whether resistance or obstruction.

In order to justify the conviction of a person under section 225B of the Penal Code, for the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself, something more than mere absconding is required; there must be an overt act of resistance or obstruction; some active opposition by show of force.

King-Emperor v. *Gun Pal*, 1 U. B. R. (1904-06), Penal Code 29; 4 Cr. L. J. 287, referred to.

Criminal revision, being review of an order of the Sub-Divisional Magistrate, Kyauktaw, dated the 23rd November 1922, passed in Criminal Regular Trial No. 107 of 1922.

JUDGMENT.—The respondent, Annawdin, failed to pay capitation-tax due by him and a warrant for his arrest was therefore, issued to the Village Headman. On the latter's going to execute it, the respondent, who saw the headman from a distance, ran out of his house and absconded. The headman then applied for a summons against the respondent on a charge under section 172, Indian Penal Code, but the Magistrate holding, rightly that that section is inapplicable, dismissed the complaint under section 203, Code of Criminal Procedure. On revision, the learned District Magistrate held it probable that the Legislature intended section 225B, Indian Penal Code, to apply to such a case, and sought to distinguish it from the case of *King-Emperor* v. *Gun Pal* (1). He could himself have ordered further enquiry but as he thought it doubtful whether section 225B applies to the facts or not and as the point is likely to come up again he reported the case to this Court for orders.

In order to justify a conviction of a person under section 225B, Indian Penal Code, for the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself, something more than mere absconding is required: there must be an overt act of resistance or obstruction, some active opposition by show of force.

It may seem anomalous that, while the law punishes a person who absconds in order to avoid being served with a *summons, notice* or *order*, there should be no provision for punishing one who absconds to avoid arrest under a *warrant*. But in the latter case, the law provides certain coercive procedure which may be followed in the alternative and hence the recalcitrant does not enjoy impunity. In the case of a warrant issued by a Criminal Court, there is the procedure by proclamation and attachment (sections 87 and 88, Code of Criminal Procedure). Under rule 107, read with rule 91 of the Rules made under the Burma Land and Revenue Act, 1876, an arrear of capitation-tax may be realized as if it were the amount of a decree for money passed against the defaulter in favour of the *thugyi* in the manner prescribed by the Code of Civil Procedure; hence if the defaulter absconds in order to evade arrest his property can be attached and sold in execution.

I, therefore, hold that section 225B, Indian Penal Code, does not apply to the case since there was no resistance or illegal obstruction.

Z. K. *Order accordingly.*

(1) 1 U. B. R. (1904-06), Penal Code 29; 4 Cr. L. J. 287.

RADHIKA RAMAN *v.* SATNARAIN KOERI.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1170 OF 1921.

July 16, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Justice Sir John Bucknill, Kt.

Raja RADHIKA RAMAN AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

SATNARAIN KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease of undetermined area—Area determined in rent suit—Subsequent suit on basis of Record of Rights—Res judicata.

A village with fixed boundaries was leased at a rental of Rs. 2-4-0 per *bigha* per annum. The land was roughly estimated at 675 *bighas* but it was agreed that if the land was found less or more on measurement, the rent would be reduced or enhanced accordingly. In a rent suit between the lessor and the lessee it was held that the area of the village was 400 *bighas*. Subsequently there was a Survey of the village and its area was entered as 545 *bighas* in the Record of Rights. The lessor then brought a suit for rent on the basis of the area entered in the Record and urged that at best the finding in the previous suit was conclusive for the years in suit in that case and could not bind the plaintiff for all time:

Held, that the finding in the previous suit was *res judicata*, a fixed parcel of land was demised whose boundaries were known and the only question was what was the area of that parcel and, in the absence of encroachment, increment, fraud or error, it was not possible, when once that question had been answered to urge that the decision was not binding in all future litigation. [p. 963, col. 1.]

Prankissen Bagchee v. *Monmohinee Dassee*, 17 W. R. 33 *Lakhi Narain* v. *Sri Ram Chandra Bhunya*, 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146, *Dhrupad Chandra Koley* v. *Harinath Singh Roy*, 45 Ind. Cas. 660; 27 C. L. J. 563; 22 C. W. N. 826, *Kesho Prasad Singh* v. *Tribhuan*, 39 Ind. Cas. 611; 2 P. L. J. 276; 1 P. L. W. 409, *Bishun Pragash Narayan Singh* v. *Achaib Dusadh*, 66 Ind. Cas. 82; 1 Pat. 159; (1922) A. I. R. (Pat.) 215, 3 P. L. T. 807, distinguished.

In a suit by a landlord against a tenant for recovery of enhanced rent, if the landlord can prove what was the area upon which rent has been paid and what is the increased area upon which he claims rent, the Court will give him a decree in respect of the excess. [p. 963, col. 2.]

Appeal from a decision of the District Judge, Shahabad, dated the 6th April 1921, modifying a decision of the Subordinate Judge, Shahabad, dated the 7th January 1920.

Messrs. *C. C. Das* and *Shiveshwar Dayal*, for the Appellants.

Messrs. *Lakshmi Narain Singh* and *Rai Bipin Behari Saran*, for the Respondents.

JUDGMENT.

Mullick, J.—The plaintiffs are proprietors of two-thirds of *Mauza* Rajadih which in the year 1878 was leased in its entirety by two registered *pattas* by the predecessors of the plaintiffs and the remaining proprietors to the predecessors of the defendants. The *pattas* and the corresponding *kabuliyats* recite "that the entire *Mauza* Rajadih original with its dependencies comprising an area of 675 *bighas* of land without measurement is given by *istimrari patta* for cultivation from the year 1287 F. S. at the rate of Rs. 2-4-0 per *bigha*," and there is a clause at the end which runs as follows :—

"The rent of so much of the said land as will be found less by measurement shall be reduced at the above rate, the rent of so much land as will be found in excess shall be increased at the said rate."

On the 21st October 1918 the plaintiffs brought the present suit for rent in respect of the years 1322 to 1325 F. S. and claimed at the rate of Rs. 2-4-0 per *bigha* on a total area of 545 *bighas* 16 *kathas* and 11 *dhurs* shown as the area of the *mauza* in the Record of Rights finally published in 1912. The defendants contest the suit and allege that the rent was Rs. 900 for the entire *mauza* per annum. The Subordinate Judge by his decree of the 7th January 1920 has accepted the plea of the defendants and decreed the suit accordingly.

In appeal the District Judge has come to the same conclusion except with regard to the claim for the year 1322; he has found that the claim for this year is barred by limitation and he has allowed the cross-appeal of the tenants in regard to it.

The present second appeal is lodged against the Subordinate Judge's decree of the 6th April 1921.

Now, it has been contended by the learned Counsel for the appellants that the learned Subordinate Judge has mistaken the scope of the suit in declining to hold it to be a suit within the provisions of section 52 of the Bengal Tenancy Act. Now, on this point the plaint is the best test. I have read the plaint carefully and I do not find any mention of what was the previous area upon which the previous rent was paid. It is certainly stated that the present area was 545 *bighas* odd and that the rental stipulated is Rs. 2-4-0

RADHIKA RAMAN v. SATNARAIN KOERI.

per *bighi* but there is not a word about the previous area which the tenants held and upon which they were paying rent. In my opinion the suit is a plain rent suit based upon the *mokarrari patta* and the decision depends upon a pure question of fact. The omission to state the previous area was, in my opinion, intentional for the plaintiffs are apprehensive that if they were to admit that the previous area upon which rent was paid was 400 *bighas* (which is now stated to be the area in argument before us) they would at once be confronted with the plea of *res judicata* based on previous litigation concerning this *mauza*.

Therefore, in my opinion, both the Subordinate Judge and the District Judge were right in treating this as a case based upon the *patta*; and the only question in the case is the proper construction of that document and what is the true area upon which rent was payable.

Now the *patta* itself leaves the area in question uncertain. The land demised is described as *Mauza* Rajadih which, according to the Revenue Survey, has certain fixed and defined boundaries, it is a distinct parcel of land the area of which at the time when the *mokarrari patta* was given had not been ascertained by the parties and was estimated at a rough guess at 675 *bighas*; but a proviso was inserted in the lease stating that upon future measurement if the area was greater, more rent would be paid, and if the area was smaller less rent would be paid. The question is, whether anything has happened between that time and the suit which enables the Court to find that the area has in fact been ascertained and permanently fixed.

On behalf of the appellants it is contended that the area had never been fixed before the Scientific Survey of 1912 and that we are bound to accept the Record of Rights and to assess rent on 545 *bighas* odd. The respondents, on the other hand, rely on previous litigation between the plaintiffs who were then proprietors of a one-third share in the *mauza*, and themselves or their predecessors. The first of these cases was a suit instituted in 1908 for the recovery of the rent of the years 1312 to 1315 F. S. It appears from a judgment of Sir Lawrence Jenkins and Mr. Justice Chatterji of the Calcutta High Court, dated the 9th August 1912, that the contention of the tenants was that they were liable to pay a consolidated rent of Rs. 900 only per annum and the learned Judges, while not accepting the contention that the plea was in effect a variation of the terms of the registered *patta*, directed that further inquiry should be made in order to determine whether or not in the circumstances a payment of Rs. 900 for many years did not raise a presumption that there has been such a measurement as would account for this payment. The case was accordingly remanded and on the 12th November 1914 the Additional District Judge of Shahabad held that the area of the *mauza* was not 675 *bighas* but that the rental payable by the defendants was a sum of Rs. 900 per annum. There was no specific finding that the area was 400 *bighas* but it is clear that at the rate of Rs. 2-4-0 per *bigha* the area in the opinion of the learned Judge was 400 *bighas*.

Apparently, no further appeal was made to the High Court, but the struggle between the parties was not ended and we find that in respect of the years 1316 to 1321 there was again a suit in or about the year 1915.

From the judgment of Babu Abinash Chandra Nag, Officiating Subordinate Judge of Shahabad, dated the 9th May 1916, we find that the plea taken by the defendants was again the same as in the previous litigation and the material issues framed by the learned Judge were :—"(2) Whether the suit is *res judicata*" and '(3) What is the yearly rental?" and '(3) (a) What number of *bighas* of the standard of measurement contemplated in the grant is contained in the village." The learned Subordinate Judge found that the judgment of the Additional District Judge in the previous litigation was *res judicata* as to the question of rent. He also found that the yearly rental was Rs. 900. He further found that the area of the *mauza* was 400 *bighas* and he, therefore, declined to give the plaintiffs a decree at the rate of Rs. 2-4-0 per *bigha* on the area recorded in the Cadastral Survey Record. That case was taken on appeal to the District Judge and after it

had been once remanded it was finally disposed of by Mr. F. G. Rowland on the 23rd August 1916, who disagreed with the Subordinate Judge on all points and decreed the suit. There was then a second appeal in the High Court at Patna and a Division Bench of this Court passed the following judgment on the 6th July 1918: 'We feel that in this case the decree of the District Judge must be discharged and that of the Subordinate Judge restored. The learned Subordinate Judge found as a fact that it was *res judicata* that the rent up to 1315 was at Rs. 900 per annum and this was certainly so and this too was in accordance with the finally published Record of Rights. The learned District Judge was of opinion that it was open to him to enquire what the rents should be. This was not in accordance with section 51 of the Bengal Tenancy Act. In order to claim a higher rate of rent than Rs. 900 per annum the plaintiff was required to prove either a novation of the contract or a decree of Court changing the rate of rent. A decree will, therefore, be made at the rate of Rs. 900 per annum, without prejudice to any suit which the plaintiff may wish to bring for enhancement of rent on the ground of increase of area."

It is contended by the appellants before us that the present suit is in accordance with the above directions given by their Lordships.

In my opinion, in view of the previous litigation, no suit for enhancement can lie. It is clear to my mind that the Division Bench of the Calcutta High Court, finding that the tenants had for a considerable period of time paid Rs. 900 per annum, directed a remand for the purpose of ascertaining whether the area of *Mauza* Rajadih had been ascertained by measurement or fixed by arrangement between the parties and the reply given by the officer, who heard the case on remand, was that the area so ascertained or fixed was 400 *bighas*. In the judgment of Babu Abinash Chandra Nag, which was affirmed on appeal by the High Court, the finding was clear and distinct, that the conclusions arrived at by Mr. Ali Ahmad, the Additional District Judge, were *res judicata*; and it is now, in my opinion, too late in the day to attempt to urge that the findings of these two Courts on that question can be re-opened. It is contended that at best those findings were conclusive for the years in suit in those cases and that they cannot bind the plaintiffs for all time. In my view the issue upon which a remand was ordered by the Division Bench of the Calcutta High Court was: 'What was the area of the *mauza* as settled between the parties?" and it is not possible, when once that question was answered, to urge that it was not binding in all future litigation.

Reliance has been placed by the learned Counsel for the appellants on various cases beginning from *Prankissen Bagchee* v. *Monmohinee Dassee* (1); of the rest it is only necessary to refer to *Lakhi Narain* v. *Sri Ram Chandra Bhunya* (2), *Dhrupad Chandra Koley* v. *Harinath Singha Roy* (3), *Kesho Prasad Singh* v. *Tribhuan* (4) and *Bishun Pragash Narayan Singh* v. *Achaib Dusadh* (5). In all these cases the principle is quite clear. If the landlord can prove what was the area upon which rent has been paid and what is the increased area upon which he claims rent, then the Court will give him a decree in respect of the excess. In this case that principle does not apply. Here there is no question either of encroachment or increment or of fraud or error. A fixed parcel of land was demised the boundaries of which were known and the only question was, what was the area of that parcel. Now if the landlord had by a previous measurement found the area of the *mauza* to be 400 *bighas* and he had shown that the measurement was either fraudulent or erroneous, it might have been possible for him in that case to claim on the 545 *bighas* recorded in the Record of Rights provided the standard of the measurement was the same, but there the land has not altered and its area has been adjudicated upon by a Court whose decree is final. In my opinion the finding that the area

(1) 17 W. R. 33.
(2) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146;
(3) 45 Ind. Cas. 600; 27 C. L. J. 563; 22 C. W. N. 826.
(4) 39 Ind. Cas. 611; 2 P. L. J. 276; 1 P. L. W. 409.
(5) 66 Ind. Cas. 82; 1 Pat. 459; (1922) A. I. R. (Pat.) 215; 3 P. L. T. 807.

is 400 *bighas* is binding upon the parties so long as the contract subsists; and it is noteworthy that Babu Abinash Chandra Nag held that, owing to the difference in the standard of measurement between the Cadastral Survey and the standard prevalent at the time when the *patta* was executed, it was quite possible that the 545 *bighas* were the equivalent of the 400 *bighas* in respect of which rent had always been paid.

Our attention has been drawn to the fact that defendant No. 11, who is the co-sharer of the remaining one-third part of the *mauza*, realized in 1911 rent according to the area recorded in the Cadastral Survey. It is not quite clear how this area was found to be the correct area in 1911 when the Record of Rights was not published until 1912, but one explanation may be that the Record of Rights commenced in 1909 and that the plaintiff in that suit took the area from the draft Record of Rights. But the question, whether the plaintiffs in the present suit are entitled to rely upon the decree given to their co-sharer, has been considered by the Subordinate Judge and after taking it into account he is still unable to decree the present claim on the footing that the true area is 545 *bighas* odd. In my opinion the learned Subordinate Judge was correct.

There is, finally, the question of the cross-appeal which has been decreed by the District Judge. The point of limitation does not seem to have been pressed in the Trial Court, but it was argued before the District Judge, and it is quite clear that the learned District Judge's decision is erroneous on this point. The learned Judge finds that the rent for 1322 is barred by limitation. If, as it appears to be the case, the period of limitation is 6 years (the *mokurrari patta* being a registered document) then obviously no question of limitation can arise. But even if it were held, as the learned Judge seems to have held, that 3 years is the period of limitation, then the period in this case expired on the 24th September 1918, and it is admitted that the Civil Court was then closed and did not re-open till the 21st October 1918 when the plaint was filed in Court. Therefore, the suit was in time.

The result, therefore, is that the appeal will be decreed in a modified form; the decision of the District Judge with regard to the rent for the year 1322 will be set aside and the plaintiffs will be entitled to a decree for the full amount at the rate allowed by the Subordinate Judge whose decree will be restored.

With regard to costs, the defendants will get their full costs as allowed by the Subordinate Judge for his Court; in respect of the costs incurred by them in the Court of the District Judge and in this Court they will get five-sixths of the costs in each Court.

Bucknill, J.—I agree.

Appeal allowed.

N. H.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1637 OF 1921.

April 17, 1923.

Present:—Mr. Justice Daniels.

RADHA KRISHUN SHUKUL AND OTHERS—DEFENDANTS—APPELLANTS

versus

NOKH LAL SHUKUL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 4—Fraud—Suit by minor to set aside compromise—Pleadings—Particulars—Burden of proof.

If it is sought to set aside a decree on the ground of fraud, the allegation of fraud must be clear, definite and specific. [p. 966, col. 1.]

Nanda Kumar Howladar v. *Ram Jiban Howladar*, 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457, relied on.

There is no warrant for the proposition that if a minor on coming of age comes forward to challenge a decree passed against him on the basis of a compromise, even though he does not allege in what way the compromise was invalid, the burden is immediately thrown upon the opposite party of establishing that sanction to the compromise was duly given and that all the proceedings in the suit in which the decree was passed were regular. [p. 965, col. 2.]

Partab Singh v. *Bhabuti Singh*, 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T 299; 25 M L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 40 I. A. 182 (P. C.), *Ganesha Row* v. *Tulja Ram Row*, 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.) and *Badri Prashad* v. *Gopal Behari Lal*, 50 Ind. Cas. 752; 41 A. 553; 17 A. L. J. 789, distinguished.

Second appeal from a decree of the District Judge, Ghazipur, dated the 1st July 1921.

Dr. *M. L. Agarwala*, for the Appellants.
Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought by the plaintiffs to set aside as not binding on them a compromise in a previous suit, dated 12th January 1920, entered into by their elder brother Sita Ram as their guardian *ad litem*. The plaintiffs and their elder brother Sita Ram are the sons of one Ram Sunder. There had been a partition between Ram Sunder and his brother Nokh Lal, the answering defendant in the present case. Subsequently, Nokh Lal brought a suit against the plaintiffs and their elder brother alleging that the partition was vitiated by fraud and that the sons of Ram Sunder had, in consequence, obtained possession of more than their proper share. This suit was ultimately compromised, Sita Ram entering into the compromise on his own behalf and also as guardian *ad litem* of his minor brothers, the plaintiffs. The only ground on which the plaintiffs in their plaint sought to set aside the compromise is contained in paragraph 3 of the plaint in which they allege :—

"Defendant No. 1 (*i. e.*, Nokh Lal), having practised deception upon the plaintiffs and the defendant No. 2 (*i.e.*, Sita Ram) and having colluded with him filed a regular suit in this Court in respect of the cultivatory holdings with which the defendant No. 1 had no concern and made the plaintiffs also a party to the suit under the guardianship of defendant No. 2. Defendant No. 2 transferred the land in question to defendant No. 1 under an invalid compromise filed in the said suit."

The learned Munsif dismissed the suit on the ground that the compromise was a *bona fide* settlement of a family dispute which had been fairly arrived at and had subsequently been acted upon by all the parties, and that it was binding on them. It would perhaps have simplified matters if the learned District Judge in appeal had given a finding on this issue. He considered, however, that it was unnecessary to do so as no specific fraud vitiating the compromise had been either alleged or proved in the case. He also considered that, until some ground for impeaching the compromise had been made out or at least alleged, he was entitled to adopt the maxim *omnia rite acta esse præsumuntur* and to assume the validity of a compromise which was accepted by the Court and embodied in its decree. The appellants' contention is that if a minor on coming of age comes forward to challenge a decree passed against him on the basis of a compromise, even though he does not allege in what way the compromise was invalid, the burden is immediately thrown upon the opposite party of establishing that sanction to the compromise was duly given and that all the proceedings in the suit in which the decree was passed were regular. This is a very bold, not to say a startling proposition to put forward, and I know of no authority which can be adduced in support of it. It is certainly not borne out by the authorities on which the learned Counsel has relied. The cases relied on are *Partab Singh* v. *Bhabuti Singh* (1), *Ganesha Row* v. *Tulja Ram Row* (2) and *Badri Prashad* v. *Gopal Behari Lal* (3). The facts of these cases are altogether different. In the first it was found as a fact that there was no proper appointment of a guardian *ad liten* and that leave to enter into the compromise had not been obtained from the Court. On these facts the compromis was naturally set aside. In the second case also it was an admitted fact that no sanction to enter into the compromise on behalf of the minor was given but it was contended that the compromise was validated because the defendant executed it in another capacity as defendant to the suit. In the third case also it was found as a fact that there was no order giving permission to the next friend to compromise the suit on behalf of the minor. Here there is neither finding nor evidence, nor indeed any allegation either in the proceed-

(1) 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 40 I. A. 182 (P. C.).

(2) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 23 M. L. J. 150; 40 I. A. 132 (P. C.).

(3) 50 Ind. Cas. 752; 41 A. 553; 17 A. L. J. 789.

ings in the Munsif's Court or even in the plaintiffs' appeal to the Court below, that permission to enter into a compromise was not given. The plea is raised for the first time in second appeal. As regards the other point, no proposition is better established than that if it is sought to set aside a decree on the ground of fraud the allegation of fraud must be clear, definite and specific. There are numerous cases on the point but it is sufficient to refer to *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (4). The rule is embodied in O. VI, r. 4 of the Code of Civil Procedure. Here, as has been already found, no specific fraud whatever was alleged. The suit has been rightly dismissed by the Court below. and I dismiss the appeal with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

(4) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 19 OF 1922.
March 29, 1923.

Present :—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Ramesam.

In the matter of the INDIAN COMPANIES ACT, VII OF 1913 AND *In the matter of* COIMBATORE MERCANTILE BANK, LTD., BY ITS SECRETARY, MR. T. RAMASWAMI AIYENGAR.

T. R. VENKATARAMANA AIYAR—RESPONDENT—APPELLANT

versus

THE COIMBATORE MERCANTILE BANK, LTD., BY ITS SECRETARY, MR. T. RAMASWAMY AIYENGAR—PETITIONER—RESPONDENT.

Companies Act (VII of 1913), ss. 10, 12—Memorandum of Association — Appointment of person as Agent, Secretary and Director, whether "object" or "condition"—Resolution of Company deleting clause—Application to Court for confirmation, maintainability of—Discretion of Court.

The object of a Company under the Companies Act was stated in one of the clauses of the Memorandum of Association to be to carry on a banking business and things ancilliary thereto, and by another clause a gentleman was appointed "Agent, Principal, Secretary and Director to the Bank" with wide powers of transacting business. Subsequently, the Company, by a resolution deleted the clause relating to the said appointment and applied to the Court under section 12 of the Companies Act for confirmation of the resolution treating it as an alteration of the Memorandum of Association "with respect to one of the objects of the Company":

Held, (1) that the appointment could not be regarded as one of the objects of the Company but that, on the other hand, the clause amounted to a "condition" within the meaning of section 10 of the Act which could not be altered either by the Company or by the Court; [p. 968, col. 1.]

(2) that even if the clause was not a condition, it was at least a statement of a fact solemnly made in the Memorandum which neither the Court nor the Company could delete; [p. 968, col. 1]

(3) that in the matter of confirmation of the resolution of a Company under section 12 of the Companies Act, the Court was bound to exercise a discretion having regard to the interests of the various persons, shareholders, creditors and others, and that the Court ought, in any case, to refuse to exercise its discretion in the present case, since the Company had made a contract in the most solemn manner with a third person, and there was no justification for the Court or the Company to unmake that contract. [p. 967, col. 2.]

Ashbury v. *Watson*, (1885) 30 Ch. D. 376; 54 L. J. Ch. 985; 54 L. T. 27; 33 W. R. 882, *In re Welsback Incandescent Gas Light Co., Ltd.*, (1904) 1 Ch. 87; 73 L. J. Ch. 104; 89 L. T. 645; 52 W. R. 327; 11 Manson 47; 29 T. L. R. 122, relied on.

Appeal from an order of Mr. Justice Phillips, in Original Petition No. 188 of 1921, dated the 27th October 1921, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court.

Mr. *V. Krishnan*, for the Appellant.

Messrs. *N. Srinivasacharya* and *K. S. Rajagopala Aiyengar*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is an appeal from an order of Phillips, J., on a petition made under section 12 of the Indian Companies Act asking the Court to confirm the special resolution of a Company for an alteration in the Memorandum of Association. Clause 7 of the memorandum is in the following words.—"T. R.

Venkataramana Aiyar has been appointed Agent, Principal, Secretary and Director to the Bank and given powers to enter on the responsibility of this Bank into any agreement or transaction with the registered Banks in the following places and other places and with business and Industrial Concerns of local traders with a view to the Bank's earning commission or profit." The actual words are in Tamil and the translation given above, I think, adequately represents the meaning.

The only power that the Court has to confirm resolutions of a Company in regard to an alteration of the Memorandum of Association is in respect of matters covered by section 12; for section 10 enacts that "a Company shall not alter the conditions contained in its Memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act." Other specific conditions of the Memorandum can be altered in the manner provided for in other parts of the Act. It is not contended that this clause comes under any of them. It is contended that it comes under section 12 as being "with respect to the objects of the Company" which may be altered in this way "so far as may be required to enable it to carry on its business more economically or more efficiently or to restrict or abandon any of the objects specified in the Memorandum. In my judgment, this is not an object of the Company at all. The object of the Company, as stated in clause 3 of the Memorandum, is to carry on banking business and things ancillary thereto, and the appointment of this gentleman as Agent, Secretary and Director is a method of carrying out the object of the Company but it is not in itself an object at all. If, however, it ought to be regarded as one of the objects of the Company, the question would arise whether the Court ought to confirm the resolution of the Company putting an end to it. I call attention to this, because the confirmation or otherwise of such a resolution is a matter of discretion, and, in this case, it is clear that no discretion has been exercised at all; because the learned Judge says that he "is satisfied that this is an alteration that can be made by the Company and, therefore, order the alteration as prayed." He gives no reasons for exercising his discretion in that way, but apparently treats it as a matter which, if the Company has the power to do, it is the duty of the Court to assist the Company in so doing, and I think, it desirable to point out that that is not the intention of the Legislature at all. The intention of the Legislature is, as indeed is clearly stated in section 14, that the Court should exercise a discretion having regard to the interest of the various persons, share-holders, creditors and others.

Now, if this were one of the objects of the Company, and the resolution has, therefore, to be confirmed by the Court and I had to exercise my discretion upon it without any hesitation, I should refuse and for this reason, that the Company has made a contract with this man in the most solemn form that the Company can, namely, by putting it into its Memorandum and I can see no justification for a Court, so to speak, to unmake the contract or to permit the Company to unmake the contract by altering its Memorandum of Association. Nor, indeed, do I think it would have the least effect, because if there is such a contract the man has his contractual rights and the fact that the Company purports to revoke, with the consent of the Court, that contract does not, as between that man and the Company, interfere in any way with his rights.

But there are other things that can be put into a Memorandum of Association than the object and the matters set out in the Companies Act, such as name, capital, address etc. They have been described as conditions. A very common one is a provision for the rights *inter se* of preferential and ordinary share-holders. It has been held that in respect of such condition no power is given in the English Companies Act, which corresponds completely with the Indian Companies Act on this point, to alter the conditions in the Memorandum. Such a condition is unalterable either by the Company or by the Court at all. See *Ashbury* v. *Watson* (1) followed and

(1) (1885) 30 Ch. D. 376; 54 L. J. Ch. 985; 54 L. T. 27; 33 W. R. 882.

approved in *In re Welsback Incandescent Gas Light Co., Ltd.* (2).

It is, however, argued that this is not a condition but something else. It was suggested in *Ashbury* v. *Watson* (1) by Lord Justice Fry that there might be some details of management of a Company contained in the Memorandum which would be alterable not being conditions. No case of this kind has ever arisen, and I am quite satisfied that this clause is not a detail of management at all. Condition for this purpose is also described as stipulation and, in my judgment, this is one. It is a very important provision. It is not necessary to discuss now the duration of that agreement. That may be a matter for discussion elsewhere, but at any rate for the time there was a man set up with, and he agreed himself to have, almost unlimited powers of control in the affairs of this Company; and share-holders, who took their shares in the face of the Memorandum would know that they were to have the advantage of that man's efforts. It may indeed have been one of the most important reasons guiding people to become shareholders in the Company. I think, it is a condition within the meaning of section 10 and is, therefore, unalterable. If it were not a condition and it is not one of the objects—it is at the least a statement of fact solemnly made in the Memorandum, namely, that this man has undertaken this business and is given these powers, and how a Court can be asked to delete from a Memorandum or how the Company by its resolution can delete a statement of fact like this, I do not see. I find no provision in the Companies Act permitting it and I see no ground on which the resolution of the Company so doing could be sustained.

It follows, in my judgment, that this petition must fail and ought to have been dismissed. I think, it is desirable to say that nothing that we are saying will affect the rights under the contract as between Mr. Venkatarama Iyer and the Company. Whether in fact he has resigned in a binding fashion as is alleged by the Company, whether he has been guilty of misconduct as is alleged by the Company, whether the Company has broken their contract by dismissing him or refusing to employ him further, are questions which can be determined in the ordinary course of law; and it does not assist anyone to arrive at a resolution of those questions to apply to the Court in this way or for the Company to pass special resolutions as they purport to have done in this case. These matters are entirely open and remain for decision in any suit that has been instituted or may be instituted between the parties.

This appeal must be allowed with costs on the higher scale.

Ramesam, J.—I agree.

V. N. V.

W. C. A.

Appeal allowed.

(2) (1904) 1 Ch. 87; 73 L. J. Ch. 104; 89 L. T. 645; 52 W. R. 327; 11 Manson 47; 29 T. L. R. 122.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 273 AND 274 OF 1922.

March 27, 1923.

Present:—Mr. Justice Krishnan.

Raja SAMBASADASIVA CHINNA RAYAL VARU—PLAINTIFF—PETITIONER

versus

BANDAR MADDULAPPA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 110—Suit for recovery of jodi—*Limitation.*

Jodi is merely favourable rent and not a charge on the land, and the period of limitation for a suit to recover arrears of *jodi* is three years under Art. 110 of Schedule I to the Limitation Act.

Venkatagiri Rajah v. *Venkat Rau*, 21 M. 243 at p. 244; 7 Ind. Dec. (N. S.) 528 and *Gajapati Rajah* v. *Suryanarayana*, 22 M. 11; 8 Ind. Dec. (N. S.) 8, followed.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the District Munsif, Madanapalle, in S. C. S. Nos. 377 and 378 of 1921 respectively.

Mr. *K. Krishnamoorthy*, for the Petitioner.

Mr. *N. Chandrasekara Aiyar*, for the Respondents.

JUDGMENT.—The question raised in this case is one of limitation as to arrears

of *jodi* and road-cess claimed by the *zemindar* against the defendant who holds the suit land on service *inam* under him subject to payment of *jodi* as well. This Court has been taking the view that *jodi* is only favourable rent. See the observation in *Venkatagiri Rajah* v. *Venkat Rau* (1), and the case reported in *Gajapati Rajah* v. *Suryanarayana* (2). In the latter case the question raised was one of limitation and only 3 years' arrears were decreed. Though there may be a good deal to be said if the matter were *res integra*, I think, I must follow these rulings which have not been overruled or dissented from. Following them, I must hold that Art. 110 applies and the suit is barred as held by the lower Court.

The petition (Civil Revision Petition No. 273 of 1922) is dismissed with costs.

Civil Revision Petition No. 274 of 1922 follows and is dismissed; but there will be no costs as no one appears for the respondent.

V. N. V. *Petition dismissed.*

W. C. A.

(1) 21 M. 243 at p. 244; 7 Ind. Dec. (N. S.) 528.
(2) 22 M. 11; 8 Ind. Dec. (N. S.) 8.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 946 OF 1923.

June 22, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Lala PALESHWARI PRASAD—DEFENDANT—APPELLANT

versus

SHANKAR DAYAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 71—Attesting witnesses turning hostile—Execution, method of proving—Proof of attestation, whether necessary.

When the attesting witnesses to a document have been won over and turn hostile, the execution of the document may be proved by any evidence that may be available; it is not necessary, in this event, to prove attestation also.

Narain Das v. *Dilawar*, 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250, *Laksman Sahu* v. *Gokhul Maharana*. 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat.) 415, followed.

Second appeal against the decree of the District Judge, Gorakhpur, dated the 23rd February 1923.

Mr. *P. L. Banerji*, for the Appellant.

JUDGMENT.—The only plea urged in this appeal is that the mortgage sued on was not proved. It has been found by the Courts below that the attesting witnesses had been won over and gave evidence hostile to the plaintiff. The plaintiff examined the writer of the deed to prove execution, under section 71 of the Evidence Act and his evidence has been accepted. The appellant's contention is that it is necessary that this witness should have been able to swear that both the attesting witnesses were present when the executant signed the deed and that they witnessed it. This point is concluded against him by the authority both of this High Court and of the Patna High Court. In *Narain Das* v. *Dilawar* (1) it was held by a Bench consisting of Richards C. J., and Banerji, J., that if the mortgage appeared on the face of it to have been executed in the presence of more than one person and it was proved in the manner prescribed by section 71 of the Evidence Act, this was sufficient. In *Laksman Sahu* v. *Gokhul Maharana* (2) the question was still more specifically dealt with. The relevant passage in the judgment of Das, J., who delivered the leading judgment, is as follows:—

"The learned Vakil who has argued this case on behalf of the respondent urges before us that the proof of execution will not help the plaintiff: it must be proved that the document was properly attested. In my opinion, so far as section 71 of the Evidence Act is concerned, execution includes attestation, for section 71 only operates if the attesting witness denies or does not recollect the execution of the document."

We think that these rulings correctly express the intention of section 71. The main object of attestation is to secure unimpeachable evidence of the execution of the document. The law provides that the attesting witnesses, if available, must be called and that in their absence no other evidence to prove execution shall be accepted. If they are dead or have been won over by the other side the person claiming

(1) 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250.
(2) 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat.) 415.

under the document is allowed to prove it as best he can. It is sufficient if he can prove execution by any evidence that may be available. It would be laying an impossible burden on him to require that he should be able to produce a witness who could not only prove execution but was also able to swear that both the attesting witnesses were present and that they attested the deed.

We accordingly dismiss the appeal under O. XLI, r. 11.

K. S. D. & W. C. A. *Appeal dismissed.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 407 OF 1922.
February 8, 1923.
Present:—Mr. Justice Pratt.
MAUNG GYI—APPELLANT
versus
MAUNG ON GAING AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 119—Interference with rights of adopted son, what amounts to—Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Suit dismissed—Finding against defendant, whether* res judicata.

The interference mentioned in Art. 119 of Schedule I to the Limitation Act is an interference which must amount to an absolute denial of the status of adoption held by the plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. [p. 971, col. 1.]

Ningawa v. *Ramappa*, 28 B. 94; 5 Bom. L. R. 708, relied on.

A mere denial of the status of the plaintiff as an adopted son does not amount to an interference with his rights as such adopted son within the meaning of Art. 119 of Schedule I to the Limitation Act. [p. 971, col. 1.]

In an earlier suit defendant sued to redeem certain land which had belonged to plaintiff's adoptive mother as her heir and specifically denied the plaintiff's adoption which was put in issue and decided against plaintiff. But the redemption suit was eventually dismissed:

Held, (1) that the suit having been dismissed the plaintiff had no right of appeal against the finding that there was no adoption, and that that finding did not operate as *res judicata*; [p. 971, col. 1.]

(2) that the unsuccessful attempt of the defendant in the redemption suit to exclude plaintiff from his right to redeem certain property as an adopted son did not amount to an interference with the latter's rights as an adopted son within the meaning of Art. 119 of Schedule I to the Limitation Act. [p. 971, col. 1.]

Appeal against the judgment and decree of the District Court, Lower Chindwin, dated the 4th May 1922, passed in Civil Appeal No. 19 of 1922.

Mr. *A. C. Mukerjee*, for the Appellant.

Mr. *Dutt*, for the Respondents.

JUDGMENT.—Plaintiff sued for a declaration that he was the adopted son of Ma Shwe Me, deceased.

The Trial Court granted a decree.

On appeal the District Court held that the suit was barred by limitation under Art. 119 of the First Schedule to the Limitation Act on the ground that the rights of the plaintiff as adopted son had been interfered with by the action of the first defendant, Ma Tok (his natural mother), in suing in Civil Suit No. 88 of 1913 of the Township Court, Salingyi, to redeem land, which had belonged to her deceased sister, the plaintiff's adoptive mother, as heir.

The first defendant as plaintiff in that suit in evidence specifically denie the adoption, which was put in issue and decided against the present plaintiff. The second defendant, Ma Ein Kywe, in that suit was also a party and the learned Judge of the District Court held that her intervention was an interference with and denial of the plaintiff's claim.

The Trial Court considered the question of limitation and came to the conclusion that as the redemption suit was dismissed with costs there had been no interference with the present plaintiff's rights as an adopted son.

It seems to me that, from a common sense point of view, the Township Judge was right. The suit by Ma Tok was not an interference with Maung Gyi's rights as an adoptive son but an attempt to interfere with them.

It would only have amounted to an interference, if the attempt had been successful, and she had obtained a decree.

Denial of status would not seem to amount to an interference.

The intervensions of Ma Ein Kywe in the suit certainly did not amount to an invasion of Maung Gyi's rights *qua* adopted son, since her case was that the land was the property of her father and not of Ma Tok's.

INDER DEO RAI v. RAM CHARITTER RAI.

I have looked up several cases on the point and in all of them the interference with the rights of the adopted son was of an active nature and he had been excluded from property.

In the present case all that there has been is an unsuccessful attempt to exclude him from his right to redeem by way of a regular suit.

It is true that the Court held that the adoption had not been proved in the former suit, but as the suit was dismissed, and there was no right of appeal by the present plaintiff the matter was not *res judicata* as the lower Courts correctly held. In *Ningawa* v. *Ramappa* (1) a Bench of the Bombay High Court held that the interference mentioned in Art. 119 is obviously an interference, which must amount to an absolute denial of the status of adoption held by a plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. There has been no such exclusion in the present instance. In the case cited it was held that the Article had no reference to an interference, which merely postponed the rights of the adopted son to succeed as heir to his adoptive father.

I am of opinion that the action of Ma Tok in bringing the former suit in which she challenged the present plaintiff's status as adopted son of Ma Shwe Me did not amount to an interference with his rights as an adopted son.

I allow the appeal. The finding and decree of the District Court is set aside and that of the Township Court restored with costs throughout.

Z. K. & W. C. A. *Appeal allowed.*

(1) 28 B. 94; 5 Bom. L. R. 708.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1595 OF 1921.

April 17, 1923.

Present:—Mr. Justice Daniels.

INDER DEO RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM CHARITTER RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 8, 23 to 30—Thekedar, *whether tenant—Fixed-rate tenancy, creation of—Pleadings—Events happening during pendency of suit, consideration of—Technical objections, value of.*

A *thekedar* is a tenant for the purpose of applying the provisions of the Agra Tenancy Act, and the provisions of sections 23 to 30 of the Act regarding the right of sub-letting are applicable to a *thekedar*. [p. 972, col. 2.]

Natha v. *Miankhan*, 2 Ind. Cas. 552; 6 A. L. J. 649, followed.

A fixed-rate tenant is defined in section 8 of the Agra Tenancy Act and a person who does not come within the definition cannot be classed as a fixed-rate tenant. [p. 972, col. 2.]

A fixed-rate tenancy cannot be created by contract. [p. 972, col. 2.]

Bachchi v. *Bachchi*, 28 A. 747; 3 A. L. J. 513; A. W. N. (1906) 219, followed.

Courts sit for the purpose of administering justice and where the rights of the parties are clear, a Court is not debarred from doing justice by a merely technical objection. [p. 973, col. 1.]

Plaintiffs brought a suit for possession of property on the basis of a gift from their father. The suit was dismissed on appeal although in the meantime their father had died and his right to the property in suit and the plaintiff's right of succession to their father were admitted:

Held, that the plaintiff's suit must be decreed on the basis of inheritance and they must not be relegated to a fresh suit merely because they had not asked for an amendment of the plaint or because an amendment would affect the nature of the suit.

Second appeal from a decree of the District Judge, Ghazipur, dated the 8th of July 1921.

Mr. *U. S. Bajpai*, for the Appellants.

Dr. *M. L. Agarwala* and Mr. *S. C. Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of 14 *biswas* 6 *dhurs* of land in the village of Hata in the Ghazipur District. The plaintiffs are the sons of one Pema. Pema and the answering defendants jointly took a perpetual lease of three plots of *sir* land with an area of 2 *bighas* 16 *biswas* at a rent of Rs. 3 a year on payment of a *nazrana* of Rs. 740. Pema made a deed of gift of his interest in this lease to his sons the plaintiffs. On the basis of this lease the plaintiffs filed the present suit alleging that under a private partition Pema had been in possession of 14 *biswas* 7 *dhurs* of land and that the defendants had unlawfully dispossessed him. The defendants took a plea that Pema had not paid his share of the *nazrana*. This

plea has been found to be untrue and is no longer in issue. They also alleged that Pema's rights under the lease were non-transferable. This plea has been discussed by both the Courts below and is challenged in the appeal to this Court. The Munsif got rid of it by holding that the transfer, though in form a lease, was really an out and out sale. On this view the question did not arise. The District Judge held that the document was a lease and could not be treated as anything else. He gave effect to the defendant's plea and dismissed the suit. In the meantime, however, Pema had died and it was urged before the Judge that even if Pema's rights were non-transferable they were certainly heritable and the suit should be decreed on the basis of the title which the plaintiffs had obtained by inheritance. The pleas argued in appeal before this Court raise substantially two issues:—

1. Was the gift by Pema to the plaintiffs a valid gift?

2. If not, should the suit have been decreed on the basis of their title obtained by inheritance?

On the first issue the plaintiffs' case has been put in a number of alternative forms. It is first suggested that the lease should be treated as an out and out sale as held by the learned Munsif, and stress is laid on the fact that very extensive rights are conferred by the lease, including the right to sink a well or to construct a house, and that no right of re-entry is reserved. I cannot hold that these are sufficient grounds as between parties to the document for holding that the lease is anything else than it purports to be. Having regard to the small area of land involved, the rent reserved is a substantial rent and in any controversy between the parties to the lease the rights of the present plaintiffs can only be their rights as lessees under the terms of the instrument. They could not possibly claim against their lessor nor can they claim against the defendants to be treated as absolute proprietors.

The second contention is that they should be treated as *thekedars* or lessees of a proprietary interest; and the third contention is that they should be treated as fixed-rate tenants whose interest is transferable.

As regards the second contention *thekedars* are tenants for the purpose of applying the provisions of the Tenancy Act and it has even been held in *Natha* v. *Miankhan* (1) that the provisions of sections 23 to 30 regarding the right of sub-leasing are applicable to them.

As regards the third contention the lease purported to confer on the lessees the same rights as are possessed by fixed rate tenants and it has been held in *Bachchi* v. v. *Bachchi* (2) that a fixed-rate tenancy cannot be created by contract, the reason being that a fixed-rate tenant is defined in section 8 of the Act and no person can be classed as a fixed-rate tenant who does not come within the definition. The unsatisfactory position thus arrived at is due to the too rigid classification of tenants in section 6 of the Tenancy Act the result of which is that all lessees including *thekedars* have to be included in the class of non-occupancy tenants. No adequate provision has been made for lessees holding under a sub-contract and in such cases the intention of the parties is liable to be frustrated.

During the pendency of the suit the plaintiffs' father died and their right to the relief which they claimed became absolute. Whether Pema's interest was or was not transferable it was certainly heritable. As the learned Judge differed from the Trial Court as to Pema's right to transfer his interest by gift, he was asked to take notice of the new situation which had arisen and to do justice between the parties. He declined to do so on the ground that it would change the nature of the suit.

It is urged in support of the view taken by the learned Judge that on their father's death the plaintiffs should have applied for an amendment of the plaint. No doubt this would have been the strictly correct course to take, but they may well have considered it unnecessary in view of the Court's attitude to the technical defence put forward. The case in the Mun-

(1) 2 Ind. Cas. 552; 6 A. L. J. 649.
(2) 28 A 747; 3 A.L.J. 513; A.W.N. (1906) 219.

sif's Court was fought mainly on the plea of substance, and the technical objection was brushed aside by the Munsif as totally without force. It was only when they found that the District Judge was disposed to give effect to this defence that it became necessary for the plaintiffs to urge, and they did urge, that the question had now become immaterial. The Courts sit for the purpose of administering justice and where the rights of the parties are clear I do not think that I should be deterred from doing justice by a merely technical object of this kind. It would be absurd under the circumstances to relegate the plaintiffs to a fresh suit. It was, no doubt, suggested in argument that, possibly, if the point had been rasied in the Trial Court there might have been some additional defence which the defendants might have raised. It is difficult to conceive of any such defence, it being common ground between the parties that Pema was the plaintiff's father and that they are the persons who succeeded to his interest on his death. Counsel has been unable to suggest any such defence in this Court and none was suggested in the Court below. There is no other question in controversy between the parties as to which either of them wishes to address any argument to me. I have specially recalled them in order to ascertain this.

For the reasons given above I allow the appeal and setting aside the decree of the Court below restore the decree of the Trial Court. Under the circumstances I direct that the parties bear their own costs throughout.

Appeal allowed.

Z. K.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 246 OF 1921.
July 3, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

KISHUN PRASAD SAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAKIM CHAUDHARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage-deed—Personal covenant to pay interest—Suit for redemption—Property, whether can be made liable for interest

Plaintiffs mortgaged a house for Rs. 399 carrying interest at 12 annas per cent. per mensem, and executed a mortgage-deed, which provided that the defendants would be put in possession of a shop from the rent of which they would set off Rs. 2 per month against a portion of the interest on the mortgage-money, the balance being paid by plaintiffs, and that on the plaintiffs paying the principal sum of Rs. 399 they would be entitled to redeem the mortgage. In a suit for redemption:

Held, (1) that the conditions relating to redemption were clearly stated in the mortgage-deed and that there was nothing to indicate that the property was charged for payment of the interest as well; [p. 974, col. 2.]

(2) that consequently the plaintiffs were entitled to redeem the mortgage on payment of the principal sum alone. [p. 974, col. 2.]

Second appeal from a decision of the Subordinate Judge, Shahabad, dated the 16th July 1920, modifying a decision of the Munsif, Buxar, dated the 5th May 1919.

Messrs. *P. Dayal* and *B. B. Saran*, for the Appellants.

Mr. *Md. Hasan Jan*, for the Respondents.

JUDGMENT.

Miller, C. J.—The plaintiffs in this case claimed to redeem a mortgage granted by their predecessors-in-interest, Benga Chaudhuri and others to Goka Chand, the predecessor of the defendants, in the year 1882. It appears that the mortgagors had borrowed a sum of Rs. 399 from the mortgagees at 12 annas per cent. per mensem interest, the property given as security being a house situated at *Kasba* Buxar. It is not disputed that the plaintiffs are entitled to redeem and the only question which was raised before the Trial Court and afterwards on appeal related to the terms upon which the mortgagor is entitled to redeem.

The instrument of mortgage in this case is in somewhat unusual terms. It provides as follows "Whereas we," that is the mortgagors, "borrowed Rs. 399 of the currency on interest at 12 annas per cent. per mensem in order to pay the money due to Gokul Chand son of Sheo Shanker Ram Kalwar, resident of the said *Kasba* Buxar, which interest on the said loan amounts to Rs. 36 annually, as regards payment of the money principal and interest this condition was agreed upon between the parties, that there is a shop bounded

as per boundaries given below belonging to us and situated in the said *Kasba* Buxar." The said *Mahajan*, "that is the mortgagee", "should, as mortgagee, occupy the said shop from to-day" the word used for mortgagee in that sentence is *rehandar*. "He should set off the rent of the mortgaged shop, Rs. 2 per month, against a portion of the said interest and we the declarants would pay in cash to the said mortgagee every year the sum of Rs. 12 on account of interest left unpaid and due from us out of the said sum of Rs. 36 by taking receipts for the same." Then follows the clause which relates to redemption of the property: "When we shall pay the said sum of Rs. 399 principal at the end of the month of *Jeyth* in any year, we shall take back this deed from the said creditor.' Then follows a provision for payment of the ground rent, *chaukidari* tax and other repairs of the house which are to be borne by the mortgagors. That is the whole of the operative part of the mortgage in so far as it is material for present purposes. It appears that, although Rs. 2 per month in respect of interest were paid to the mortgagee out of the rent of the mortgaged shop, the mortgagors did not in fact pay the remaining one rupee according to their undertaking and the only question is, whether they should now be allowed to redeem without paying the one rupee interest which they undertook by the terms of the mortgage-deed to pay. It is contended on behalf of the respondents who represent the mortgagees in this case that the property was hypothecated not only to secure repayment of the principal sum and the two rupees per cent. per mensem as interest, but also the remaining one rupee per month the interest payable by the mortgagors. It is contended, on the other hand, by the appellants that the clause in the mortgage-deed is specific and provides in terms, that on payment of the Rs. 399 principal in the month of *Jeyth* in any year then they shall take back the deed, which means that they shall be entitled to redeem. Certain cases have been brought to our notice dealing with various kinds of mortgages where there has been some ambiguity in relation to the question whether the mortgaged property was in fact hypothecated for payment of interest or not. I can quite understand that in certain cases where an ambiguity does arise the Court may be entitled, looking at the whole terms of the mortgage contract, to come to the conclusion that the property was intended to be charged not merely with the principal sum advanced but also with the interest payable on that sum. There can be no doubt, that in cases, for example, where the property is said to be charged with the mortgage-money that may properly be taken to include not merely the principal sum advanced but the interest payable upon that sum. In other cases where the property is hypothecated for payment of the principal sum and interest in terms merely up to the due date it may also be inferred that if the property is not redeemed by the due date then it was intended that it should continue to be hypothecated for the payment of interest accruing even after the due date. There may be other cases in which there is a certain amount of ambiguity and one may draw inferences from the whole terms of the mortgage-deed itself. In the present case, however, it seems to me that the conditions relating to redemption are clearly stated in the contract itself. In the first place, the mortgagees are merely to occupy the mortgaged shop and out of the profits to reimburse themselves for Rs. 2 per month only of the interest, the other rupee being paid by the mortgagors themselves. It is nowhere provided in the document that the mortgaged property shall be held as security for payment of interest beyond the Rs. 2. Then, when we come to the terms relating to redemption, it is clearly stated that "when we shall pay the said sum of Rs. 399 principal we shall take back this deed." It seems to me that in the face of that express provision there is no room for drawing any inference that, it was intended, before redemption, should be allowed, not only the Rs. 399 principal should be repaid but also any balance of interest which the mortgagors had undertaken to pay themselves. The words are quite clear. They refer only to the sum of Rs. 399 principal and nothing more and it seems to me that, in these circumstances, we should be giving a strained

construction to those terms of the deed if we were to say that before the mortgagors should be allowed to redeem they should pay not only the Rs. 399 principal which is stipulated therein but also that they should pay the interest, which they had undertaken personally to pay and in respect to which there is nothing in the contract to indicate that the property was charged for payment.

Both the Trial Court and the Subordinate Judge on appeal came to the conclusion that the property could not be redeemed without payment of the interest. In my opinion, their decision cannot be supported and this appeal must be allowed with costs to the appellants here and in the Courts below. The decree of the lower Appellate Court will be set aside. The sum of Rs. 399 has already been deposited in Court. The appellants are, therefore, entitled to possession of the mortgaged property; on their obtaining possession the respondents will be entitled to take the money out of Court. The plaintiffs are entitled to the profits arising out of the property calculated at Rs. 2 per month from the date of the deposit until delivery of possession.

Kulwant Sahay, J.—I argree.

Appeal allowed.

K. S. D. & W. C. A.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2033 OF 1921.

November 15, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

BIRESWAR GHOSE—DEFENDANT—APPELLANT

versus

PANCHCOURI GHOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Execution sale—Fraudulent decree—Auction-purchaser, position of—Protection to bona fide *purchaser without notice, nature of—Principles of justice, equity and good conscience, application of—Pleadings—Plea not specifically raised—Procedure.*

Per *Mookerjee, J.*—An execution sale which is brought about by fraud practised on the Court by the decree-holder, is liable to be set aside on that ground, on application to the Execution Court, even though the auction-purchaser may not have participated in or may not have been cognizant of the fraud. [p. 978, col. 2.]

Chitambar v. *Krishnappa*, 26 B. 543; 4 Bom. L. R. 249, *Nemai Chand Kanji* v. *Deno Nath Kanji*, 2 C. W. N. 691, *Rojoni Kant Bagchi* v. *Hossain-ud-din Ahamd*, 4 C. W. N. 538, *Hira Lal Ghose* v. *Chundra Kanto Ghose*, 26 C. 539; 3 C. W. N. 403; 13 Ind. Dec. (N. S.) 946, *Bhubon Mohun Pal* v. *Nunda Lal Dey*, 26 C. 324; 3 C. W. N. 399; 13 Ind. Dec. (N. S.) 811, *Hungsha Majillya* v. *Tincowri Das*, 8 C. W. N. 230, *Ambika Prasad Singh* v. *Whitwell*, 6 C. L. J. 111, *Abbubaker Sahib* v. *Mohidin Sahib*, 20 M. 10; 7 Ind. Dec. (N. S.) 7, *Adhar Mani Dassi* v. *Monmotha Nath Bose*, 6 C. W. N. 279, *Bishun Chand* v. *Bijoy Singh*, 11 Ind. Cas 399; 13 C. L. J. 588; 15 C. W. N. 648; 8 A. L. J. 587; 13 Bom. L. R. 440; (1911) 2 M. W. N. 418; 21 M. L. J. 652; 10 M. L. T. 335 (P. C.), *Radha Madhab Paikara* v. *Kalpataru Roy*, 16 Ind. Cas. 811; 17 C. L. J. 209, relied on.

Subject to the conditions prescribed by O. XXI, r. 90 of the Code of Civil Procedure, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice. [p. 979, col. 1.]

But where the validity of an execution sale is impeached on the ground that the decree which is the foundation of the sale was obtained by fraud, the position of a *bona fide* purchaser for value without notice must be determined with reference to the principles of justice, equity and good conscience. [p. 980, col. 1].

Case-law examined and discussed.

Where there is no statutory provision directly conclusive on the question of the rights and liabilities of the parties, the only justice, equity and good conscience which Judges steeped in the principles of English jurisprudence can and do administer, in default of any other rule, is so much of English Law and usage as seem reasonably applicable in this country. [p. 983, col. 2].

Satis Chandra v. *Ram Dayal*, 59 Ind. Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31, relied on

Execution purchases on the basis of fraudulent decrees are of no effect when the purchaser is aware of, if not a party to, the fraud. [p. 984 col. 1].

Case-law relied on.

Having regard to the facts of each case, the Court has to bear in mind that the protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of Equity acts solely upon the conscience of the litigant parties, by compelling the defendant to do what and only what, *in foro conscientiæ* he is bound to do. The protection given to the *bona fide* purchaser simply means that from the relations subsisting be-

tw en the two parties especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be uncon c entious and inequitable to do so; that Court w ll not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between the part es, It is in most cas s available only by way of defence. [p. 989, col. 1.]

It would be a well-merited reproach to the adm nistrat on of justice if the Court were compelled to uphold fraudulent execution purchases by the application, without discrimination, of the formula of *bona fide* purchaser for value without notice. [p. 990, col. 2.]

The plea of defence of purchase for value without notice should not be overruled on the ground that the question was not specifica ly raised in the pleadings or in the issues; the defect may be remedied, if necessary, by a remand on terms as to costs, especially as the defence has sometimes been entertained, when it has been pleaded in substance and is a just inference from the facts alleged. [p. 977, cols. 1 & 2.]

Per *Rankin, J.*—Judicial sales fraudulently procured wi l not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, must be of very different value in diffe ent circumstances. But in al cases the burden of proving that he acted in good faith and w thout notice of the fraud is in the first instance upon the purchaser. This is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value. [p. 991, col. 1.]

Appeal against a decree of the Subordinate Judge, Hughli, dated the 3rd September 1921, revers ng that of the Munsif, Howrah, dated the 31st January 1920.

Dr. *Dwarka Nath Mitter*, Babus *Bhupendra Kumar Ghose* and *Pramatha Nath Banerjee*, for the Appellants.

Babu *Manmatha Nath Roy*, for the Respondents.

JUDGMENT.

Mookerjee, J.—The subject-matter of this lit gation is a tract of land which was taken by the ancestors of the plaintiffs, on the 18th May 1879, in *Mourasi Mokarari* tenancy right from a family of Ghoses. The plaintiffs, like their predecessors, were in possession by payment of rent to their landlords till they were dispossessed on the 13th February 1917, by the first defendant who obtained delivery through Court on the allegation that he had purchased the land on the 21st November 1916, in execution of a decre for arrears of rent. The plaintiffs made an ineffectual attempt at resistance, and their objection was rejected by the Court on the 11th June 1917. On enquiry they ascertained what had happened to their tenancy, and the facts they d scovered may be briefly narrated at this stage.

In 1904, the Ghoses sued the plaintiffs for arrears of rent and obtained an *ex parte* decree for Rs. 2-2-0. No further details are available, as the records of the rent suit have been destroyed in accordance with statutory rules. No application for execution of this decree appears to have been made till the 2nd August 1907 when proceedings were instituted for realisation of the decretal amount and Rs. 3-3-0 as costs. A sale was held on the 21st November 1907 when one Behar Lal Das, since deceased, was the sole bidder present and purchased the tenancy for a sum of Rs. 22. The sale was confirmed on the 30th January 1908. The purchaser, however, never obtained delivery of possession through Court and never paid rent to the landlords. The result was that on the 14th April 1913, the Ghoses instituted a suit against Soudamini Dasi, widow of Behari Lal Das, for recovery of Rs. 15-7-6 as arrears of rent for four years from 14th April 1909 to 13th April 1913. The suit was decreed *ex parte* on the 24th June 1913. A sale was held on the 21st November 1916, when Bireswar Ghose, now appellant before us, became purchaser of the tenancy for a sum of Rs. 50. The sale was confirmed in due course; and when the purchaser went to take possession, he came into conflict with the plaintiffs, as already stated. The pla ntiffs thereupon instituted this suit, on the 31st May 1918, for recovery of possession of the disputed land upon car cellation of the *ex parte* decrees and consequent execution sales, on the allegation that they had been brought about by fraud on the part of the Ghoses. According to the plaintiffs the fraud cons sted in the suppression of all notices in the suits and in the execution proceedings and the submission of false returns of service to the Court. The plaintiffs

further suggested that the ostensible purchaser was, on each occasion, a creature of the Ghoses who had managed to purchase a valuable property for an insignificant price. The Ghoses, the purchaser at the second sale, as also the widow of the purchaser at the first sale, were all joined as defendants. The claim was, however, contested, on paper at any rate, by the second purchaser alone. He repudiated the charge of fraud and maintained that he had made the purchase on his own account. The Court of first instance held that the charge of fraud was not established by the evidence and dismissed the suit. Upon appeal, the Subordinate Judge has reversed that decision. He has held that the suits and execution proceedings were fraudulent, that all notices were suppressed both in the suits and in the execution proceedings, and that false returns of service were submitted to the Court by the officers concerned. In this view, the Subordinate Judge has held that the decrees and sales must be vacated and the property restored to the plaintiffs. On the present appeal, the second purchaser has urged that he is a *bona fide* purchaser for value without notice and is entitled to retain the property, even though the suits and execution proceedings be held to have been fraudulent. In support of this proposition, reliance has been placed upon the decision in *Chitambar* v. *Krishnappa* (1). The plaintiffs-respondents have controverted this position, and have further contended that the defence of purchase for value without notice, even if available, should have been specifically alleged and proved. In support of this proposition, reference has been made to *Attorney-General* v. *Biphosphated Guano Co.* (2) and *In re Nisbet & Potts Contract* (3). We have not thought it right to overrule the plea of defence of purchase for value without notice on the gound that the question was not specifically raised in the pleadings or in the issues; the defect may be remedied, if necessary, by a remand on terms as to costs, specially as the defence has sometimes been entertained, when it has been pleaded in substance and is a just inference from the facts alleged; *Taylor* v. *Blakelock* (4). We shall consequently examine, whether the defendant has a substantial answer to the claim.

It may be stated at the outset that in a long line of cases in this Court the view has been maintained that an execution sale which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground, by application to the Execution Court, even though it is not established that the auction-purchaser has participated in or has been cognizant of the fraud. Thus, in *Khirode Sundari Debi* v. *Jnanendra Nath Pal* (5), it was ruled that a judgment-debtor is entitled, by an application under section 244 of the Civil Procedure Code of 1882, to have an execution sale of his properties set aside, if he alleges and proves fraud on the part of the decree-holder, though no fraud is alleged or proved against the auction-purchaser who is a stranger to the suit. Maclean, C. J., treated this proposition as well-settled by the decisions in *Nemai Chand Kanji* v. *Deno Nath Kanji* (6); *Rojoni Kant Bagchi* v. *Hossain-ud-din Ahmed* (7) and *Hira Lal Ghose* v. *Chundra Kanto Ghose* (8). Banerjee, J., referred in addition to the decision in *Bhubon Mohun Pal* v. *Nunda Lal Dey* (9) and assigned the following reason in support of his conclusion; "The sale in execution of a decree is brought about by the instrumentality of the Court, the Court being set in motion by the decree-holder. If the decree-holder is guilty of fraud in the conduct of the sale the process of the Court must be held to have been abused by him in bringing about the sale; and it cannot be said that a sale obtained through

(1) 26 B. 543; 4 Bom. L. R. 249.
(2) (1879) 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621.
(3) (1906) 1 Ch. 386 at p. 395; 75 L. J. Ch. 238; 54 W. R. 286; 22 T. L. R. 233; 94 L. T. 297.
(4) (1886) 32 Ch. D. 560 at p. 563; 56 L. J. Ch. 390; 55 L. T. 8.
(5) 6 C. W. N. 283.
(6) 2 C. W. N. 691.
(7) 4 C. W. N. 538.
(8) 26 C. 539; 3 C. W. N. 403; 13 Ind. Dec. (N. S.) 946.
(9) 26 C. 324; 3 C. W. N. 399; 13 Ind. Dec. (N. S.) 811.

the abuse of the process of the Court by the fraud of the decree-holder who set the Court in motion, should be upheld, merely because the auction-purchaser is innocent of the fraud. The auction-purchaser, of course, is entitled to have the purchase-money paid by him refunded by the decree-holder; but he cannot insist upon a sale brought about by fraud practised upon the Court and by the decree-holder being maintained." Banerjee, J., adhered to this view in *Hungsha Majillya* v. *Tincowri Das* (10), when he was pressed with the decision in *Mohesh Chandra Bagohi* v. *Dwarka Nath* (11), in which it had been held that, however fraudulent the conduct of a plaintiff in a suit may be, if the purchaser is not implicated in the fraud the validity of the sale cannot be affected by the badness of the decree in execution of which the sale took place. Banerjee, J., observed that even if this were conceded, a different rule should hold good where not only the decree but the execution proceedings are fraudulent. "If the sale is brought about fraudulently, that must be a sale brought about by abusing the process of the Court; and such a sale would be invalid, quite irrespective of the validity or invalidity of the decree, and the auction-purchaser cannot be entitled to maintain his purchase, notwithstanding that the proceedings by which he became a purchaser were fraudulent." This view was followed in *Ambika Prasad Singh* v. *Whitwell* (12), which dissents from *Abbubaker Sahib* v. *Mohidin Sahib* (13), and refers to *Adhar Mani Dassi* v. *Monmotha Nath Bose* (14). On the other hand, where the scope of the fraud is limited to the suit and does not pervade the execution proceedings as well, it has been held that an innocent purchaser, not a party to the fraud nor apprised thereof before he paid his money, would be protected: *Bishun Chand* v. *Bijoy Singh* (15), *Radha Madhab Paikara* v. *Kalpataru Roy* (16).

There is thus a long and uniform series of decisions in this Court in support of the proposition that, where an execution sale has been brought about by fraud practised on the Court by the decree-holder, the sale will be set aside on application to the Execution Court, even though the auction-purchaser may not have participated in, or may not have been cognisant of the fraud. This principle has received legislative approval in O. XXI, r. 90 of the Civil Procedure Code, 1908, where provision is made for cancellation of an execution sale on the ground of a material irregularity or fraud in publishing it, provided the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Under section 311 of the Code of 1882, which was replaced by O. XXI, r. 90 of the Code of 1908, an execution sale could be set aside on the ground of material irregularity in publishing or conducting it, provided the applicant had sustained substantial injury therefrom. On this rule, the judicial decisions engrafted the principle that an execution sale might be set aside on the ground of fraud under section 244. The consequence was a three-fold distinction between the two classes of cases: (*i*) when fraud was established, no question of substantial injury arose; (*ii*) the period of limitation governing an application for cancellation of a sale on the ground of fraud was three years, whereas the period governing an application based on the ground of irregularity was 30 days, and (*iii*) the decision on an application for cancellation of a sale on the ground of fraud operated as a decree, subject to a first appeal and a second appeal, while the adjudication on an application founded on allegation of irregularity, operated as an order subject to a first appeal only. These differences have been obliterated by the Code of 1908 and the two classes of cases have been assimilated. The Code, be it noticed, does not exclude specifically the application of rule 90 in cases where the purchaser is a *bona fide* purchaser for value without notice

(10) 8 C. W. N. 230.
(11) 24 W. R. 260.
(12) 6 C. L. J. 111.
(13) 20 M. 19; 7 Ind. Dec. (N. S.) 7.
(14) 6 C. W. N. 279.
(15) 11 Ind. Cas. 399; 13 C. L. J. 588; 15 C. W. N. 648; 8 A. L. J. 587; 13 Bom. L. R 440; (1911) 2 M. W. N. 418; 21 M. L. J. 952; 10 M. L. T. 838 (P. C.).

(16) 16 Ind. Cas. 611; 17 C. L. J. 209.

of the irregularity or the fraud; and our attention has not been drawn to any judicial pronouncement, except the dicta in *Paresh Nath* v. *Hari Charan* (17), to show that the Court should, in the application of the provisions of O. XXI, r. 90, have regard to the fact that the purchaser is a stranger to the proceedings. On the other hand, the statement contained in the referring order made by Pandit, J., on the 16th May 1867, in the case of *Abdool Hye* v. *Nawab Raj* (18), shows that a sale may be set aside on the ground of irregularity, however innocent the purchaser. It must further be borne in mind that, by virtue of section 18 of the Indian Limitation Act which extends the period of limitation in cases of fraud, a sale may have to be set aside under O. XXI, r. 90, even though it may have been meanwhile confirmed under O. XX, r. 92. The position then is that, subject to the conditions prescribed by O. XXI, r. 90, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and that the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice. As Pandit, J., pointed out in the case mentioned, "a purchaser in execution is always an adventurer and knows that his purchase is attended with risk," —the risk, amongst others, that his purchase may be nullified on the ground of material irregularity or fraud in publishing or conducting the sale.

We have next to consider the class of cases where the validity of an execution sale is impeached on the ground that the decree which is the foundation of the sale had been obtained by fraud. The question of the position of a *bona fide* purchaser for value without notice, in this connection, was reserved by Sir Barnes Peacock, C. J., in delivering the judgment of the Full Bench in *Nilmani Burnick* v. *Pudlo Lochan Chuckerbutty* (19). In that case, as also in *Ram Soondur Poramanick* v. *Prosunno Coomar Bose* (20), it was ruled that a suit lies in a Civil Court to set aside a sale in execution of a decree fraudulently obtained in a Revenue Court under the Bengal Rent Recovery Act, 1859. This conclusion was rested on the ground that it is a cause of suit in the Civil Courts, which have jurisdiction to administer the rules of equity, justice and good conscience, to set aside decrees obtained by fraud and to restrain the parties to the fraud from reaping the fruit of such decrees. Peacock, C. J., then added the following observation: "In this case, the Revenue Court, upon review, set aside the judgment under which the tenure was sold, and passed a fresh judgment for a different amount. When that judgment was set aside, there was no judgment to support the sale which had taken place under it. It is unnecessary to say what would have been the effect of setting aside the decree under which the sale took place, if the purchaser at the sale had been a *bona fide* purchaser. It is sufficient to state that a decree set aside for fraud would not support a sale to a purchaser in collusion with the parties to the fraud and acting as *benami* for one of them. This is the charge in the present case, and if the fraud alleged be made out, the plaintiff is entitled to relief." The question arose directly for decision in the case of *Abdool Hye* v. *Nawab Raj* (18). There, a decree was obtained against the appellant in the Court of Behar and was transferred for execution to the Court of Surajgarh. The judgment-debt was paid into Court at Behar on the 14th January 1851. An intimation was sent to the Surajgarh Court that the decree had been satisfied and execution was no longer necessary. This, however, reached the Court after the sale had been held on the 3rd February 1851, and the property had passed into the hands of a stranger. The judgment-debtor thereupon sued for cancellation of the sale. The Trial Court dismissed the suit on the ground that the plaintiff had no right to bring the action, and this was confirmed by the lower Appellate Court. Pandit, J.,

(17) 10 Ind. Cas. 361; 38 C. 622; 15 C. W. N. 675; 14 C. L. J. 300.
(18) 9 W. R. 196; B. L. R. Sup. Vol. 911.
(19) B. L. R. Sup. Vol. 379; 5 W. R. Act X, Rul. 20.
(20) B. L. R. Sup. Vol. 382; 5 W. R. Act X, Rul. 22.

elaborately discussed the law on the subject, and, with the approval of Bayley, J., referred the following question to a Full Bench for decision:

"Whether with reference to objections urged by the purchaser, the sale should or should not be set aside, or, in other words, whether and how far in a regular suit, claims of a purchaser in execution of decrees are to be respected and protected on grounds of his innocence and ignorence."

Peacock, C. J., with the concurrence of Bayley, Seton-Kerr, Phear and Macpherson, JJ., delivered the judgment of the Full Bench in the following terms:—

"The substantial question of law which has been referred for the decision of the Full Bench is, whether, having reference to the cases mentioned in the order of reference, *In re Shumboonath Roy* (21), *In re Chunaernath* (22); *In re Nadir* (23); *In re Gunga Pershad* (24), *Bootan* v. *Bhugwan* (25), a *bona fide* purchaser for valuable consideration and without notice at a sale in execution of a decree is protected from having the sale set aside, under the present or former law. We are of opinion that the decisions do not go to the extent of saying that, under no circumstances, can a sale be set aside as against a purchaser. In each case it will be for the Court which tries the case, to determine whether it will be in accordance with the principles of justice, equity and good conscience, that the sale ought to be set aside or not. Each case must be determined by the Court upon its own merits."

It must be noted at this stage that no reference is made, either in the Order of Reference or in the judgment of the Full Bench, to a dictum of the Judicial Committee in *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (26), decided on the 26th February 1866, that is, after the judgment of the Full Bench in *Nilmani Burnick* v. *Pudo Lochan Chuckerbutty* (19) which was decided on the 5th February 1866 and before the Order of Reference in *Abdool Hye* v. *Nawab Raj* (18), which was made on the 16th May 1867. The appeal before the Judicial Committee arose out of a suit instituted by Bindesree Dutt Singh to obtain cancellation of an agreement made by his step-mother and late guardian whereby debts and obligations were incurred by her, which led to a decree against his estate during his minority and a consequent judicial sale. The defendant judgment-creditor became the purchaser at that sale and his title was impeached on the ground that the agreement, the decree, and the sale were fraudulent and collusive. The history of the transactions is set out at length in the judgment of the Sudder Court pronounced in an appeal from the decision of the Principal Sudder Amin: *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (27). It was urged before the Sudder Court that the sale could not be reversed upon a late precedent of that Court; *Ali Hossein* v. *Badul Khan* (28). Roberts and Batten, JJ. overruled this contention in the following terms:

"But there is this peculiarity in this case, that the vendee is not an innocent purchaser, but one who has caused the sale of the property by his own dishonest and artful agency. Such sales, we have no doubt, ought to be cancelled, as the law will not allow a party to take advantage of his own wrong." This view was assailed before the Judicial Committee, and it was argued that there was no evidence to show that there was fraud and collusion between the guardian of the minor and the appellant or that the sale was prejudicial to the estate of the infant. Lord Chelmsford observed: "You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986 borrowed according to your argument to save the estate, but under that cognovit, or confession of judgment, you force a sale yourself and actually buy in the minor's

(21) (1847) Carrau 117; 2 Sum. Rep. 94.
(22) (1841) Carrau 39.
(23) (1842) Carrau 71.
(24) (1842) Carrau 74.
(25) (1849) Beng. S. D. A. 283; 10 Ind. Dec. (O. S.) 856.
(26) 10 M. I. A. 454 at pp. 459, 460, 473, 474; 8 Sar. P. C. J. 1871; 19 E. R. 1044.
(27) (1863) 2 N. W. P. Sud. Dec. 73.
(28) (1863) N. W. P. S. D. A. decided on 19th May.

estate: Can that stand? *Lalla Bunseedhur* v. *Roonwur Bindeseree Dutt Singh* (26) Counsel for the appellant answered; "The sale was by public auction under a decree of Court, whereby the payment of the Rs. 26,986, advanced to save the estate, was decreed: If the transaction as to the *Ikraranamah* fails, yet the appellant was a purchaser at an execution sale and a decree-holder. His rights were similar to a stranger purchasing, *Ali Hossein* v *Badul Khan* (28)." Counsel for the respondent urged that the whole transaction was shown by the evidence to be tainted with fraud; he was stopped by Lord Chelmsford with the observation, "We are satisfied on that point." The question, which the Judicial Committee was, in these circumstances, called upon to consider was whether the appellant could set up his purchase at the execution sale as a bar, though the entire transaction which he himself had brought about, was tainted with fraud. Sir James Colvile held that the Courts below were warranted in their conclusion that the transaction was not only prejudicial to the estate, but had also the character of a fraudulent contrivance, and then added the following observation with reference to the question, whether the sale had interposed an effectual bar to the application of the more appropriate equity of restoration of the property to the minor than the remedy by appropriation of the surplus sale-proceeds:

"Their Lordships concur with the learned Judges of the Sudder Court in dissenting from the authority of the case which is stated to have been decided in 1847 (1863?) by two out of three of the then Judges of the Sudder Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other. In the present case, the judgment by cognovit, the execution and the sale are all tainted with the fraud which entered into the original transaction, the execution of the *ikrar*. All are parts of the contrivance by which the respondent has been deprived of his property and the appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the respondent."

It is manifest that the Judicial Committee were not called upon to examine, whether a *bona fide* purchaser for value without notice was entitled to retain the property which has vested in him by the sale, even though the decree and sale were tainted with fraud. The question was, whether, on the assumption that an innocent purchaser was entitled to special protection, a fraudulent purchaser could be included in the same category. The answer was in the negative, and the reason assigned was that he who has wronged the other party cannot be allowed to enjoy the fruit of his wrong doing. It may be conceded that even a dictum of the Judicial Committee is entitled to great respect, but we cannot altogether overlook the circumstances of the litigation where the pronouncement was made.

Let us return to the decision of the Full Bench in *Abdool Hye* v. *Nawab Raj* (18). The principle enunciated there was applied in *Jungee Lall* v. *Sham Lal Misser* (29). In that case, an *ex parte* decree was obtained against the infant members of a Mitkshara family under such circumstances that their interest in the estate could not be bound thereby. Before the decree was executed, the mother of the infants notified that she denied their liability and questioned the validity of the *ex parte* decree on the ground that they were not properly represented in that suit. Notwithstanding such notice the defendants purchased the property at the execution sale. It was ruled by Markby and Birch, JJ., that the purchasers were not protected by a decree which, by reasonable diligence, they might have discovered to be invalid. In such circumstances the purchasers could not invoke the principle of the decision in

(29) 20 W. R. 120.

Jan Ali v. *Jan Ali* (30), where no question of fraud was raised, and it was ruled that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree. The question came up for consideration again in *Mohesh Chandra Bagchi* v. *Dwarka Nath* (11). There the suit was instituted to set aside an *ex parte* rent-decree obtained under the Bengal Rent Recovery Act, 1859, and an execution sale consequent thereon. The Trial Court found that the entire proceedings—the suit, the decree and the sale—were fraudulent, and cancelled the decree and sale, commenting adversely on the conduct of the purchaser, who was a Pleader and a stranger to the suit. Upon appeal, the District Judge dismissed the suit as barred by limitation. On second appeal to this Court, Jackson and McDonnell, JJ., held that the suit was not barred by limitation and remanded the case for re-trial with special reference to the question, whether the defendant or any of them had been proved to have been implicated in the fraud, as found by the primary Court. It was observed that, upon the authority of previously decided cases, it was clear that, however fraudulent the conduct of the plaintiff in the rent-suit might have been, if the purchaser was not implicated in the fraud, the validity of the sale would not be affected by the badness of the decree under which the sale took place. It may be stated that the previous decisions on the subject were neither mentioned nor discussed in the judgment. Amongst later decisions, reference has already been made above to the judgment of the Judicial Committee in *Bishun Chand* v. *Bijoy Singh* (15). There, a suit was brought to set aside an auction sale on the ground that it was brought about by the fraud of the decree-holder and the judgment-debtor and that the auction-purchase was a *benamidar* of the judgment-debtor. The Trial Court found these allegations established and set aside the sale. On appeal to this Court, that decree was affirmed, as a reasonably clear case of fraud and dishonesty to which the purchaser was a party, had been made out. The Judicial Committee reversed the concurrent finding that the sale was fraudulent and collusive. Lord Robson held that the original debt and the decree thereon were genuine, that the auction-purchaser had made the purchase with his own money, and that the allegation of fraud and conspiracy made against the auction-purchaser had not been brought home to him. In such circumstances, the conclusion was inevitable that the sale could not be successfully impeached.

We have finally to consider the decision in *Chitambar* v. *Krishnappa* (1), where Jenkins, C. J., and Crowe, J., doubted the correctness of the Full Bench decision in *Abdool Hye* v. *Nawab Raj* (18) on the authority of the decisions in *Gore* v. *Stacpoole* (31), *Bowen* v. *Evans* (32), *Colelough* v. *Bolger* (33), *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh* (26) and *Jan Ali* v. *Jan Ali* (30). We have already referred to the decisions in *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh* (26) and *Jan Ali* v. *Jan Ali* (30), and we shall presently consider the English and Irish decisions mentioned. We must not overlook, however, that the decision of the Full Bench is binding on us, until it is set aside by the Full Court or a contrary rule is enunciated by the Judicial Committee. The appellant has, indeed, invited us to hold that the Full Bench decision, which so far as we know, has not been challenged in this Court since 1868, is erroneous. We are not prepared to accept this contention. The decision, as we have seen, does not lay down an inelastic or inflexible rule; on the other hand, it enables the Court to determine each case upon its own merits and to decide whether, in accordance with the principles of justice, equity and good conscience, the sale should or should not be set aside as against the purchaser. The principle that, in all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience, was expressly formulated in section 93 of the Administration

(30) 1 B. L. R. A. C. J. 56; 10 W. R. 154; 3 Mad. Jur. 474; 1 Ind. Dec. (N. S.) 158.

(31) (1813) 1 Dow. 18; 14 R. R. 1; 3 E. R. 607.

(32) (1843) 1 J. & L. 170; 6 Ir. Eq. R. 569; 68 R. R. 242.

(33) (1816) 4 Dow. 54; 16 R. R. 24; 3 E. R. 1087.

of Justice Regulation promulgated by the Governor-General in Council on the 5th July 1781. The rule was thereafter successively re-produced in section 21 of Regulation III of 1793, in section 24 of the Bengal Civil Courts Act, 1871, and in section 37 of the Bengal Civil Courts Act, 1887. Now, the decision of a case accordng to the principles of justice, equity and good conscience has generally meant decision according to the principles of English Law applicable to a similar state of circusmstances. This was justified in *Dada Honaji* v. *Babaji Jagushet* (34) mentioned by Jenkins, C. J., in *Shivrao Narayan* v. *Pundlik Bhaire* (35) on the authority of the judgment of the Judicial Committee in *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (36), but it is doubtful whether the Judicial Committee really intended to enunciate the comprehensive rule attributed to their decision. Lord Hobhouse, however, in the later case of *Waghela Rajsanji* v. *Shekh Masludin* (37) stated that "equity and good conscience" had been "generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances." See also *Rajah of Vizianagram* v. *Rajah Setrucherla* (38); *Meenakshi* v. *Rama Aiyar* (39); *Govindan Nair* v. *Atchutha Menon* (40), *Kripa Sindhu* v. *Annada Sundari* (41); *Gurdeo Singh* v. *Chandrika Singh* (42). In this connection, reference may be made to the observation of Sir Barnes Peacock, C. J.; in *Rambux Chittangeo* v. *Modhoosoodun Paul Chowdhry* (43), that where rights of parties are determined according to the general principles of equity and justice, this must be done without any distinction, as in England, between that partial justice which is administered in the Courts of Law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. This was adopted by Jenkins, C. J. in *Deb Narain* v. *Ram Sadhan* (44); see also the observation of Peacock, C. J. in *Khemamoyee* v. *Shushee Bhoosun Gangooly* (45). In these circumstances, it is not surprising to find that where, as in the present instance, there is no statutory provision directly conclusive on the question of the rights and liabilities of the parties the only justice, equity and good conscience which Judges steeped in the principles of English jurisdprudence can and do administer, in default of any other rule, is so much of English Law and usage as seem reasonably applicable in this country: *Satis Chandra* v. *Ram Dayal* (46).

The principles applicable to cases of this character are concisely stated by Sir Edward Sugden (afterwards Lord St. Leonards) in his classical treatise on the Law of Vendors and Purchasers (14th Ed., 1862, page 110):

"If a decree is obtained by fraud, it may be relieved against, and it has been said that a purchaser is bound to see that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case; but, if the Court itself be imposed upon, it would be strong measure to imply notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court, as a general rule, are bound to see that the sale is made according to the decree. And this more specially applies to the plaintiff in the cause; of course, the purchaser making use of the machinery of the Court to obtain the estate

(34) 2 Bom. H. C. R. 36 at p. 38.
(35) 26 B. 437; 4 Bom. L. R. 90.
(36) 9 M. I. A. 303 at p. 321; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.
(37) 14 I. A. 89 at p. 96; 11 B. 551 at p. 561; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 9 Ind. Dec. (N. S.) 364.
(38) 26 M. 686; 13 M. L. J. 83.
(39) 18 Ind. Cas. 34; 37 M. 396; 13 M. L. T. 97; 24 M. L. J. 106; (1913) M. W. N. 40.
(40) 28 Ind. Cas. 394; 39 M. 433; 28 M. L. J. 310; 2 L. W. 290.
(41) 35 C. 34; 6 C. L. J. 273; 11 C. W. N. 983.
(42) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

(43) B. L. R. Sup. Vol. 675 at p. 679; 7 W. R. 377; 2 Ind Jur. (N. S.) 155.
(44) 20 Ind. Cas. 630; 41 C. 137 at p. 146; 18 C. L. J. 603; 17 C. W. N. 1143.
(45) 9 W. R. 94.
(46) 59 Ind. Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31.

fraudulently as against the persons entitled to the inheritance, although with the concurrence of the tenant for life, cannot sustain his purchase; but a *bona fide* sale cannot be impeached, simply because the suit was in fact instituted for the purpose of carrying it into execution. The tenant for life cannot be permitted in such a sale to obtain a benefit at the expense of the remainder-man, and if the purchaser permit him to do so, that may in some cases vitiate the sale, although the Court, if the transaction was not fraudulent, will struggle to correct the misapplication, and not rescind the sale."

The principles upon which a Court of Equity acts in setting aside a sale had under a decree, were elaborately discussed by Sir Edward Sugden, when Lord Chancellor of Ireland in the case of *Bowen* v. *Evans* (32) which was subsequently taken up to the House of Lords; *Bowen* v. *Evans* (47). Reference was made to the decisions of Lord Redesdale in *Kennedy* v. *Daly* (48) and *Giffard* v. *Hort* (49) where purchases on the basis of fraudulent decrees were pronounced to be of no effect as the purchaser was aware of, if not a party to the fraud. To the same effect is the decision of Manners, L. C., in *Blake* v. *Foster* (50). On the other hand, in *Bennett* v. *Hamill* (51) Lord Redesdale held that the purchaser was not affected by error in the decree and observed as follows: "A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has on that investigation properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court; and he has further to see that taking the conveyance he takes a title that cannot be impeached *allunde*." This was substantially the view adopted by Manners, L. C., in *Lightburn* v. *Swift* (52). Amongst other cases mentioned by Sir Edward Sugden in *Bowen* v. *Evans* (32), are the decisions of the House of Lords in *Gore* v. *Stacpoole* (31), *Colclough* v. *Bolger* (33), *Colclough* v. *Sterum* (53) and *Bandon* v. *Becher* (54). In each of these cases, relief was granted on the ground of fraud, and it was established that the purchaser, if not a party to the fraud, had notice thereof, actual or constructive; they will be found analysed by Sir Edward Sugden in his treatise of the Law of Property as administered by the House of Lords, 1849, Chapter VI, section iii, pages 679-720. In one of the cases, *Gore* v. *Stacpoole* (31) Lord Redesdale doubted whether even a purchase under the decree, without notice of the fraud, would be a protection, as he held it clear that a purchaser was bound to see that, at least so far as appeared on the face of the proceedings before the Court, there was no fraud in the case. Sir Edward Sugden hesitated to go as far as Lord Redesdale and observed in *Bowen* v. *Evans* (47): "That goes a great way, and I should act upon that opinion with very great precauton. If I found a purchaser buying where fraud appeared clearly on the face of the decree, I should hold him to have notice of it; but I should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud which was not discovered by the Court, or the officers of the Court, or the Counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted by the facts of the case;" see also *Lansdowne* v. *Beauman* (55) where Hart, L. C., referred to the observations of Lord Redesdale in *Giffard* v. *Hort* (49) and expressed the opinion "that the utmost caution should be used in touching sales under decrees, and that nothing could be more dangerous than for the Court to strain the effect of notice, for the purpose of unsettling the transaction of an honest purchaser under a decree." In this connection reference may be made to the de-

(47) (1848) 2 H. L. C. 257; 81 R. R. 136; 9 E. R. 1090.
(48) (1804) 1 Sch. & Lef. 355 at p. 377.
(49) (1804) 1 Sch. & Lef. 356 at p. 399.
(50) (1813) 2 Ball & B. 387.
(51) (1806) 2 Sch. & Lef. 566.
(52) (1812) 2 Ball & B. 207.
(53) (1821) 3 Bligh 181; 22 R. R. 1; 4 E. R. 572.
(54) (1835) 9 Bligh (N. S.) 532; 3 Cl. & F. 479; 5 E. R. 1388.
(55) (1828) 1 Moll. 89 at p. 92.

cision of the House of Lords in *Mullins* v. *Townsend* (56), as an illustration of a case where the irregularities in connection with the sale were so grave and manifest that the Court had no difficulty in condemning the transaction as fraudulent and in cancelling the sale which had been made at an undervalue. The cases of *Lloyd* v. *Johnes* (57) and *Curtis* v. *Price* (58), which are mentioned in *Bowen* v. *Evans* (32), furnish instances, not of fraud but of irregularity in the proceedings, and it was accordingly held by Lord Eldon, in the one case and by Sir William Grant, M. R., in the other, that the purchaser should not lose the benefit of his purchase. The decision in *Townsend* v. *Warren* (59), which was heard in the first instance by Manners, L. C. and subsequently affrmed by the House of Lords was based upon very special facts, as explained by Sir Edward Sugden in *Bowen* v. *Evans* (32) and also in his Law of Property page 712. The sale was allowed to stand, though a fraud had clearly been practised on the inheritance and the purchaser was a party thereto; the case, however, was treated by Lord Chancellor Manners erroneously, as it subsequently transpired, as one of irregularity, and relief was confined to the award of the full and fair value of the property at the time of the sale. On the other hand, in *Thornhill* v. *Glover* (60) Sir Edward Sugden in 1842 set aside a sale which had taken place in 1808, as it appeared that the machinery of the Court had been resorted to to effectuate a sale made, not by the order of the Court, but by a contract entered into behind the back of the Court and though he deplored that the Court should be required to interfere after such a lapse of time, he added that he must not, in the words attributed by Lord Harcourt to Twisden, J., in *Attorney-General* v. *Sutton* (61) "steal leather to make poor men shoes." We may add that in *Beloley* v. *Carter* (62) Selwyn, L. J., quoted with approval the following passage from the judgment of Sir Edward Sugden in *Bowen* v. *Evans* (32) which sets out succinctly the reasons why a judgment and sale should not be permitted to be impeached to the detriment of an innocent purchaser:

"First there is *Lloyd* v. *Johnes* (57) in which Lord Eldon held that the purchaser should not lose the benefit of his purchase by reason of an irregularity in the proceedings; that case has been explained by Lord Redesdale in *Bennett* v. *Hamill* (51) and by Sir W. Grant in *Curtis* v. *Price* (58). Lord Redesdale seems not to have entirely agreed with Lord Eldon, but, with great deference to the high authority with whom I am compelled to differ, I entirely subscribe to the doctrine of Lord Eldon. In *Curtis* v. *Price* (58), the Master of the Rolls, though not called on to decide the point, declared his opinion to be, that although accounts were not taken or inquiries directed which ought to have been taken and directed, yet that being the act of the Court it could not affect the purchaser and he was also of opinion that a direction by the Court to pay the purchase-money to a wrong person would not affect the purchaser. I entirely subscribe to that opinion. I think that, though there may have been some advantage taken of the parties to the cause, it ought not of itself to constitute a ground for impeaching the sale for it would be extremely dangerous to impress upon the minds of purchasers under decrees that that which had escaped the vigilance of the Court, of its officers, and of the Bar, would form a sufficient ground to set aside a sale. I could not lay down a rule more mischievous to the suitors of the Court and the interests of the public, for it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside."

Reference may also be made in this connection to *Gavin* v. *Hadden* (63). We may take it, then, that a judgment which has been obtained by fraud, either in the Court, or of one or more of the parties, can be impeached by means of an action, and can be set aside against those who

(56) (1831) 2 Dow & Cl. 430; 5 Bli. (N. S.) 567; 6 E. R. 787.
(57) (1804) 9 Ves. 37; 7 R. R. 147; 32 E. R. 514.
(58) (1805) 12 Ves. 89; 8 R. R. 303; 33 E. R. 35.
(59) (1812) 1 J. & L. 221; 6 Ir. Eq. Rep. 620.
(60) (1848) 3 Dr. & War. 195.
(61) (1721) 1 P. Wm. 754 at p. 765; 24 E. R. 600.
(62) (1869) 4 Ch. App. 230 at pp. 238, 239; 17 W. R. 300.
(63) (1871) 3 P. C. 707; 8 Moo. P. C. (N. S.) 90; 3 L. R. P. C. 707; 17 E. R. 847.

procured it by fraud: *Toulmin* v. *Steere* (64); *Cammell* v. *Sewell* (65), *Coaks* v. *Boswell* (66); *Boswell* v. *Coaks* (67), *Schedden* v. *Patrick* (68). There is, however, at least one exception to this rule; for, as stated by Cozens-Hardy, L. J., in *Birch* v. *Birch* (69), although in most cases a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a judgment granting Probate of a Will, inasmuch as a Will must be either good or bad against all the world.

Reference has sometimes been made in the discussion of this question, as in *Chitambar* v. *Krishnappa* (1), to the class of cases which hold that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree: *Chunder Kant* v. *Bissessur* (70), *Jan Ali* v. *Jan Ali* (30), *Zainul-Abdin* v. *Muhammad Asghar* (71), *Mukhoda Dassi* v. *Gopal Chunder Dutta* (72), *Inderjit* v. *Pootee Begum* (73): *Janakdhari Lal* v. *Gossain Lal Bhaya* (74); *Nagendra Nath Basu* v. *Parbati Charan Koyal* (75). The principle which lies at the root of this class of cases was investigated in *Krishna Chandra* v. *Jogendra Narain* (76) and does not logically require extension to cases where a fraud has been committed on the Court itself. The rule that a stranger purchaser is not affected by the reversal of the decree for error or irregularity is based, as the cases show, on grounds of public policy, though it operates harshly upon the person whose property has been sold, and who it may turn out in the end was not liable at all to the plaintiff. It is at least questionable whether this rule should be made to comprehend within its scope the class of cases where fraud has been committed upon the Court, which, though established for the administration of justice, has been utilised by an unscrupulous litigant for the accomplishment of a dishonest purpose; such an extended application of the rule would undoubtedly tend to encourage fraud.

The question under consideration has, as may be anticipated, frequently come under examination in the Courts of the United States and the balance of judicial opinion there favours the view that a *bona fide* purchaser for value without notice at an execution sale, is not affected by infirmities in the judgment or proceedings subsequent thereto, which do not appear on the face of the record, such as secret vices, frauds, defects or other infirmities; see Freeman on Void Judicial Sales, section 41; Freeman on Judgment section 509; Freeman on Executions, section 342; Kleber on Void Judicial and Execution Sales, section 369, Rorer on Judicial and Execution Sales, sections 570, 1101. The adoption of the rule has been often challenged, but has been defended on grounds which are best stated in the judgment of a Full Bench of the Supreme Court of California in *Reeve* v. *Kennedy* (77) where Crockett J. observed as follows:

"No principle is better settled than that a purchaser at a judicial sale, without notice under proceedings regular on their face and had in a Court of competent jurisdiction, is not affected by any mere error of the Court; for which the judgment might be reversed on appeal, nor for any secret vice in the judgment, not appearing on the face of the record and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the face of the record that the Court had jurisdiction to render the judgment, and whether there is a valid

(64) (1817) 3 Mer. 210; 17 R. R. 67; 36 E. R. 81.
(65) (1858) 3 H. & N. 617; 117 R. R. 878; 27 L. J. Ex. 447; 4 Jur. (N. S.) 978; 32 L. T. (O. S.) 196; 157 E. R. 615.
(66) (1886) 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32.
(67) (1894) 6 R. 167.
(68) (1854) 1 Macqueen 535.
(69) (1902) P. 130; 71 L. J. P. 58; 86 L. T. 364; 50 W. R. 437; 18 T. L. R. 485.
(70) 7 W. R. 312.
(71) 15 I. A. 12; 10 A. 166; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).
(72) 26 C. 734; 3 C. W. N. 766; 13 Ind. Dec. (N. S.) 1069.
(73) 19 W. R. 197.
(74) 1 Ind. Cas. 871; 37 C. 107; 11 C. L. J. 254; 13 C. W. N. 710.
(75) 35 Ind. Cas. 339; 20 C. W. N. 819.
(76) 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537.

(77) (1872) 43 Cali. 643.

execution. But nothing more is required of him. Unless the plaintiff in the action be also the purchaser at the sale, the latter will not be affected by any mere error of the Court, even though the judgment be afterwards reversed for such error; nor can his rights be impaired by any secret vice in the proceedings, resulting from fraud or other similar cause, of which he had no notice. As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a *bona fide* purchaser, without notice, could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demands that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and by a Court of competent jurisdiction should be protected as against mere errors of the Court, and against secret vices in the proceedings founded on fraud, accident or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale, if he incurred the hazard of losing his money, in case it afterwards should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied, as proving a service on the defendant, was in fact false. These propositions are too familiar to require the citation of authorities in their support and we have been referred to none which appear to contravene them, unless it be two cases decided by the Supreme Court of Iowa: *Hansby* v. *Blackman* (78); *Bryant* v. *Williams* (79). The principle settled in those cases is, that a defendant in an action, who was not a resident of the State, and was not served with process by publication or otherwise, and for whom an Attorney without authority had entered an appearance, might afterwards, on proof of these facts, recover the property sold under the judgment from a *bona fide* purchaser, without notice. It is unnecessary, for the purposes of this case, to examine the reasoning on which these decisions are founded. But if the peculiar facts of those cases should take them out of the general rule to which I have adverted, it would only prove that the rule, in its broadest sense, is not wholly without an exception and would not impugn the rule itself. If an unauthorized appearance by an attorney, for a non-resident defendant, who was not served with process, can be afterwards shown to invalidate the title of a *bona fide* purchaser without notice at the execution sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doctrine ought not to be further extended."

This was followed by the Supreme Court of Virginia in *Marrow* v. *Brinkley* (80), and when an attempt was made to question that decision before the Supreme Court of the United States, the application for leave to appeal was rejcted: *Marrow* v. *Brinkley* (81). The question was again elaborately discussed by the Supreme Court of North Carolina in *Millsaps* v. *Estes* (82) and in *Yarborough* v. *Moore* (83), and the rule was re-affirmed that innocent purchasers at a judicial sale, who had no notice of any irregularity in the proceedings and the judgment under which the sale was made, would be protected in their purchase, where the Court had jurisdiction of the parties and subject-matter of the proceeding and the judgment on its face authorised a sale. The rule has been enunciated in similar terms and recognised or applied without question, in New Yark in *Clarke* v. *Davenport* (84), in Alabama in *Dunklin* v. *Wilson* (85), in New Jersy in *Wilson* v. *Hoffman* (86), in Maryland in *Spindler* v.

(78) (1865) 20 Iowa 128.
(79) (1866) 21 Iowa 229.

(80) (1888) 85 Va. 551; 6 S. E. 605.
(81) (1889) 129 U. S. 178; 32 Law. Ed. 654.
(82) (1904) 137 N. C. 585; 70 L. R. A. 170; 107 Am. St. Rep. 496; 50 S. E. 227.
(83) (1909) 151 N. C. 176; 615 S. E. 763.
(84) (1857) 14 N. Y. Supr. Ct. 95.
(85) (1879) 64 Alabama 162.
(86) (1901) 60 Atl. 592.

Atkinson (87), in Arkansas in *Carden* v. *Lane* (88), and in Missouri in *Hellenan* v. *Rigsdale* (89). The Courts in the United States have, however, struggled to avoid the manifest hardship, if not injustice, of the application of the rule by the adoption of two principles: (*i*) they have drawn a distinction between judgments which are void and voidable and they have ruled that if the judgment is void, even a *bona fide* purchaser does not acquire an unimpeachable title; *Rankin* v. *Schofield* (90), *McDonald* v. *Rankin* (91), *Taylor* v. *Savage* (92), *Mitchell* v. *Maxent* (93), *Lamister* v. *Keelero* (94); (*ii*) they have held that a person is not a *bone fide* purchaser, unless he purchases without notice, actual or constructive, of the title or equity claimed to be superior to his rights as purchaser, and knowledge sufficient to put a reasonably prudent man on enquiry is constructive notice; in other words, though an execution purchaser need not be in a mood to scent fraud, he need not have complete information of every fact material for him to know; he is bound to make enquiry when there is anything that would excite the suspicion of a prudent man and place him on his guard: *Barnes* v. *McClinton* (95), *Gibson* v. *Winslow* (96), *Farr* v. *Sims* (97), *Lang Syne Gold Min. Co.* v. *Ross* (98), *Pettis* v. *Johnston* (99). In this way, by judicious application of the doctrine of constructive notice, the Courts of the United States have sought to avoid the harsh results which sometimes follow from the application of the stringent rule that the title of a purchaser in good faith and for value at a judicial sale should be considered invulnerable against an assault, wherein it is attempted to be shown that the judgment was procured by fraudulent machinations and misrepresentations of others, provided he is neither chargeable with notice thereof nor guilty of participation therein.

We are thus brought back to the rule enunciated by Sir Barnes Peacock in *Abdool Hye* v. *Nawab Raj* (18), namely, that in cases of this character, where a stranger has purchased, the Court should determine whether it will be in accordance with the principles of justice, equity and good conscience to set aside the sale. The Court has, in fact, to reconcile two conflicting principles. On the one hand, as De Grey, C. J., said in *R.* v. *Duchess of Kingston* (100), fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice, and, in the words of Lord Coke, avoids all judicial acts, ecclesiastical and temporal. James, L. J., emphasised the same idea when he stated in *Vane* v. *Vane* (101) that a Court of Equity will wrest property, fraudulently acquired, not only from the perpetrator of the fraud but, to use Lord Cottenham's language in *Trevelyan* v. *Charter* (102), affirmed by the House of Lords in *Charter* v. *Trevelyan* (103), from his children and his children's children or, as was said in *Huguenin* v. *Baseley* (104) and *Bridgeman* v. *Green* (105), from any persons amongst whom he may have parcelled out the fruits of his fraud, and will restore it to those from whom it has been fraudulently abstracted. On the other hand, as Lord Loughborough said in *Jerrard* v. *Saunders* (106), against a purchaser for valuable consideration without notice, the Court will not take the least step imaginable, which is only a re-statement of the

(87) (1852) 3 Maryland 409; 56 Am. Dec. 755.
(88) (1886) 48 Ark. 216; 2 S. W. 709; 3 Am. St. Rep. 228.
(89) (1906) 199 Mo. 375; 97 S. W. 890.
(90) (1906) 81 Ark. 440; 98 S. W. 674.
(91) (1909) 92 Ark. 173; 122 S. W. 88.
(92) (1813) 1 Howard 282; 11 Law. Ed. 132.
(93) (1866) 4 Wallace 237; 71 U. S., XVIII, 326.
(94) (1887) 123 U. S. 376; 31 Law. Ed. 238.
(95) (1831) 3 Pen. & W. 67; 23 Am Dec. 62.
(96) 1863) 46 Pa. St. 380; 84 Am. Dec. 552.
(97) (1832) Richardson Eq. Cas. 122; 24 Am. Dec. 396.
(98) (1888) 20 Nev. 127; 18 Pac. 358; 19 Am. St. Rep. 337.
(99) (1920) 190 Pac. 681.

(100) (1776) 20 How. St. Tr. 544; 2 Sm. L. C. 754.
(101) (1873) 8 Ch. App. 383 at p. 397; 42 L. J. Ch. 299; 28 L. T. 320; 21 W. R. 252.
(102) (1835) 4 L. J. Ch. 209 at p. 214; 8 Jur. 105.
(103) (1844) 11 Cl. & F. 714; 65 R. R. 305; 8 E. R. 1273.
(104) (1807 14 Ves. 273; 9 R. R. 148; 1 Wh. & T. L. C. (7th Ed.) 247, 33 E. R. 526.
(105) (1757) Wilmot 58; 2 Ves. 627; 97 E. R. 22.
(109) (1794) 2 Ves. 454 at p. 458; 30 E. R. 721.

pronouncement of Lord Northington in *Stanhope* v. *Earl Verney* (107), that a purchase without notice for a valuable consideration is a bar to the jurisdiction of the Court; see also similar expressions, perhaps more cautiously phrased, by Lord Loughborough in *Strode* v. *Blackburne* (108) by Lord Eldon in *Wallwyn* v. *Lee* (109), and by Lord Romilly in *Attorney-General* v. *Wilkins* (110). On the facts of each case, the Court has to determine which of these doctrines should prevail. In the solution of the problem, we have to bear in mind that the protection given to the *bona fide* purchases had its origin exclusively in equity and is based entirely upon the conception that a Court of Equity acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, *in foro conscientiæ* he is bound to do. If the relations between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief; if the relations are not of this character, then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore, simply means that from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain because it would be unconscientious and inequitable to do so; that Court will not in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf. We are not concerned here with the very exceptional cases where a *bona fide* purchaser is aided by affirmative relief, by reason of the fraud of the party holding the prior title or interest; these need not be exhaustively enumerated and classified for our present purpose, but examples are furnished by the decisions in *Savage* v. *Foster* (111), *Ibbottson* v. *Rhodes* (112); *West* v. *Jones* (113), *Dillon* v. *Costelloe* (114), *Hickson* v. *Aylward* (115), *Wallade* v. *Lord Donegal* (116). But apart from such special instances, the doctrine is applied for the protection of the defendant in cases which have been grouped by Lord Westbury into three classes in *Phillips* v. *Phillips* (117); (*i*) where an application is made to the auxiliary jurisdiction of the Court by the possession of a legal title; (*ii*) where the plaintiff holding an equitable estate or interest seeks to enforce it against a purchaser of the legal title, and (*iii*) where the plaintiff seeks to enforce some equity as distinguished from an equitable estate, as the re-formation of a deed on account of mistake or its cancellation on the ground of fraud. In each case, it must be remembered that the doctrine is confined to Courts of Equity and is in no sense a rule of property but is a rule of inaction. In such circumstances, the most convenient course to follow is obviously to enunciate the rule in an elastic form, adaptable to varied combinations of circumstances, as was done by Sir Barnes Peacock in *Abdool Hye* v. *Nawab Raj* (18). In the application of that rule to a concrete case, we may usefully bear in mind that a *bona fide*

(107) (1761) 2 Eden 81 at p. 85; 28 E. R. 826.
(108) (1796) 3 Ves. 221; 30 E. R. 979.
(109) (1803) 9 Ves. 24 at p. 34; 7 R. R. 142; 32 E. R. 509.
(110) (1853) 17 Beav. 285 at p. 291; 99 R. R. 149; 22 L. J. Ch. 830; 17 Jur. 885; 1 W. R. 478; 51 E. R. 1043.
(111) (1723) 9 Mod. 35; 88 E. R. 299.
(112) (1706) 2 Vernon 554; 23 E. R. 958.
(113) (1851) 1 Sim. (N. S.) 205; 89 R. R. 67; 20 L. J. Ch. 362; 61 E. R. 79.
(114) (1827) 2 Molloy 512.
(115) (1828) 3 Molloy 1.
(116) (1837) 1 Dr. and War. 461.
(117) (1862) 4 De G. F. & J. 208; 138 R. R. 97; 31 L. J. Ch. 321; 8 Jur. (N. S.) 145; 5 L. T. (N. S.) 855; 10 W. R. 236; 45 E. R. 1164.

purchaser for value without notice has always been a favourite with Courts of Equity. But to crystallize the rule further, would only be to impair its utility. Thus alone can we give effect to the elementary truth that the law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society, though the progress of the law must be by analogy to what is already settled.

Tested in the light of these principles, how does the case for the defendant stand? We have seen that in 1904, the landlords sued the present plaitiffs to recover Rs. 2-2-0 as arrears of rent. It has not been investigated whether the claim was real or illusory. This much is known that the processes were suppressed, false returns were submitted to the Court, and an *ex parte* decree was obtained. The decree was not executed for three years. Processes were again suppressed, false returns submitted and the sale held on the 21st November 1907, when Behari Lal Das became the purchaser for an insignificant sum. The judgment-debtors were not present; there were no bidders; there was no competition. Any purchaser, however optimistic, could, in such circumstances, have inferred that there must have been something wrong with the proceedings. Das, after his purchase, never obtained delivery of possession and never paid rent to the landlords; the original tenants were accordingly left in undisturbed occupation as before. The landlords next sued the widow of Das—this time for the recovery of Rs. 15-7-6—and obtained an *ex parte* decree on the 24th June 1913, as processes were suppressed and false returns submitted to the Court. The sale was not held till after the lapse of more than three years, on the 21st November 1916, when the appellant, Bireswar Ghose became the purchaser for a small sum. The processes in execution had not been served. There were no bidders; there was no competition. If the intending purchaser had made any enquiry, he would have found that, not the judgment-debtor, then widow of Das, but the original tenants were in occupation. This would have put a reasonable man on his guard; *Barnhart* v. *Greenshields* (118), *Mancharji Sorabji Chulla* v. *Kongseoo* (119), *Hakeem Meah* v. *Beejoy Patnee* (120), *Radha Madhav Paikara* v. *Kalpataru Roy* (16). The fact remains that the appellant was able to secure the property for an insignificant sum. We cannot hold, in these circumstances, that the *bona fide* of the first or of the second purchaser were as unquestionable as their good fortune in acquiring a property at a fraction of its value without contest or competition. In our opinion, it would be a well-merited reproach to the administration of justice if we were compelled to uphold execution purchases of this description, by the application, without discrimination, of the formula of *bona fide* purchaser for value without notice.

We feel no doubt that the Subordinate Judge has rightly set aside the sale and decreed the suit; his decree must consequently be affirmed and this appeal dismissed with costs.

Rankin, J.—I agree in the view that this appeal should be dismissed with costs. The circumstances of the case as found by the lower Appellate Court indeed the mere dates of the decrees and executions, coupled with the fact that Behari Las was never in possession convince me that the defence of "purchaser for value without notice" has no basis in the facts. There is simply no room for it. There is an express finding that he was not a *bona fide* purchaser and, in the circumstances detailed by the learned Subordinate Judge, any other finding would have been inexplicable. Neither by his pleading nor by the way in which issues were taken at the trial, or points advanced on first appeal has the purchaser done anything to entitle him to complain that the judgment of the Court below is an insufficient analysis of the facts as to this part of the case. It may be taken that there was some room for controversy upon the facts as the Courts below were not in agreement. But I see no error of law and, on the facts stated by the learned Subordinate Judge, I see no escape from his

(118) (1853) 9 Moo. P. C. 18; 105 R. R. 1; 14 E. R. 204.
(119) 6 B. H. C. R. 59.
(120) 22 W. R. 8.

conclusion. The judgment of Jenkins, C. J., in Bombay case *Chitambar* v. *Krishnappa* (1), decides merely that inadequacy of price, in the absence of notice of the fraud or defect in the proceedings, does not give rise to a right to have the sale set aside. It in no way throws doubt upon the proposition that judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, must be of very different value in different circumstances. In this present case this consideration goes but a little way. In other cases it may go almost all the way. But in all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This, in my opinion, is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity, where it can, will favour those who show that in innocence they have given value.

B. N. & W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1030 OF 1921.
July 13, 1922.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

BALKISHAN—DEFENDANT—APPELLANT

versus

RAGHUBAR DAYAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 9, scope of—Cause of action—Suit to eject defendant as tenant—Subsequent suit for possession, whether barred.

O. IX, r. 9 of the Civil Procedure Code does not preclude a plaintiff, after his suit has been dismissed on one cause of action, from bringing another suit on another cause of action. The rule is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit, which was dismissed. Thus, on the failure of a suit for ejectment in which the cause of action was the refusal of the defendant to vacate after he had been served with notice of ejectment, a subsequent suit for possession of the same property based on a denial of title would not be barred. [p. 992, col. 2.]

***Hafi Khan* v. *Baldeo Das*, 24 A. 90; A. W. N. (1901) 188, distinguished.**

Second appeal from a decree of the District Judge, Aligarh, dated the 7th of April 1921, confirming a decree of the Subordinate Judge, Aligarh, dated the 14th of December 1920.

Munshi *Panna Lal*, for the Appellant.

Maulvi *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to a certain house and a shop standing in Hathras city. They practically formed one building and belonged to Jamna Das, who, on the 4th of June 1890, made a gift thereof in favour of the plaintiff. Jamna Das died in *Sambat* 1961. Shortly afterwards, the plaintiff hypothecated the said house including the shop, by way of a simple mortgage in favour of Makhan Lal for a sum of Rs. 100. The allegation of the plaintiff was that that mortgage was intended for the benefit of Bhola Nath who held a contiguous house, and that about two years later Bhola Nath took possession of the mortgaged property on an agreement to pay rent at Rs. 2 per mensem, out of which Re. 1 per mensem was to be credited in payment of interest due on the mortgage and the balance in payment of the principal due thereon.

The plaintiff goes on to say that in defiance of that arrangement a suit was brought by Makhan Lal for recovery of the money due on the mortgage and a decree was eventually obtained on the 24th of August 1916, which the plaintiff had ultimately to satisfy. The plaintiff next brought a suit against Balkishan, the son of Bhola Nath, for possession of the said house on an allegation that he was in occupation thereof as a tenant and was refusing to vacate the same in spite of notice. There was also a claim laid for damages on account of certain materials said to have been removed by Balkishan. That suit was

referred to arbitration, but the plaintiff did not appear before the arbitrator, who consequently reported that the suit ought to fail for default of the plaintiff. The defendant was present before the arbitrator to prosecute his defence. The Court before which the suit was pending dismissed the suit for default, acting under the provisions of O. IX, r. 8 of the Code of Civil Procedure.

The present suit has been filed by the same plaintiff for the recovery of possession of the same property. The allegation now made is that Bhola Nath had been put in possession of the house in lieu of the principal and interest payable to him under the mortgage of the 13th of August 1904; that Bhola Nath was succeeded by Balkishan and that Balkishan had wrongfully denied in the previous suit that he was a tenant. The date of the denial of the title of the plaintiff by Balkishan in the previous suit has been treated as the cause of action for the present suit. The defendant Balkishan denied the title of the plaintiff, and pleaded that he had been in adverse possession of the disputed property. He also denied that Bhola Nath had been in occupation of the said property as a tenant and alleged that the suit was without any cause of action and not maintainable.

The Court of first instance found that the plaintiff was the owner of the disputed property and that Bhola Nath was occupying the same as a tenant under an arrangement that the rent was to be credited in satisfaction of the money due on the mortgage of the 13th of August 1904. It was further found that the dismissal of the previous suit did not bar the institution of the present one because the cause of action for the present suit was not the same as that on which the previous suit was instituted. The lower Appellate Court was not satisfied that Bhola Nath had taken the house on an agreement to pay rent in the manner alleged by the plaintiff, but it was of opinion that the possession of Bhola Nath and after him of Balkishan, was in any case permissive and that the plaintiff was entitled to eject the defendant from the disputed property.

It is urged on behalf of the defendant-appellant that the claim is barred by limitation, because the defendant was in adverse possession of the disputed property and it is also contended that the dismissal of the previous suit operates as a bar to the maintenance of the present one. In regard to the former, the finding of the Courts below is conclusive. The Court of first instance was of opinion that the agreement on which the plaintiff had relied was proved, and though the lower Appellate Court did not agree with that conclusion, its finding that the possession of Bhola Nath, and after him of the defendant, was permissive is sufficient to dispose of the contention that the possession of either of them could be adverse to the plaintiff.

The learned Counsel for the defendant appellant has referred to the decision in *Haji Khan* v. *Baldeo Das* (1). But in that case the plaintiff had failed to establish the tenancy and no license or permission to occupy the disputed property had been proved. On the other hand, in *Abdul Ghani* v. *Babni* (2), it was held that where a suit was brought against a person, described to be a tenant, for possession of the lease-hold property and the defendant had denied the tenancy alleged by the plaintiff, and asserted that he had been in adverse possession for a period of seventeen years, and the said tenancy was found to be not established, nevertheless that was not considered sufficient to preclude the plaintiff from asserting and establishing that the possession of the defendant was permissive, and he was granted relief on that basis.

The second contention is equally futile, for O. IX, r. 9, of the Code of Civil Procedure does not preclude the plaintiff after his suit has been dismissed on one cause of action, from bringing another suit on another cause of action. The cause of action in the previous suit was the refusal of Balkishan to vacate the premises after he had been served with a notice of ejectment. The cause of action in the present suit is the denial of title. As held in *Gobind Chunder Addya* v. *Afzul Rubbani* (3), the operation of section 103 of the old

(1) 24 A. 90; A. W. N. (1901) 188.
(2) 25 A. 256; A. W. N. (1903) 18 (F. B.).
(3) 9 C. 426; 12 C. L. R. 29; 4 Ind. Dec. (N. S.) 932.

Code of Civil Procedure (corresponding to O. IX, r. 9 of the present Code) is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit which was dismissed.

The appeal, therefore, fails and is dismissed with costs.

W. C. A. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1275 OF 1921.
July 27, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Justice Sir John Bucknill, Kt.,

Babu DURGA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

G. I. P. RAILWAY AND E. I. RAILWAY THROUGH THEIR AGENTS—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 77, interpretation of—Money value of claim whether to be stated—Intention to sue.

Section 77 of the Indian Railways Act merely requires that a demand for compensation shall be made; it nowhere prescribes that the money value of the claim shall be stated, nor does it require the claimant to notify that he intends to sue. [p. 994, col. 1.]

Appeal from a decision of the District Judge, Bhagalpur, dated the 23rd May 1921, confirming the decision of the Subordinate Judge, Bhagalpur, dated the 28th May 1920.

Mr. *Parmeshwar Dayal*, for the Appellants.

Messrs. *S. N. Bose* and *N. C. Sinha*, for the Respondents.

JUDGMENT.

Mullick, J.—On the 14th August 1918 the plaintiffs, Messrs. Harasmal Mamraj Marwari, who were holders of three Railway receipts for goods despatched from Victoria Terminus, Bombay, to Bhagalpur, addressed to the Agent of the East Indain Railway, a letter the material portion of which ran as follows:—"we have the honour to inform you that the goods caused (*sic*) by these consignments noted above have not yet reached Bhagalpur, on account of which we are suffering great loss; we, therefore, request the favour of your kindly inquiring into the matter and arranging for delivery of the consignment at an early date failing which we shall be compelled to take such other steps for the realization of the value of the afo esaid consignments as we may be advised to do."

The letter was addressed to the Agent, East Indian Railway, Howrah, but seems to have been opened and acknowledged by the General Traffic Manager of the East Indian Railway at that place. This last named officer then sent the letter to the Divisional Traffic Manager who, after carrying on a correspondence with the plaintiffs for some time regarding the loss of the consignments, finally wrote to him on the 18th November 1918, in the following terms:—"I much regret the loss you have sustained in the case but cannot admit any liability as the consignment was robbed from a running train to which no clue has been obtained and Risk H note held protects us."

Thereupon, on the 23rd April 1919, the plaintiffs instituted the suit out of which the present appeal arises claiming Rs. 2,165-10-0 as damages from the Great Indian Peninsula Railway, the first party defendants, the East Indian Railway Company, 2nd party defendants, and the Bengal Nagpur Railway, 3rd party defendants. The Trial Court dismissed the suit on two grounds: (1) that the notice required by section 77 of the Indian Railways Act had not been served upon the Railway Administration in the manner required by section 140 of the Act, and (2) that the notice itself was invalid and ineffective inasmuch as it had omitted to mention either the amount of the claim or to notify to the defendant No. 2 his intention to bring a suit.

The plaintiffs then appealed to the District Judge, and on the 18th May 1921 filed a petition for the examination of additional witnesses for the purpose of proving that the notice had in fact reached the Agent of the East Indian Railway; but at the hearing of the appeal the Pleader for this respondent stated that he would argue the case upon

the assumption that the notice was duly served upon the Agent although he did not admit that it was so served. In the result, the learned Judge held that, apart from the defect in service, the suit was not maintainable as the notice did not specify the amount of compensation demanded and he dismissed the appeal.

The present second appeal is preferred by the plaintiffs and the points upon which our decision is required are, whether the notice to the East Indian Railway was valid and whether it was served according to law.

Now, with regard to the first point, it is quite clear that the Courts below have taken a too narrow view of section 77 of the Indian Railways Act (Act IX of 1890). That section declares that no person shall be entitled to compensation for the loss, destruction or deterioration of goods unless his claim to the compensation has been preferred in writing within six months from the date of the delivery of the goods for carriage by Railway. The section merely requires that a demand for compensation shall be made and nowhere prescribes that the money value of the claim shall be stated.

It was next urged that the notice is bad because it does not intimate that the claimant intends to sue. The reply to this is, that section 77 does not require the claimant to notify that he intends to bring an action. It merely requires that a claim to compensation should be preferred. It might have been otherwise if the Statute had expressly required that notice of action shall be given as in *Mason* v. *Birkenhead* (1) and *Norris* v. *Smith* (2) and in certain classes of suits referred to in the Civil Procedure Code and the Bengal Wards Act. Therefore, in the absence of any authority, I must find that the Courts below have taken a too narrow view of the section and that the notice was a claim for compensation within the meaning of section 77.

The next question is, whether the notice was served. This point has not been determined by the lower Appellate Court, but as an application was made before him by the plaintiffs for permission to call additional evidence to prove service I think we should state what our view of the law is. The evidence shows that the office of the Agent of the East Indian Railway is not at Howrah, but at 1, Fairlie Place, Calcutta. The Subordinate Judge has found that there has been no compliance with clause (*c*) of section 140 of the Act and the learned District Judge must come to a decision on this point. If he agrees with the Subordinate Judge, then the question will arise whether, notwithstanding his failure to comply with clause (*c*), the plaintiffs are entitled to prove that the notice was in fact delivered to the Agent and that there was service under clause (*a*). Now, I think the answer to that question is in the affirmative and that the plaintiffs are entitled to prove that the notice has actually been delivered either by themselves or their agent or by some other person. In my opinion the *Agent, East Indian Railway Co.* v. *Ajodhya Prasad* (3) does not conflict with this view. In that case the notice was addressed to the Traffic Manager and it was held that that was not a notice to the Agent. It is true that the learned Judges dissented from *Woods* v. *Meher Ali* (4), but it does not seem to me that it was necessary for the purpose of deciding the question before them to consider the question whether actual delivery to the Agent of a wrongly addressed notice would constitute service within the meaning of section 140. *Prima facie*, the plaintiff had good ground for thinking that the notice had been delivered to the Agent, for the General Traffic Manager had not only acknowledged receipt of it but also directed an inquiry to be held and, in the circumstances, it is somewhat difficult to understand the plea of non-service now taken. I think, therefore, that it was open to the plaintiffs to give evidence in the Trial Court that the notice was in fact delivered to the Agent; but the question arises whether their omission to give that evidence in the Trial Court

(1) (1860) 2 L. T. (N. S.) 632; 6 H. & N. 72; 29 L. J. Ex. 407; 158 E. R. 30; 123 R. R. 392.
(2) (1839) 113 E. R. 72; 2 P. & D. 353; 10 A. & E. 183; 8 L. J. (N. S.) Q. B. 274; 50 R. R. 374.
(3) 49 Ind. Cas. 498; (1919) Pat 150.
(4) 3 Ind. Cas. 479; 13 C. W. N. 24; 4 M. L. T. 427.

can be cured in the Appellate Court. If the District Judge finds that sufficient cause has been shown then he will admit the evidence under O. XLI, r. 27, of the Civil Procedure Code and in this connection it will be useful to invite the learned Judge's attention to the recent decision of their Lordships of the Privy Council in *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (5).

The result, therefore, is that the decree of the learned District Judge is set aside and the appeal is remanded to him for re-hearing in accordance with law. Costs to abide the result.

Bucknill, J.—I agree.

Appeal remanded.

K. S. D.

(5) 74 Ind. Cas. 747; 21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 28; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 258 OF 1922.

July 19, 1922.

Present :—Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

MUNNA LAL AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

THE COLLECTOR OF SHAHJAHANPUR AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution sale—Objection that property not covered by decree sold, whether maintainable.

Where at a sale in execution of a decree property other than that covered by the decree is sold, an objection by the judgment-debtor that he has been dispossessed of property not covered by the decree is not maintainable under section 47 of the Civil Procedure Code. [p. 990, col. 1.]

Second appeal from a decree of the District Judge, Shahjahanpur, dated the 26th of November 1921, confirming that of the Subordinate Judge, Shahjahanpur, dated the 23rd of May 1921.

Munshi *Gulzari Lal*, for the Appellant.

Babu *Lalit Mohan Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. It appears that a mortgage was made on the 5th of August 1882 by Nirmal Singh, the predecessor-in-interest of the judgment-debtors respondents, hypothecating 2½ *biswas* of *mahal* No. 3 in Bajhera Bhagwanpur in favour of Basant Rai, the father of the decree-holders-appellants. In the Settlement of 1899 *mahals* Nos. 2 and 3 were amalgamated and formed into a single *mahal*. The 2½ *biswas* share of the *mahal* No. 3 which was mortgaged with Basant Rai, corresponds with 3 *bighas* 18 *biswansis* and odd of the amalgamated *mahal* No. 2.

Subsequently, a suit was filed by the grandsons of *Musammat* Umed Kunwar for the recovery of the entire old *mahal* No. 3 and a decree was obtained, in pursuance of which they obtained mutation of names in their favour against Jit Singh, the son of Nirmal Singh. Later on, the mortgagee filed a suit on his mortgage and got a decree against the judgment-debtors-respondents, in execution of which the 2½ *biswas* share of old *mahal* No. 3 which was described as corresponding with 3 *bighas* 18 *biswansis* and odd of the new *mahal* No. 2 was brought to sale and was purchased by the decree-holders themselves. Subsequently, they obtained possession over the purchased property and got mutation of names effected in the revenue papers by the removal of the names of the judgment-debtors-respondents in respect of that share. The present application was then filed by the judgment-debtors, who asserted that the auction-purchasers had taken possession of their property which was outside the mortgage. The Courts below found that the auction-purchasers had taken possession of the property of the judgment-debtors outside the mortgage, and holding that the objection was entertainable under section 47 of the Code of Civil Procedure, directed restitution.

On behalf of the auction-purchasers it is contended that the judgment-debtors cannot go behind the decree which was passed against them, and that in any case their objection ought not to have been entertained under section 47 of the Code of Civil Procedure. It appears that the judgment-debtors held a share in old *mahal* No. 2, which was not mortgaged.

O. XXI, r. 100, has no application because that rule is confined in its operation to persons who are not judgment-debtors and have been dispossessed of the property claimed by them. The judgment-debtors here complain that they have been dispossessed of their property which appertained to old *mahal* No. 2 and was not covered by the decree. The question is, is this objection maintainable under section 47 of the Code of Civil Procedure? If the decree had been one for possession, the question would have been answered in the affirmative. In fact this was so held in *Abdul Karim* v. *Islamunnissa Bibi* (1). But in the present instance the possession of the disputed property has been obtained by a person who is an auction-purchaser of that property in execution of a decree obtained on foot of a mortgage made by the father of the judgment-debtors. An auction-purchaser might be treated as a representative in one sense of the decree-holder and in another of the judgment-debtor, and it is questionable whether a dispute about the identity of the property sold, between a person who has acquired the rights of the judgment-debtors and the judgment-debtors, can be entertained under section 47 of the Code of Civil Procedure. In *Bhagwati* v. *Banwari Lal* (2) it was held that a suit by an auction-purchaser for possession of the property purchased by him against the judgment-debtors can be maintained and that section 244 of the old Code of Civil Procedure would not bar such a suit. The principle of that decision is applicable to the present case and we are not prepared to hold that the objection in the present instance was rightly entertained. It is not necessary to go into the other matters raised in the appeal. It is open to the judgment-debtors to obtain any relief to which they might be entitled by way of a regular suit.

We allow the appeal and setting aside the order of the Courts below, disallow the application with costs here and hitherto. The judgment-debtors-respondents will bear their own costs throughout.

W. C. A. *Appeal allowed.*

(1) 34 Ind. Cas. 231; 38 A. 339; 14 A. L. J. 401.
(2) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 95 OF 1922.

February 26, 1923.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Richardson.

NURSING DASS KOTHARI—PLAINTIFF—APPELLANT

versus

CHUTTOO LALL MISSER—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (1) (a)—Contract Act (IX of 1872), s. 20—Vendor and purchaser—Duty of vendor to disclose material defect—Constructive notice of defect—Mistake—Matter of fact essential to agreement—Calcutta Improvement Act (V of 1911), s. 63, notice issued under.

Under section 55 (1) (*a*) of the Transfer of Property Act a seller is not bound to disclose to the buyer a defect of which he is not actually aware. The doctrine of constructive notice does not apply to the case of a seller who is unaware of a defect in the property agreed to be sold. [p. 998, col. 1.]

The fact that a notice has been issued under section 63 of the Calcutta Improvement Act in respect of certain property which is agreed to be sold is "essential to the agreement" within the meaning of section 20 of the Contract Act. [p. 998, col. 2.]

Plaintiff agreed to purchase certain property from the defendant. Previously to this, however, a notice under section 63 of the Calcutta Improvement Act had been issued in respect of a substantial portion of the property, but neither party was aware of this. On the fact coming to the knowledge of the plaintiff he brought a suit for a declaration that the agreement of sale was void and inoperative and to recover the amount paid by him to the defendant as part payment of the purchase price:

Held, (1) that the notice which was issued under section 63 of the Calcutta Improvement Act was "a matter of fact essential to the agreement" within the meaning of section 20 of the Contract Act; [p. 998, col. 2.]

(2) that both parties having been unaware of the fact at the time of entering into the agreement, the agreement was void under section 20 of the Contract Act, and the plaintiff's suit must, therefore, succeed. [p. 998, col. 2.]

Appeal against the judgment and decree of Mr. Justice Buckland, dated the 27th June 1922.

Sir *Asutosh Chaudhuri* (with him Mr. *S. C. Bose*), for the Appellant.

Mr. *S. R. Dass*, *Advocate-General*, (with him Mr. *S. N. Banerjee*), for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother

NURSING DASS KOTHARI v. CHUTTOO LALL MISSER.

Mr. Justice Buckland, who dismissed the suit of the plaintiff with costs.

The suit was brought for the purpose of obtaining a declaration that a certain agreement for the purchase of the land and premises No. 43, Burtolla Street, Calcutta, is void and inoperative and to recover a sum of Rs. 36,000 with interest which the plaintiff had deposited as part payment of the purchase price.

The date of the agreement in question was the 29th of November 1919. The defendant was a Receiver appointed in a certain suit by this Court, and he sold by auction the property in pursuance of an order of the Court. The plaintiff was the highest bidder, and purchased the property for Rs. 1,41,000 and made a deposit, as I have already said, of Rs. 36,000. Subsequently, the plaintiff discovered that a notice had been published under section 63, sub-section (2), of the Calcutta Improvement Act which affected these premises. That notice had been published on the 18th of December 1918, and objectoins to matters contained in the notice had to be put in by the 31st of March 1919, so that, if it is material for the consideration of this case, it is to be noted, that the time for making objections had expired before the date of the sale to the plaintiff. No mention of this notice was made in the sale notification. The facts relating to this matter are to be deduced from the memorandum which was agreed to by the parties in the Trial Court. It is as follows:—

"With reference to the question of knowledge it is stated by Mr. Mitter on behalf of the plaintiff that he does not impute personal knowledge to the defendant and accepts the defendant's denial in regard thereto until after the contract was entered into. He, however, imputes to him prior constructive notice of the intended acquisition by reason of the public notification and by reason of the fact that particular notice had been served on the Official Receiver who preceded him as a Receiver. Mr. Das on behalf of the defendant similarly says that he does not impute personal knowledge to the plaintiff and accepts the denial with regard thereto, but he relies upon the constructive notice of the intended acquisition afforded by the public notification. Mr. Das also admits that the property, which formed the subject-matter of the notice, was about half the property in suit and was not an insignificant amount."

The defendant was not the first Receiver in this matter. It appears that the Official Receiver had been appointed Receiver, and the defendant was appointed as a Receiver to succeed the Official Receiver and the learned Judge in his judgment stated—'It has, however, been admitted by the defendant's Counsel that the defendant found a copy of this notice among other papers which he received after the sale from the Official Receiver whom he succeeded in the Receivership of this estate." So, it is clear, that the defendant himself did not know of this notice until after the sale of November 1919. The plaintiff refused to complete the purchase. The result was, that the Receiver put up the property for sale again, and on that occasion it fetched one lakh and six thousand rupees. We were informed that at this sale the notice, which had been published by the Improvement Trust Board, was referred to.

The learned Judge came to the conclusion that, under the provisions of section 63 of the Calcutta Improvement Act, nothing more had been done than to prepare a plan of a proposed public street and to publish the requisite notices, and possibly to apply to the Local Government for sanction, but as to that no information had been forthcoming nor would it affect the matter, and that the result was that at the time of the sale by auction the land sold was subject to no disabilities or burden or restrictions on the owner's use, whatever might be the most appropriate expression. The learned Judge further said that he did not think that, in such circumstances, it was the duty of the defendant to disclose the existence of a notice which in fact might not and did not in law, as a necessary consequence, result in detriment to the purchaser of property by curtailing his right as owner.

The learned Counsel on behalf of the plaintiff urged, in the first place, that a possible result of the notice, which had been published by the Improvement Trust, was that half the premises might be taken

NURSING DASS KOTHARI v. CHUTTOO LALL MISSER.

by the Improvement Trust for the purposes of the Act. It is not necessary for me to go through the provisions of section 63 in detail. It is sufficient for me to say that it seems to me on the facts of this case that the position may be stated as follows:—proceedings had been put in train by the Improvement Trust which, if brought to completion, might result in a restriction being placed upon the use of the property by the purchaser and that that restriction might apply to no less than half the property which was admitted in the above mentioned note to be "not an insignificant amount."

The learned Counsel for the appellant argued, in the first place, that such a liability constituted a material defect in the property within section 55 (1) (*a*) of the Transfer of Property Act. The section runs as follows:—"The seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover." The learned Counsel argued, further, that the seller, *i.e.*, the defendant, must be taken to have been aware of the material defect in the property, and consequently it was his duty to disclose it to the plaintiff, the buyer.

In my judgment, the learned Counsel cannot bring the plaintiff's case within that section. It is admitted that at the time of this sale the defendant was not in fact aware of the notice, constituting the alleged defect—if it may be so called—in the property. The learned Counsel, however, said that inasmuch as the defendant's predecessor, the Official Receiver, had express notice of the proceedings instituted by the Improvement Trust, the defendant also must be taken to have had notice of such proceedings: and he referred to the definition of "notice" in section 3 of the Transfer of Property Act. I am not prepared to accept that argument.

In the first place, I do not understand how the seller can be called upon to disclose that of which he is not aware; and, in the second place, when I look at the last sentence of section 55, I find this provision. 'An omission to make such disclosures as are mentioned in this section, paragraph (1) clause (*a*) and paragraph (5) clause (*a*), is fraudulent." Consequently, if the seller does not disclose to his buyer any material defect in the property of which he is aware and of which the buyer is not aware and which he could not discover with ordinary care, the omission is declared by the provisions of the section to be fraudulent: consequently, in my judgment, having regard to the facts of this case and to the fact that the defendant had no knowledge of the notice at the time of the sale, the plaintiff's case does not come within that section. It is not, therefore, necessary for me on this appeal to consider or to decide whether the facts to which I have referred, constitute a material defect in the property. The first point, therefore, upon which the learned Counsel for the appellant relied, fails.

The second ground upon which the learned Counsel for the appellant relied was, that the case comes within section 20 of the Indian Contract Act. That was considered by the learned Judge, and he came to the conclusion that the alleged defect in the property was not essential to the agreement for the reasons which I have already mentioned and which were the basis of his judgment. It is necessary, therefore, for me to consider this question.

It appears to me that the notice issued by the Improvement Trust and the liability to restriction upon the use of the premises to which I have already referred, consequent upon the proceedings initiated by the Improvement Trust, may be said to be "a matter of fact essential to the agreement." The learned Advocate-General argued that it did not follow that, because proceedings under section 63 had been initiated by the Improvement Trust, any further steps to carry out Street Improvements would be taken. That is true. On the other hand, the converse is equally true, and the proceedings under section 63 having been initiated, the Improvement Trust might eventually carry out Street Improvements which would affect the premises. That essential matter of fact was unknown both to the plaintiff and the defendant at the time of the plaintiff's purchase; consequently, by reason of the provisions of section 20 of the Contract Act, the agreement is void. The words of the section are: 'where both the parties to an agreement are under a mistake as to

a matter of fact essential to the agreement the agreement is void." For these reasons and on the above-mentioned ground, I am of opinion that the plaintiff is entitled to the declaration for which he asked, namely, that the agreement is void, and he is further entitled to a decree for the return of the deposit of Rs. 36,000.

The result is that the appeal is allowed, the learned Judge's judgment and decree are set aside. A declaration will be made that the agreement is void and there will be a decree in favour of the plaintiff for rupees thirty-six thousand.

The defendant must pay the costs of the plaintiff in this Court and in the Trial Court.

Richardson, J.—I agree. It is common ground that neither party knew of the defect consisting in the liability created by the notice in the *Gazette*. An attempt was made by the learned Advocate-General by a close examination of the provisions of section 63 of the Calcutta Improvement Act, as amended by Act III of 1915, to minimise the liability to which the property is subject. He said that every house in Calcutta is subject to a possibility that it may be acquired under the Improvement Act for the purposes of the Act, and that the notice issued by the Board of Trustees under section 63 stating that a plan had been made of a proposed public street, which would pass through this particular house carried the liability of the house to be acquired under the Act very little further. There were other stages to be gone through and the premises could not be acquired until the proposed public street had first become a projected public street and had then found its way into an Improvement Scheme sanctioned by the Local Government under section 48 of the Act. But, in my opinion, the notice in the *Gazette* did crystallize the general liability to which this property, in common with other properties in Calcutta, is subject in such a way as to entitle the buyer to say that he would not be getting a property of the description which at the time of the sale he thought he was getting. He would be getting a property which he might not be able to keep and instead of which he might in the result be entitled merely to a sum of money by way of compensation. Where section 20 of the Contract Act is in question it may not always be easy to say whether a mistake has been made as to a matter of fact "essential to the agreement." In my opinion, however, the present case falls within the section, and, with great respect to the learned Judge, I am of opinion, that this appeal should be allowed.

Z. K. & W. C. A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 771 OF 1921.
July 4, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

MOHAN LAL—DEFENDANT—APPELLANT

versus

PRASADI LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Mortgagees, several—Suit by one mortgagee to recover his share of mortgage-money.

Where one of several mortgagees brings a suit to recover only his share of the mortgage-money, he is not entitled to bring the whole of the mortgaged property to sale to realize simply his share; he is entitled to recover his share of the mortgage-money as against a proportionate part of the mortgaged property. [p. 1000, col. 2.]

Second appeal from a decree of the District Judge, Meerut, dated the 3rd of February 1921 confirming that of the Subordinate Judge, Meerut, dated the 17th of June 1920.

Pandit *Uma Shanker Bajpai*, for the Appellant.

Babu *Surendra Nath Gupta*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for sale on the basis of a mortgage-deed dated the 21st of September 1910, executed by defendants Nos. 1 and 2 and the father of defendant No. 3, in favour of plaintiff No. 1, the father of plaintiff No. 2, and Mohan Lal, defendant No. 4. The plaintiffs' case was that they were entitled to half the mortgage money while Mohan Lal was the owner of the other half, but as Mohan Lal had purchased the entire equity of redemption in execution of a simple money-decree, they sued to recover only half the mortgage-money by sale of the entire mortgaged property. The pleas raised in defence

MOHAN LAL *v.* PRASADI LAL.

by the contesting defendant Mohan Lal were, (1) that the money was advanced by him alone and he was the sole mortgagee, the other names having been entered only fictitiously, and (2) that in any case the plaintiffs were entitled to sell only half of the mortgaged property.

The Court of first instance came to the conclusion that the plaintiff had a share in the mortgagee rights, and held that out of the mortgage-money amounting to Rs. 500 the plaintiffs had contributed two sums of Rs. 75 and Rs. 87-8-0 and it gave them a decree for these two sums plus interest, but directed that the amount be realized by sale of the entire mortgaged property. This decree has been affirmed on appeal.

The defendant has come up in second appeal to this Court and two main points are urged. The first is that the sum of Rs. 75 paid by the plaintiffs was included in the sum of Rs. 87-8-0 referred to in the written statement. This contention has no force. The sum of Rs. 75 has been proved to the satisfaction of both the Courts below to have been paid by the plaintiffs direct to *Musammat* Manbhari, a previous creditor mentioned in the deed, whereas Rs. 87-8-0 is an item which is found to have been paid to Mohan Lal, defendant, himself towards the bond in suit.

The second point raised is as to the plaintiffs' right to sell the whole mortgaged property.

Now, it may be that in order to effect a merger the two rights must be co-extensive in some share, howsoever small, though one be higher than the other and that, ordinarily, the acquisition of a share in the equity of redemption by one only of several mortgagees does not necessarily break up the integrity of the mortgage so as to entitle a mortgagor, interested in only a fractional part of the property, to redeem his share on payment of a proportionate amount. In such cases the other mortgagees, who have neither expressly nor by implication agreed to the breaking up of the integrity, may successfully resist the claim. But that point does not arise in the present case which stands on quite a different footing. Here the plaintiffs, in suing for only half the mortgage-money, have practically admitted that something has happened which has had the effect of satisfying half the mortgage amount. It would be highly inequitable to allow the plaintiffs to throw the burden of their share of the mortgage-money on the whole property, for it may very well place the defendant in a very much worse position than he might have been in but for the auction-purchase. Had the plaintiffs treated the mortgage as being still intact and sued for the whole sum, impleading Mohan Lal merely as a representative of the mortgagors, and agreed to share with Mohan Lal either the sale-proceeds or the property purchased in execution of the mortgage-decree, the case might have been different. But to permit the plaintiffs to sell the whole property in order to realize simply their share of the mortgage-money would be grossly unjust, as it may possibly result in Mohan Lal's losing his share of the mortgage-money as well as the mortgaged property. The plaintiffs by suing for only their share of the mortgage-money must be deemed to have admitted that the balance of the mortgage-money has been satisfied by the acquisition of a proportionate share of the mortgaged property.

We are, therefore, distinctly of opinion that, in the circumstances of this case, the plaintiffs should be given a decree to recover their share of the mortgage-money as against a proportionate part of the mortgaged property only, which comes to Rs. 162-8-0 Rs. 500=13/40.

We accordingly allow the appeal and modify the decree of the Courts below, directing that the amount decreed be realized by sale of only 13/40ths of the mortgaged properties. A fresh decree under O. XXXIV, r. 4, will be prepared. We extend the time for payment up to six months from this date.

Appeal allowed.

W. C. A.

SASI KANTA ACHARJYA v. SALIM SHEIKH.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 106 TO 108 AND 1016 OF 1921.

February 27, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

SASI KANTA ACHARJYA—PLAINTIFF—APPELLANT

versus

SALIM SHEIKH—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 105, 109—Enhancement of rent—Application under s. 105, withdrawal of, effect of—Suit for enhancement in Civil Court, maintainability of.

There is no provision in the Bengal Tenancy Act that an application made under section 105 of the Act and subsequently withdrawn has the same effect as if it had never been made. [p. 1002, col. 2.]

An application for enhancement of rent made to a Revenue Officer under section 105 of the Bengal Tenancy Act, bars a subsequent suit in the Civil Court for the same relief, by virtue of the provision contained in section 109 of the Act, and it is immaterial that the application under section 105 had been withdrawn and the permission of the Revenue Officer for the institution of a Civil suit obtained. [p. 1001, col. 2.]

Chiodith v. *Tulsi Singh*, 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467, *Aswini Kumar Aich* v. *Sarada Charan Basu*, 37 Ind. Cas. 253; 24 C. L. J. 79, *Kamini Sundari* v. *Abdul Halim*, 47 Ind. Cas. 420; 28 C. L. J. 254, *Saraj Kumar Acharji* v. *Umed Ali*, 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 19; (1922) A. I. R. (C.) 251, distinguished.

Abeda Khatun v. *Majubali Chowdhury*, 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304, followed.

Appeals against the decrees of the Subordinate Judge, Mymensingh, dated the 13th September 1920, modifying those of the Munsif, Mymensingh, dated the 30th January 1920.

Babu *Jogesh Chandra Roy* (with him Babu *Nagendra Nath Bose*), for the Appellant.

Babu *Radhabenode Pal*, for the Respondent.

JUDGMENT.

Ghose, J.—These appeals arise out of as many suits for rent at an enhanced rate on several grounds stated in the plaints. The Munsif made a partial decree in favour of the landlord, the plaintiff. On appeal by the defendants, the Subordinate Judge has dismissed the claim for enhancement on the ground that the suit for enhancement is not maintainable under the provisions of section 109 of the Bengal Tenancy Act, the landlord having made applications under section 105 of the Act before the Revenue Officer, on the authority of the case of *Abeda Khatun* v. *Majubali Chowdhury* (1). The learned Vakil for the appellant argues before us that there is a difference of opinion with regard to the construction of section 109, and contends that the case of *Abeda Khatun* v. *Majubali Chowdhury* (1) is distinguishable from the present case and that the other cases relied on by him support his contention that such a suit is maintainable, notwithstanding the provisions of section 109 of the Bengal Tenancy Act. Before deciding the question, it seems to me that it is necessary to look into the provisions of section 109 of the Act in order to see whether the present suit for enhancement is maintainable. What happened in this case was, that the plaintiff presented an application under section 105 of the Bengal Tenancy Act before the Revenue Officer with regard to a number of holdings. Then, on the 18th of September 1917, he presented a petition before the Revenue Officer to the effect that certain of the tenants whose holdings had been recorded in a number of *khatians* had compromised the suit but certain other tenants among whom are the present defendants did not appear for the purpose of coming to a compromise, and he prayed that permission might be granted to him to bring suits in the Civil Court against the defendants who had not compromised and that the case might be disposed of according to the compromise entered into by the others. On this petition, the Revenue Officer made this order: "Plaintiff files a petition for permission to withdraw cases against the defendants of *khatians* Nos. 172, 196, etc., The prayer is allowed. Other defendants have compromised. Put up on 27th September 1917 for judgment." In the judgment, nothing further is said with regard to those defendants who did not compromise. Now, section 109 of the Bengal Tenancy Act runs thus: "Subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which

(1) 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304.

is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive)". There cannot be any doubt that this matter, which is now for decision in the Civil Court, was a matter which was the subject of an application made under section 105 of the Bengal Tenancy Act. The contention is that, when the application under section 105 was withdrawn against these defendants, the operation of section 109 cannot come into play; or, in other words, the contention is that, unless there has been a decision on the application by the Revenue Authority it is open to the party who made the application to bring a suit in the Civil Court with regard to the same subject-matter. It seems to me that to accept such a contention would be to make an addition to the section and to read the words "subject of an application made" as if they stand for "subject of a decision", which, in my judgment, we cannot do. Therefore, apart from authorities, it would seem that the decision of the learned Subordinate Judge is right as regards the true construction of section 109 of the Bengal Tenancy Act. It is contended, however, by the learned Vakil for the appellant that a number of cases have been decided the other way and that this matter should be referred for decision to a Full Bench. The cases to which he refers are these *Chiodith* v. *Tulsi Singh* (2), *Aswini Kumar Aich* v. *Sarada Charan Basu* (3), *Kamini Sundari* v. *Abdul Halim* (4) and *Saraj Kumar Acharji* v. *Umed Ali* (5). In the case of *Chiodith* v. *Tulsi Singh* (2) the learned Judges, although they expressed an opinion in favour of the contention now advanced by the learned Vakil for the appellant, said this: "Moreover, it cannot well be said that the subject-matter of the application made in 1906 and the subject-matter of the suit brought in 1909 are the same." If the subject-matter of the two proceedings were different, then the suit was certainly maintainable and sectoin 109 of the Bengal Tenancy Act would not prevent a party from bringing a suit. That case is, therefore, distinguishable from the present case and the observations made therein do not prevent us from taking a different view. The same may be said of the case of *Aswini Kumar Aich* v. *Sarada Charan Basu* (3). The learned Judges in that case said this "These matters are entirely foreign to the jurisdiction of the Revenue Officer under section 106, his work being confined to a decision of the point whether the entry in the Record of Rights is correct or not." Similarly, in the case of *Kamini Sundari* v. *Abdul Halim* (4), the learned Judges observed as follows "We are unable to agree with him that is, the Subordinate Judge) in this opinion as it seems to us that the subject-matter of the suit under section 106 and the subject-matter of the present suit are entirely different." The case of *Saraj Kumar Acharji* v. *Umed Ali* (5) apparently follows the previous cases, and the case of *Abeda Khatun* v. *Majubali Chowdhury* (1) is distinguished on the ground that, in that case, there was no permission to withdraw the suit with leave to bring a fresh suit. It may be said that in the present case also there was no such leave granted. It may be a question as was raised in the case of *Saraj Kumar Acharji* v. *Umed Ali* (5), that, even if such leave were granted, whether the Revenue Officer had any jurisdiction to grant leave to bring a suit in a Court of different jurisdiction. There is no provision, however, in the Bengal Tenancy Act that an application made under section 105 and subsequently withdrawn has this effect, that such application had never been made. It is only the Legislature that can wipe out the effect of an application made by reason of its being withdrawn and we cannot supply what may possibly be an omission of the Legislature in not making such a provision. With great respect, therefore, I am unable to accept the opinion expressed in some of the cases that an application made and withdrawn has the effect as if the application had never been made. There does not appear to be any binding decision to the contrary on the question involved in these cases. On the other hand, the facts in *Abeda Khatun* v. *Majubali Chowdhury* (1) closely resembles

(2) 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467.
(3) 37 Ind. Cas. 253; 24 C. L. J. 79.
(4) 47 Ind. Cas. 420; 28 C. L. J. 254.
(5) 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 191 (1922) A. I. R. (C.) 251.

the facts in the cases before us. The appeals must, therefore, be dismissed and with costs in those cases in which the respondents have entered appearance.

Walmsley, J.—I agree.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 609 OF 1022.

April 5, 1923.

Present:—Mr. Jutice Ramesam and Mr. Justice Coleridge.

PUTIEVU KAMRAJU—PLAINTIFF—APPELLANT

versus

CHUNDURI GUNNAYYA AND OTHERS—DEFENDANTS Nos. 1 TO 7—RESPONDENTS

Minor— Sale of minor's property by person acting as guardian—Sale to third person by minor, after attaining majority—Possession, suit for, maintainability of.

A judicial sale is binding on the persons who are parties to it unless it is set aside. But a person who has the right of avoiding a private sale executed by another may elect to avoid it merely by selling the property to some third person on the footing that the prior sale is not binding on him. The result of such a sale is that the vendor has a complete title from his point of view though it will become effective only if the Court ultimately finds that the prior sale is not binding on him. But contingent on that event, the vendor has got not merely a bare right to sue but a complete title to the property which in law is assignable. [p. 1004, col. 1.]

Malkarjun v. *Narhari*, 25 B. 337: 5 C. W. N. 10; 2 Bom L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar P. C. J. 339 (P. C.), *Muthukumara Chetty* v. *Anthony Udayan*, 24 Ind. Cas. 120; 38 M 867; 15 M. L. T. 361; 29 M. L. J. 617, *Fitzroy* v. *Cave*, (1905) 2 K. B. 364; 74 L. J. K. B 829; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612, *Prosser* v. *Edmond*, (1835) 1 Y. & C. 481; 41 R. R. 322; 160 E. R. 196, *Krishna Dhone* v. *Bhagaban Chandra*, 34 Ind. Cas. 188, *Ganpat Lal* v. *Bindasini Prashad Narayan Singh*, 56 Ind. Cas. 274; 47 I. A. 91; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 124 C. W. N. 954; 28 M. L. T. 330; 47 C 924 (P C.), distinguished.

The mother of a minor, as his guardian, alienated certain properties belonging to the minor. The minor on attaining majority, sold the properties to a third person ignoring the sale by his guardian, on the footing that no valid title was conveyed by it:

Held, that a suit by the vendee from the minor for possession of the properties was not bad for want of a prayer to set aside the alienaton by the minor's mother.

Second appeal against a decree of the Court of the Subordinate Judge, Vizagapatam, in A. S. No. 174 of 1921, (A. S. No. 139 of 1921 on the file of the District Court, Vizagapatam) preferred against a decree of the Court of the District Munsif, Chodavaram, in O. S. No. 78 of 1920.

Mr. *Y. Suryanarayna*, for the Appellant.

Mr. *P. Narayanamurthy*, for the Respondents.

JUDGMENT.

Ramesam, J.—This second appeal relates only to Item No. 1 out of the properties which are the subject of the original suit and it is necessary only to state the facts so far as this item is concerned The item originally belonged to the first defendant's father who mortgaged it in 1907. After his death the mother of the first defendant during his minority as his guardian sold the property by a sale-deed dated 4th May 1913. After the first defendant attained majority, ignoring the sale-deed by his mother and on the footing that no valid title was conveyed by it to the vendee, he sold it to the plaintiff by a sale-deed dated 8th November 1919, and the plaintiff now sues to recover the property. The District Munsif dismissed the suit on the ground that the right of the first defendant to avoid the sale by the mother within three years after attaining majority was not assignable. Incidentally he also states in paragraph 9 of his judgment that the suit is not maintainable on the ground that the intention to avoid the sale as it was epxressed by the first defendant was not enough. What he perhaps meant was that the suit is not maintainable for want of a prayer to set aside the sale. His language is not very clear. On appeal by the plaintiff the Subordinate Judge, while holding in favour of the appellant that the first defendant's right was assignable, held that the suit was bad for want of a prayer to set aside the sale and on this ground affirmed the decree of the District Munsif. The plaintiff filed this appeal.

I am unable to agree with the ground taken by the Subordinate Judge. This ground was not taken in the written statement nor was it the subject of an issue, and, unless one can hold that it was what the Ditrict Munsif meant, it was not even before the District Munsif. The Subordinate Judge relies for his conclusion on the language of their Lordships of the Privy Council in *Malkarjun* v. *Narhari* (1). That was a case of a Court sale. A judicial sale has to be set aside so far as the persons who are parties to the sale are concerned and, if not set aside, it will be binding on them for ever. Here we have not got to do with a judicial sale but with a private sale. The first defendant has got the right of avoiding it. By selling the property to the plaintiff on the footing that the sale by the mother was not binding on him he has chosen to avoid it, and the result of it is that from this point of view he has got a complete title. The title no doubt will only be effective if the Court ultimately finds that the sale by the mother is not binding on him. But contingent on that event he has got a complete title and this title is not a bare right to sue and is, therefore, assignable. *Muthukumara Chetty* v. *Anthony Udayan* (2) is a case where during the minority another guardian purported to exercise his right of avoiding it and, therefore, has no bearing on the present case. *Fitzroy* v. *Cave* (3) and *Prosser* v. *Edmonds* (4) were cases of mere rights *in personam*. No question of title to immoveable property was involved in them.

Krishna Dhone v. *Bhagaban Chandra* (5) *Ganpat Lal* v. *Bindasini Prashad Narayan Singh* (6) do not help the respondent. If it is necessary, I would even allow the plaint to be amended by adding the necessary prayer. But I do not think it necessary.

The result is that the decrees of the Court below have to be reversed and the suit has to be remanded to the District Munsif for trial. The suit has already been remanded in respect of Item No. 2. The result of this order will be that the whole suit will have to be tried. Costs to abide the result. The apepll nt will be entitled to a refund of the Court-fee paid on second appeal.

Coleridge, J.—I concur.

V. N. V. *Case remanded.*
W. C. A.

(1) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I.A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).
(2) 24 Ind. Cas. 120; 38 M. 867; 15 M. L. T. 361; 29 M. L. J. 617.
(3) (1905) 2 K. B. 364; 74 L. J. K. B. 829; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612.
(4) (1835) 1 Y. & C. 481; 41 R. R. 322; 160 E. R. 196.
(5) 34 Ind. Cas. 188.
(6) 56 Ind. Cas. 274; 47 I. A. 91; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 24 C. W. N. 954; 28 M. L. T. 330; 47 C. 924 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 8 OF 1922.
July 5, 1922.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

IQBAL HAIDAR KHAN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Musammat WASI FATIMA BIBI—PLAINTIFF AND LACHMI NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Proprietary rights, finding as to extent of—Finding of fact—Pleadings—Court, duty of—Costs—Clerical error—High Court, power of, to correct.

A finding as to the extent of the proprietary rights of a vendor in immoveable property sold by him, arrived at upon a review of the entire evidence, is a question of fact, and cannot be challenged in second appeal. [p. 1005, col. 2.]

The duty of a Trial Court is to do no more than try out a litigation on the pleadings of the parties and on the facts raised and put in issue before it, and not to anticipate and meet before hand any objection to a plaintiff's suit which may possibly be raised at the stage of second appeal. [p. 1006, col. 1.]

Where a suit is tried out on a particular basis, the decision arrived at ought not in second appeal to be interfered with upon a plea which was not merely not raised by the defendant in the Courts below, but which is contrary to and inconsistent with the position there taken up by the defendants. [p. 1006, col. 1.]

Where a High Court is seised of a matter as a Court of Appeal it has power to correct a clerical error as to costs. [p. 1006, col. 2.]

First appeal from an order of the Judge, Small Cause Court exercising the powers of a Subordinate Judge, Allahabad, dated the 3rd September 1921.

IQBAL HAIDAR KHAN v. WASI FATIMA BIBI.

Maulvi *Iqbal Ahmad*, for the Appellants.

Munshi *Kamla Kant Varma*, for the Respondents.

JUDGMENT.

Piggott, J.—This is an appeal against an order of remand. It is preferred by the defendants-vendees in a pre-emption suit. We are concerned in this litigation only with the transfer of the vendors' proprietary rights in a village called Nawawan. The sale-deed was dated the 9th of July 1919 and according to its terms the vendors purported to convey to the vendees a share of 4 annas and odd in the proprietary rights of the said village, of which share the vendors described themselves as full proprietors. Now, it was an admitted fact in both the Courts below that this was a misdescription. The vendors did possess rights over the entire share purporting to be conveyed by the deed of sale; but as a matter of fact they were the proprietors of only a small fractional share and usufructuary mortgagees in respect of the remainder. The plaintiff pre-emptor was in this difficulty —she had admittedly no right to pre-empt the transfer of mortgagee rights by one usufructuary mortgagee to another. She felt herself compelled to limit her claim to that fraction of the share specified in the deed of sale of which the vendors were full proprietors. The extent of this fraction was specified in the plaint as a share of 4 pies only. The defendants replied that the fractional share held by them with full proprietary rights was in excess of 4 pies. The Trial Court took evidence on both sides, and eventually, without recording a precise finding as to the extent of the proprietary rights of the vendors, came to the conclusion that those rights extended over a share of 5 pies at least, if not more. On this finding the learned Munsif dismissed the suit on the ground that it offended against the principle that a plaintiff claiming to pre-empt must pre-empt all the property sold in respect of which he has any right of pre-emption at all.

There was an appeal to the District Judge and the lower Appellate Court has recorded a finding that the proprietary rights of the vendors extended to a share of 4 pies only. On this finding the decree of the Trial Court has been reversed and the suit remanded, to be tried out on the merits with reference to other issues raised.

The present appeal is against this order of remand. In so far as the petition of appeal seeks to challenge the lower Appellate Court's finding as to the extent of the proprietary rights of the vendors, we think it sufficient to say that that finding is, in our opinion, a clear finding of fact. There was evidence on both sides. The register of proprietary rights produced by the *patwari* of the village was discredited by the witness himself. He said that the vendors somehow got themselves recorded as proprietors in respect of shares over which they only held mortgagee rights. The defendants produced an official from the *tahsil* and put in evidence an extract from a certain register of property rights, by which it was sought to show that at one time in the past the vendors had acquired by purchase proprietary rights in a share of 10 pies and odd. It seems to have been admitted that they had subsequently sold one-half of the proprietary rights then acquired, and it was on the strength of this evidence that the Trial Court held that the extent of the proprietary rights of the vendors at least exceeded a share of 5 pies. The lower Appellate Court had refused to treat this evidence as decisive and, upon a review of the entire evidence, has recorded its finding. We are not impressed by the contention that the learned Subordinate Judge has mislaid the burden of proof. This was a case in which evidence was led on both sides and a finding has been arrived at upon a review of the entire evidence.

There remain, however, two matters for consideration, one of which goes to the very root of the case. We have been referred to a principle first laid down by the pre-emption Bench of this Court in *Sahodra Bibi* v. *Bageshri Singh* (1). According to this principle it would have been, not merely open to the present plaintiff, but actually incumbent upon her, to disregard altogether any facts known to her regarding the actual extent of the

(1) 29 Ind. Cas. 1000; 37 A. 529; 13 A. L. J. 711.

proprietary rights of the vendors in this case. She could have taken them at their word and claimed to pre-empt the entire share, 4 annas and odd, of which they described themselves as full proprietors in their deed of sale. The result would presumably have been a decree for pre-emption in her favour, on the strength of which she would have stepped into the shoes of the vendees and have acquired whatever rights, proprietary or mortgagee, the vendors possessed in the entire share of 4 annas and odd. Now this was probably the way in which the plaintiff ought to have taken the matter in hand, and if the point had been raised against her either in the Trial Court, or in the lower Appellate Court we should have felt-disposed to give effect to the objection. We think it, however, very important that Courts subordinate to this Court should understand that we do not expect them to do more than try out a litigation on the pleadings of the parties and on the facts raised and put in issue before them. We are not disposed to lay upon them the burden of anticipating and meeting beforehand any objection to a plaintiff's suit which the ingenuity of abler and better instructed Counsel may find it possible to raise in this Court at the stage of second appeal. The question sought to be raised is not a question of limitation of which the Court is bound to take notice once it has been raised at any stage in a litigation. As this suit was actually tried in the Courts below, the defendants acquiesced in the position taken up by the plaintiff herself that her right to pre-emption extended only to so much of the property conveyed by the deed in suit as was held by the vendors with full proprietary rights. The suit having been tried out on this basis in the Courts below, we do not think we ought to allow the decision of those Courts to be interfered with upon a plea which was not merely not raised by the defendants in those Courts, but which is contrary to and inconsistent with the position there taken up by the defendants.

There remains only a small question regarding the order of the lower Appellate Court as to costs. We think it clear that there has been some error or oversight in the drawing up of the decree under appeal. There seems to be no justification in the record for the statement that the costs of the plaintiff in the Court of first instance amounted to Rs. 87-2-0. On the contrary, the decree of the Trial Court, which is on the record, shows that the costs of the defendants were Rs. 87-2-0 while the plaintiff's costs were Rs. 11-14-0. This being a purely clerical error and having been brought to our notice while we are seised of the matter as a Court of Appeal—we think it right that we should correct the error at once. We do so, accordingly, by ordering that in the decree of the lower Appellate Court the sum of Rs. 11-14-0 be substituted for Rs. 87-2-0 as the sum payable by the defendants Nos. 1 and 2 to the plaintiff for the costs of the Trial Court. Except as regards this matter, we dismiss this appeal, and we think that the appellants must pay all costs of this appeal.

W. C. A. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL SUIT NO. 29 1921.
January 12, 1923.

Present:—Mr. Justice Coutts-Trotter.

VENKATASUBRAMANIA AIYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Syed USUFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

International Law—Agreement opposed to Indian Law entered into in Foreign Territory—Enforcement in British India—Public policy.

Where on a person being threatened with criminal prosecution in Pondicherry for the offence of criminal breach of trust, which, under the French Law, is compoundable, executed a promissory note payable in British India and the criminal proceedings were thereupon dropped:

***Held,* that the transaction which was perfectly legal under the French Law was enforceable in British India, since the compounding of criminal offences is not in violation of the fundamental principles of public policy and natural justice, and the Indian Statute Law itself does not regard the conception of evading criminal proceedings by monetary compensation as one wholly and from its very nature to be discountenanced. [p. 1010, col. 1.]**

VENKATASUBRAMANAIA AIYAR v. USUFF.

Subraya Pillai v. *Subraya Mudali*, 4 M. H. C. R. 14, followed.

Kaufman v. *Gerson*, (1904) 1 K. B. 591; 73 L. J. K. B. 320; 90 L. T. 608; 52 W. R. 420; 20 T. L. R. 277, *Santos* v. *Illidge*, (1860) 8 C. B. (N. S.) 861; 29 L. J. C. P. 348; 6 Jur. (N. S.) 1348; 3 L. T. 154; 8 W. R. 705; 141 E. R. 1404; 125 R. R. 919 *Moulis* v. *Owen*, (1907) 1 K. B. 746; 76 L. J. K. B. 396; 96 L. T. 596; 23 T. L. R. 348, *Ertel, Bieber & Co.* v. *Rio Tinto Co.*, (1918) A. C. 260; 87 L. J. K. B. 531; 118 L. T. 181; 23 Com. Cas. 243; 34 T. L. R. 208: Westlake's International Law, p. 421, 5th Edition; Dicey's Conflict of Laws, referred to.

Civil suit in the Ordinary Original Civil Jurisdiction of the High Court of Judicature at Madras.

Mr. *C. Narasimhachari*, for the Plaintiffs.

Messrs. *V. Radhakrishnayya* and *P. Venkataramana Rao*, for the Respondants.

JUDGMENT.—This is a curious story and on the facts, as I am about to find hem, gives rise to an interesting and difficult question of International Law.

After the outbreak of War, gold became exceedingly scarce in India and consequently enhanced in value. By a Notification under Act XI of 1916, the Government of India made it illegal to import gold bullion or gold coins into British India and rendered gold so smuggled into the country liable to confiscation. This still further enhanced its value and offered additional temptation to smugglers. Many confiscations took place, some of which gave rise to suits tried before me.

In this case, the first defendant, Syed Usuff, delivered at Pondicherry through one P. Narayana Doss Mehta of Pondicherry a quantity of American Gold dollars, 378 in all, to a man called Parameswara Iyer on the 22nd of January 1920. They were to be taken to Madras and were to be delivered to Syed Usuff there. Parameswara Iyer was to be remunerated by some commission for his services. In point of fact, the dollars were seized by the Customs Officers at Chinnababu Samudram Railway Station and were confiscated to Government. The British Authorities were willing to return the gold dollars on payment of a sum of Rs. 22,000 and odd, and it appears that Parameswara Iyer arranged with a Sowcar to raise the amount of the penalty, paid it to Government and got back the dollars. I have no doubt that he did so because he reckoned that the rate of exchange was going up and that he would make a small profit on the deal, and I have little doubt that he did make a profit and the parties, though they have not any exact figures, seem to agree that the profit was probably somewhere about Rs. 4,000 or 5,000. It is alleged in the plaint that before he redeemed the dollars Parameswara Iyer gave Syed Usuff, the first defendant, the opportunity of redeeming the dollars for his own behalf through his agency and that Syed Usuff declined to find the money and relinquished the dollars. But no proof has been given of this and I am not prepared to believe it. It was somewhat half-heartedly contended for the plaintiffs that, apart from this, as soon as the dollars were seized the fiduciary relation of Parameswara Iyer to Syed Usuff was *ipso facto* terminated and that Parameswara Iyer was at liberty to enter upon a transaction of redemption of the dollars without being in any way liable to account to Syed Usuff, his principal. I cannot accede to this contention. In my opinion, so long as there was a possibility of redeeming the dollars with the chance of profit by so doing, Parameswara Iyer was bound to give his principal the option of redeeming them for the principal's benefit and was guilty of a breach of duty as agent if, without taking that step, he acquired the dollars for himself. Later on, Parameswara Iyer returned to Pondicherry where the plaintiffs who were his nephews were living and where he shared a house with them. On the 25th October 1920 the first defendant served a process at Pondicherry upon Parameswara Iyer called a Summation, a certified copy of which is before me. The effect of that document, together with a petition to the *Procureur de la Republique* has been explained to me by M. David, an Advocate practising at Pondicherry, and the document in the original is before me. I may add that there was also before me a translation made by the English Judicial Interpreter of the Pondicherry Court which is so full of elementary blunders as to make its latter part menaningless. I have made myself a translation from the French which was accepted by the parties. What it

amounts to is an allegation of *abus de confiance* which may be taken roughly to correspond to an offence of criminal breach of trust under the Indian Penal Code, and the effect of it was that Parameswara Iyer could end the matter by meeting the demand or would be liable to criminal prosecution. The outcome of it was that after considerable discussion a promissory-note for Rs. 4,000 payable at Madras was executed by the two plaintiffs, the nephews of Parameswara Iyer, in favour of Mir Hassan Ali, the second defendant. The defendants' story is that Mir Hassan Ali was merely an outsider who provided the plaintiffs with cash to satisfy the demand of Syed Usuff and that the promissory-note was given to him as a consideration for paying Rs. 4,000 in cash to Syed Usuff. I do not believe that and my finding is that no money in cash passed and that the proceedings were stopped in consideration of the signing of the promissory-note. The promissory-note was not met and this suit was instituted in this Court to set it aside, and Original Suit No. 42 was instituted to enforce it by the present defendant. One suit is a corrollary of the other and the result of one determines that of the other.

On these facts, as I have found them, a clear point of law arises. It is clear that by the law of France that which was done was perfectly legal and did not amount to duress or coercion or undue influence. But it is said that as the *lex loci solutionis* was Madras in British India the British Law must be applied and that by that law the transaction could not stand, and a number of authorities was cited. Of these I shall refer, first, to the most direct the case of *Kaufman* v. *Gerson* (1) decided by the English Court of Appeal.

In that case, a wife entered into an agreement in France to pay monies to a person who had employed her husband in a fiduciary capacity and who alleged that the husband had appropriated the money entrusted to him to his own use thereby committing a criminal offence according to the Law of France. The consideration for her promise to pay was the forbearance of the principal, the plaintiff in the English action, from prosecuting his agent, her husband, in France. I have been at pains to consider exactly what principle the Court of Appeal applied in refusing to enforce, as they did refuse to enforce, the contract, and I think it is clear what principle the Court conceived itself to be applying from a perusal of the judgment of Collins, M. R. He cites two passages from Story's Conflict of Laws and one from Westlake on Private International Law, on which it is evident that he based his judgment. One of these passages from Story is as follows: "All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality or of even natural justice, are allowed to have their due force and influence in the administration of international jurisprudence." 'Such' contracts are defined as "contracts which in their own nature are founded on moral turpitude, or are inconsistent with the good order and solid interests of society." Westlake's words are as follows: "Where a contract conflicts with what are deemed in England to be essential public or moral interests it cannot be enforced here." Collins, M. R., sums it up in his own words as follows, "Where an English Court is asked to enforce a contract made in a foreign country, it is entitled to enquire whether, though the contract might be valid according to the laws of that country, it violates some moral principle which, if it is not, ought to be universally recognised." It is common knowledge that the decision in *Kaufman* v. *Gerson* (1) was by no means universally accepted by the legal profession as being correct. And Professor Dicey in his Conflict of Laws gives very cogent reasons for such doubt. In substance, he urges two main arguments against it. The first is that the rule of the French Courts ought not to be held by a British Court to be contrary to natural justice or public policy, and the learned author says this: "French civilization and morality is as high as our own. The

(1) (1904) 1 K. B. 591; 73 L. J. K. B 325 90 L. T. 608; 52 W. R. 420; 20 T. L. R. 277.

presumption should always be in favour of the justice of the French Law and, after all, there is no patent injustice in allowing a person to escape from criminal prosecution by making compensation to the sufferer whom he has damaged." The second objection he urges is that the decision of the Court of Appeal is irreconcilable with the judgment of the Court of Exchequer Chamber in the case of *Santos* v. *Illidge* (2) and that it is the common understanding of English Lawyers that decisions of the Court of Exchequer Chamber are binding on the English Court of Appeal as constituted under the Judicature Acts. The next case to which I propose to refer is the case of *Moulis* v. *Owen* (3). In that case the plaintiff had lent money to the defendant in order to enable him to play baccarat at a club in Algiers and the defendant had given a cheque there drawn on an English Bank to re-pay the sum of money so lent. The majority of the Court of Appeal held that an action brought upon the cheque would not lie as the transaction was governed by English Law and that the cheque must be deemed to be given for an illegal consideration within the English Gaming Acts. Fletcher Moulton, L. J., dissented, and I think that the effect of his opinion may be summarised in this way, that he considered that the English Gaming Acts only purported to forbid gaming within the realm and could not be held to forbid British subjects subject to the jurisdiction of the English Courts from gaming in foreign countries where such gaming was not illegal. Once more it is common knowledge that the correctness of the decision was much canvassed in professional circles. It may be that the decision may be justified on the narrow ground that the prohibition contained in the Gaming Acts is part of the law of procedure, merely enacting that a suit shall not be brought in an English Court on such a consideration. (See Collins, M. R., at page 753 of the Report of the case and Westlake's Private International Law, page 421, 5th Edtion). There is no doubt whatever that the *lex fori* prevails as to all questions of procedure and if the provisions of the Gaming Act were rightly considered as merely part of the law of procedure, the wider objections to the case disappear and of course there disappears with them its applicability to this case. No one can suggest that the English Law as to duress and coercion as affecting the validity of contracts is other than substantive law. I now turn to the case of *Santos* v. *Illidge* (2). In that case it was held that a contract for the sale of slaves to be performed in Brazil at a time when slavery was not illegal by the law of Brazil was enforcible in England. As Professor Dicey points out, it is difficult to believe that compounding an offence is more obviously contrary to natural justice than slave trading. Several other English cases were cited, of which I need only refer to the judgment of the House of Lords in *Ertel, Bieber & Co.* v. *Rio Tinto Co.* (4), and the connected cases. The importance of the decision is not because of its direct bearing upon this case, for no one would contest the principle, that the law against trading with the enemy is so vital to the existence of the state that Courts of Law in England must declare it to be against public policy whatever be the law of the country in which such contracts were made: I cite it because of its apparent endorsement of the decision of *Kaufman* v. *Gerson* (1) and its explanation of the case of *Santos* v. *Illidge* (2), *Santos* v. *Illidge* (2) as explained by Lord Atkinson at page 299, is to be taken as turning on the construction of the English Statutes prohibiting slave-trading, especially (6 & 7 Vic. Ch. 98, section 5.) Lord Atkinson and Lord Parker explain the case as merely deciding that the English Statutes only prohibited slave-trading in the British Empire and did not purport to bind British subjects from slave-trading outside the limits of the Empire and that the case, therefore, must be treated, in the words of Lord Parker, "as turning not upon any general rule

(2) (1860) 8 C. B. (N. S.) 861; 29 L. J. C. P. 348; 6 Jur. (N. S.) 1348; 3 L. T. 154; 8 W. R. 705; 141 E. R. 1404; 125 R. R. 919.

(3) (1907) 1 K. B. 746; 76 L. J. K. B. 396; 96 L. T. 596; 23 T. L. R. 348.

(4) (1918) A. C. 260; 87 L. J. K. B. 921; 118 L. T. 1811 23 Com. Cas. 248; 34 T. L. R. 208;

AHIDANNESSA BIBI v. ISUF ALI KHAN.

of public policy but on the construction of a particular Statute."

If the matter rested there, I should find myself in very great difficulty. On the one hand, there is the decision of *Kaufman* v. *Gerson* (1) apparently approved in the House of Lords and the view of the majority of the Court of Appeal in *Moulis* v. *Owen* (3). On the other, I have the dissenting judgment of Fletcher Moulton, L. J., in that case and the weighty opinion of Professor Dicey. I do not think I can rely on *Santos* v. *Illidge* (2) partly because the House of Lords explained it, as turning on the language of a particular Statute and partly because I confess to a reluctance to accept the implied doctrine that slave-trading in any part of the world is not repugnant to natural justice, a proposition which I think is really involved in *Santos* v. *Illidge* (2). While the decisions of the English Courts are not strictly binding on Indian Judges, I myself would regard it as an intolerable presumption to take a view opposite to that taken by the English Court of Appeal and the House of Lords, though I am perfectly free to say that if I were left to my own discretion I should feel quite unable to act on the view that the provisions of the law of France, a country in many ways intellectually more developed than England, were to be treated as in violation of the fundamental principles of natural justice. But I think, sitting in an Indian Court, my position is different from what it might otherwise be for two reasons. The first is that the compounding of criminal offences is so far from being regarded by the Statute Law of this country as being a violation of natural justice that the Code of Criminal Procedure contains a list of offences which are expressly made compoundable by money compensation. It is perfectly true that a criminal breach of trust is not one of those offences, but I do not think that that affects the position that the Indian Law does not regard the conception of evading criminal proceedings by monetary compensation as one wholly and from its very nature to be discountenanced. The second and determining consideration is this. I, sitting as a Single Judge, on the Original Side of this Court, am bound by the authority of any decision of a Bench of the Court and there has been cited to me the case of *Subraya Pillai* v. *Subraya Mudali* (5). I am unable to distinguish the facts of that case from the facts of the present one and in my opinion it concludes me from deciding this case otherwise than in favour of the defendants and the corresponding case in favour of the plaintiffs.

V. N. V. *Suit dismissed.*

(5) 4 M. H. C. R. 14.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1804 OF 1920.

February 21, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Panton.

AHIDANNESSA BIBI AND OTHRES—PLAINTIFFS—APPELLANTS

versus

ISUF ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 120, 123—Debts due to deceased person collected by person holding Succession Certificate—Suit by heirs of deceased for recovery of their share—Limitation.

A person who collects debts due to a deceased person by virtue of a Succession Certificate obtained by him cannot be described to be a person who either as an executor or an administrator represents the estate of the deceased. Such a person is not under any obligation to distribute their shares in the amount collected to the persons entitled to them. [p. 1011, col. 2; p. 1012, col. 1.]

A suit by the heirs of a deceased person for an account and for recovery of their shares of the debts due to the deceased collected by the defendant by virtue of a Succession Certificate obtained by him is governed not by Arts. 120 or 123, but by Art. 62 of Schedule I to the Limitation Act. [p. 1012, col. 1.]

Abdul Gaffar v. *Nur Jahan Begum*, 29 Ind. Cas. 347; 37 A. 434; 13 A. L. J. 686, relied on.

Appeal against a decree of the District Judge, Hoogly, dated the 6th April 1920, reversing that of the Subordinate Judge of that district, dated the 31st July 1917.

Dr. *Saratchandra Basak* (with him Maulvi *Fazlul Huq* and Babu *Prakashchandra Pakrashi*), for the Appellants.

Babu *Sharatchandra Ray Chaudhuri* (with him Maulvi *A. S. M. Akram*), for the Respondents.

AHIDANNESSA BIBI v. ISUF ALI KHAN.

JUDGMENT.—The facts which have given rise to this appeal, shortly stated, are as follows:—One Azmatullah Khan carried on business as a hatter in Calcutta. On the death of Azmatullah the defendant No. 1, who is a son of the deceased by his wife, the defendant No. 4, obtained a certificate under the Succession Certificate Act for the collection of debts due to the estate of the deceased. It is alleged on behalf of the plaintiffs, who are the sons of the deceased by his wife the plaintiff No. 4, and also by the latter that the defendant No. 1 realised all the debts due to the estate of the deceased, but has not accounted for the moneys so realised and has not paid to the plaintiffs their share of the same. The plaintiff, therefore, prayed for an account of these moneys and for recovery of their share thereof, it being alleged that the plaintiffs are entitled to a nine-annas share in the said moneys. The defendants alleged that accounts had already been rendered to the plaintiffs, once in 1313 B. S. and again in 1316, and that as the plaintiffs had themselves realised some of the debts due to Azmatullah and had already got more than what was due to them, there was nothing due to the plaintiffs by the defendant No. 1. It was also alleged that, in any event, the suit was barred by limitation.

The Subordinate Judge, who tried the case in the first instance, held that the share of the plaintiffs was annas nine as claimed by them and that the plaintiffs had not realised anything and that the defendant No. 1 had not rendered any accounts. He also found that the suit had been instituted within time and accordingly ordered the taking of accounts. On appeal, the lower Appellate Court found that the share of the plaintiffs was only eight annas and not annas nine as claimed by them. It was further found that there had been no submission of accounts to the plaintiffs as alleged by the defendant No. 1. On the question of limitation the lower Appellate Court held that Art. 62 of the First Schedule of the Limitation Act applied to the facts of the present case and not Art. 120 and in that view of the matter held that the suit was barred by limitation.

The plaintiffs have appealed against the judgment of the lower Appellate Court and on their behalf it has been contended that the suit was not barred by limitation. Under Art. 62 of the Limitation Act a plaintiff in a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use has a period of three years from the date when the money is received to institute a suit for the same. In the present case the lower Appellate Court found that the moneys in question were last collected by the defendant No. 1 in December 1909, and that, inasmuch as the present suit was not instituted till the 29th July 1916, it was barred by limitation, if it be held that Art. 62 is the proper Article applicable to the facts of this case. It is, however, contended on behalf of the appellants that inasmuch as the present suit was one for accounts, the plaintiffs had six years' time under Art. 120 to institute their suit and that time ran against the plaintiffs from the date when there was a definite refusal on the part of the defendant No. 1 to render accounts. Under Art. 120 time runs from the date when the right to sue accrues and, as pointed out by the lower Appellate Court, if in a suit for accounts time is made to run from the date when the defendant refuses to comply with the plaintiff's demand for accounts, there would practically be no limitation in a suit for accounts for the plaintiff, in such a case, may choose to wait as long as he likes and all that he would have to do to save limitation even under Art. 120 is to send a letter of demand to the defendant and to institute a suit within six years of the refusal thereof. From the dates mentioned above, it would clearly appear that if the plaintiffs' suit were held to be governed by Art. 62, it was out of time, and even if Art. 120 were made applicable, it was still out of time. It was next contended on behalf of the plaintiffs, as was also contended in the Court below that the suit was really one under Art. 123 of the Limitaton Act, it being one for distributive share of the property of an intestate. The debts in question were collected by the defendant No. 1 by virtue of the certificate under the Succession Certi-

ficate Act and the defendant No. 1 could not be described to be a person, who, either as an executor or an administrator, represented the estate of the deceased, and he was not under any obligation to distribute the share in the property of the deceased to those entitled to them. In our opinion, therefore, Arts. 123 and 120 had no application to the facts of the present case. We think this case is covered by the decision of the Allahabad High Court in *Abdul Gaffar* v. *Nur Jahan Begum* (1) and that Art. 62 applied to it. The result, therefore, is that we agree with the view taken by the learned District Judge on the question of limitation and that this appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 29 Ind. Cas. 317; 37 A. 434; 13 A. L. J. 686.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 287 OF 1920.
March 19, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

MEENAKSHI VETHIAR AMMA—DEFENDANT No. 14—APPELLANT

versus

CHERIYA PARVATHI NETHIAR AND OTHERS—PLAINTIFFS NOS. 3 TO 23 AND DEFENDANTS NOS. 11 TO 13 AND 15—RESPONDENTS.

Malabar Law—**Tarwad—Karnavan,** *position of*—*Money paid by* **karnavan** *to third person, whether can be recovered*—*Trusts Act (II of 1882), ss. 63, 64*—*Money passing in circulation, meaning of*—*Pleadings, construction of*—*Decision based on one of two alternative legal positions arising from facts stated*—*Prejudice.*

The *Karnavan* of a Malabar *Tarwad* is not a mere trustee but his position is similar to that of the manager of an undivided Hindu family. [p. 1014, col. 1.]

Where a *Karnavan* misappropriates *tarwad* money and gives it away to a third person, the money being trust money in the latter's hands with notice of its character, the latter is bound under section 63 of the Trusts Act to restore it to the *tarwad*. [p. 1014, col. 1.]

The reference to money passing in circulation in section 64 of the Trusts Act means and includes the passing of money in the ordinary course of business and not the transfer of money by a specific act such as payment on behalf of a person to some other. [p. 1014, col.]

Where a plaint submits the general facts of a case to the Court without specification of their exact legal implications, and the evidence required is the same for both of two possible legal positions arising from the facts stated in the plaint though the conclusions from it would differ, the defendant cannot be held to have been prejudiced by the Court basing its decision on one of the two legal positions on the evidence on record. [p. 1013, col. 2.]

Second appeal against the decree of the District Court, South Malabar at Calicut, in Appeal Suit No. 24 of 1918, preferred against that of the District Munsif, Alatur in Original Suit No. 328 of 1916.

Messrs. *K. P. M. Menon, C. V. Ananthakrishna Ayyar* and *M. Eachara Menon,* for the Appellant.

The Advocate-General and Mr. *K. P. Kesava Menon,* for the Respondents.

JUDGMENT.—In accordance with the opinion of the Full Bench we proceed to deal with the merits. The first ground on which the appeal has been argued is that the case which the District Munsif and the lower Appellate Court eventually considered and on which they decided against the 14th defendant-appellant was not that relied on by the plaintiff in the plaint and that on this account the 14th defendant was greatly prejudiced and refrained from giving evidence on facts which weighed materially with the lower Appellate Court.

The plaintiff's case as set out among the charges in paragraph 11 (*c*) of the plaint was that the first defendant joined a *kuri* on behalf of the *tevali,* gave the amount on his prize to and got executed a *panyon* deed, Exhibit XVI, by defendants Nos. 11 to 13 in favour of the 14th defendant his daughter, instead of getting it in his own name, and that the *tevali* has a right to recover this amount thus lent, the 14th defendant having no right to it. The relief asked for in this connection in paragraph 18 was to declare that "the amount regarding Exhibit XVI belongs to the *tevali* of the plaintiffs and the first defendant and to direct the 14th defendant to deliver up the said document and other

documents relating to it to the 2nd plaintiff or to any other plaintiff whom the Court thinks proper." That case was met by the 14th defendant in paragraph 7 of her written statement. The lower Courts regarded her as putting forward two alternative cases therein. That may have been the case, though it was not clear that it is so. For it is possible to read the plaint as alleging that she had private money in Pangi Achan's and Achuta Menon's *kuri*, that she left it in the first defendant's hands and he spent it on the *tarwad* that he had replaced what he spent by his prize-money in Raman Nair's *kuri*, the *kuri* referred to by the plaintiff, and that on his repaying it, she invested the amount in Exhibit XVI. On these pleadings the argument is that the plaintiff's case in the plaint was put forward as being that the money was invested by Exhibit XVI as the first defendant's money throughout, the document being taken in the name of the 14th defendant *benami*. This differs materially from the case which the Second of the District Munsifs concerned and the lower Appellate Court found established, that the money lent under Exhibit XVI was *tarwad*, money misappropriated by the first defendant as *karnavan* and given by him to the 14th defendant, his connection with the money ceasing when it came into her hands and was used by her and the money being thus trust money in her hands with notice of its character she is bound to restore it. It is, we think, clear that there was very little attempt by the parties or their advisers in the lower Courts to put forward and adhere to any very accurate contention. The issue framed on this part of the case was general in the extreme. It was: "Are the plaintiffs entitled to get any declaration in regard to B Schedule properties?" On that issue a considerable amount of evidence was adduced on both sides. The First District Munsif concerned, no doubt, found on the material point that the money was the property of the *tarwad*. But we have not been able to follow the remainder of his judgment on this part of the case. The Second District Munsif and the lower Appellate Court have, as already stated, found that the money belonged to the *tevali* and that it was misappropriated by the first defendant and was given to the 14th defendant. Having given the matter the best consideration we can, we do not think that any surprise or misapprehension has been established on the 14th defendant's behalf. The plaint alleged *tarwad* ownership of the money; but it did not say distinctly whether Exhibit XVI was taken in the 14th defendant's name *benami* or the money was given to her. It submitted the general facts to the Court without specification of their exact legal implications. We observe that, whether the plaintiff proved the narrower case of gift by the first defendant of what was found to be trust money or the wider case of *benami*, the evidence required would be the same and the conclusions from it would differ only because, in the second case referred to, a further and different inference from the evidence would be necessary. In either case, the duty of the 14th defendant to give evidence as to the manner in which the money was in her hands, and as to her knowledge of its character must have been equally clear and we cannot hold that she has been in any way prejudiced in this respect. There is further the fact that although the case before the Second District Munsif and the lower Appellate Court was argued fully the Second District Munsif in his judgment said explicitly that no allegation or argument relating to *benami* was addressed to him and there is nothing in the lower Appellate Court's judgment to suggest that the case of *benami* was ever mentioned or that objection was taken to the case of gift of trust money. There is further no ground of appeal relating to this matter in this Court. In these circumstances, we disallow this objection and pass to the merits.

On the merits, the first point taken is that the first defendant as *karnavan* was not a trustee and that any application of trust law to his conduct is inadmissible. To support this *Eravanni Revivarman* v. *Ittappu Revivarman* (1) and *Mankootil Chathukutti Nair* v. *Komappan Nair* (2) have been relied on. Those decisions, no doubt, say that the *karnavan* is not a mere trustee. But in the first that

(1) 1 M. 153; 1 Ind. Jur. 10; 1 Ind. Dec. (N. S.) 101.

(2) 44 Ind. Cas. 572; (1918) M. W. N. 144; 35 M. L. J. 380.

was said in connection with the principles on which the Court would deal with him when his removal was asked for, and in the second the question was as to the power of a person who gave a mortgage in order to pay a barred debt. The point was that the *karnavan* was not a mere trustee like the officer of a Corporation; but his position was fully recognised as that of a manager of an undivided Hindu family. That the *karnavan* in the present case has that position is sufficient and justifies the lower Appellate Court's conclusion.

Next it is said that section 63 of the Trusts Act on which the lower Appellate Court has relied is not applicable to the 14th defendant. There is first the explicit finding of the lower Appellate Court that she knew the money was the property of the *tevali*. Next, it is said that the last clause of section 64 excludes the case from section 63 but the answer is that the money did not come to her in circulation, but reached her by means of payment made ostensibly on her behalf to the 11th to 13th defendants under Exhibit XVI. The reference to money passing in circulation in the section means and includes, in our opinion, the passing of money in the ordinary course of business by which it might have reached either the defendants or any other stranger and not the transfer to the 14th defendant by a specific act such as is now in question.

The remaining argument is against the finding that the money was the property of the *tevali*. The lower Appellate Court reached that finding because it held that the money could be traced to *tevali* funds and there was evidence to support its conclusion. That finding relates to a question of fact and is, therefore, binding on us. It is urged that the lower Court disregarded the fact that the first defendant has private funds and that even if he took the money in the first instance from *tevali* funds, he might have restored it from his own funds, the suggestion being that no conclusion against his private ownership of the money could be valid, until a full account of the *tevali* funds is taken and the fact has been ascertained. We cannot accept that. As already stated, there was evidence on which the lower Appellate Court could reach this conclusion. It was for the 14th defendant, if she desired, to rebut that evidence by taking an account or in any other manner to do so. We cannot find that she made any attempt to submit an account of the funds in her father's possession. In fact, this contention that an account was essential was never put forward until now.

The result, therefore, is that the appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 657 OF 1922.
March 8, 1923.
Present:—Mr. Justice Daniels.

GOPI NATH SHUKUL—DEFENDANT—APPELLANT
versus
SAT NARAIN SHUKUL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908). O. XLI, rr. 25, 26—Appeal—Order remitting issue, whether open to question on final hearing—Execution of decree—Mortgage—Decree for sale conditional on mortgagee paying off prior mortgage—Prior mortgage paid off by mortgagor, effect of—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Application for execution relating to different property, whether operates to save limitation.

Where an Appellate Court at the first hearing does not decide the case but merely remits certain specific issues, it is open to the Court before which the case ultimately comes for disposal to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order. [p. 1016, col. 1.]

Masihunnissa v. *Kaniz Sughra*, 60 Ind. Cas. 975; 43 A. 377; 19 A. L. J. 139; 3 U. P. L. R. (A) 30, *Mubarak Husain* v. *Bihari*, 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199, *Lachman Prasad* v. *Jamna Prasad*, 10 A. 162, A. W. N. (1887) 295; 6 Ind. Dec. (N. S.) 109, *Ganendra Nath Roy Chowdhury* v. *Surja Kanta Roy Chowdhury*, 15 Ind. Cas. 39; 17 C. W. N. 462 and *Bara Estate Limited* v. *Anup Chandra*, 41 Ind. Cas 337; 2 P. L. J. 663; 2 P. L. W. 71; (1917) Pat. 342, relied on.

It is not necessary that an execution application in order to save limitation should be directed

GOPI NATH SHUKUL *v.* SAT NARAIN SHUKUL.

against the same property which is applied for in the subsequent application. [p. 1015, col. 2.]

A decree for sale on a mortgage provided that the decree-holder would not be entitled to bring a certain portion of the mortgaged property to sale unless he paid off the amount due on a prior mortgage. The amount was paid off by the mortgagor, and the mortgagee-decree-holder applied for execution of his decree against the mortgaged property including the portion which was subject to the prior mortgage;

***Held*, (1) that the decree did not lay down any limit of time within which the amount due on the prior mortgage must be paid; that the order had been made for the protection of the prior mortgagee and that it was open to the decree-holder to make the payment so long as the right to execute his decree had not become time-barred. [p. 1016, col. 2.]**

(2) that the mere fact that the mortgagor had stepped in and made the payment did not deprive the decree-holder of his right to execute the decree against that portion of the property which was the subject of the prior mortgage. [p. 1016, col. 2.]

Second appeal against a decree of the District Judge, Gorakhpur, dated the 6th of February 1922.

Mr. *P. L. Banerji*, for the Appellant.

Messrs. *U. S. Bajpai* and *N. Upadhiya*, for the Respondent.

JUDGMENT.—This is a second appeal in execution proceedings arising out of a decree for sale on a mortgage. The appellant Gopi Nath Shukal is the mortgagor. The respondent Satnarain Shukul is the mortgagee-decree-holder. The decree provided for sale of the mortgaged shares in Arazi Ragunathpur and Arazi Bansgopal appertaining to Hariharpur in the Gorakhpur District. Two prior mortgagees held a mortgage on a portion of this area. The decree was subject to a condition that the plaintiffs should not be entitled to bring to sale the property covered by this prior mortgage if they failed to pay the decretal amount due to the prior mortgagees. No time was given within which this payment was to be made. The condition simply was that without paying the decretal amount the mortgagees decree-holders should not be entitled to bring this portion of the property to sale.

The decree was made absolute on 10th May 1913. The mortgagees put in two applications for execution, both of which proved infructuous, on 3rd May 1916 and 29th April 1919 respectively. These applications were probably put in mainly for the purpose of saving limitation as both of them were ultimately dismissed for default. The decree-holders not having at that time paid the amount of the prior mortgage-decrees they excluded the property covered by these decrees from the property which they sought to bring to sale. After the second execution application had been dismissed the mortgagors themselves paid up the amount due to the prior mortgagees. The decree-holders then, on 26th April 1920, put in the application out of which this appeal arises for sale of the entire property, stating in their application that as the amount due to the prior mortgagees had been paid by the mortgagors themselves there was now no longer any need for the decree-holders to pay it. The mortgagors objected to the execution on two grounds which form the issues for decision in the present appeal.

(1) That the decree-holder was not entitled to the benefit of a payment made by his judgment-debtor and that not having redeemed the prior mortgage himself he was debarred from seeking execution against this portion of the property.

(2) That as regards this portion of the property the application was barred by limitation.

The second ground may be very shortly disposed of. It is admitted that the two previous applications save limitation in respect of the property covered by them. It is urged that they do not save limitation with regard to this portion of the property because execution was not asked for against this portion of the property in those applications. This proposition cannot be supported and no authority has been adduced in favour of it. It has never been held necessary that an execution application, in order to save limitation, should be directed to the same property which is applied for in the subsequent application or even indeed the same person. Thus, an execution application against the principal debtor has been held to save limitation against the surety. The only ground which has been seriously pressed is the first. This plea was accepted by the Subordinate Judge but was rejected by the District Judge who held that it was immaterial whether the

payment was made by the mortgagor or by the subsequent mortgagee. The case came originally before Stuart, J., who agreed with the Court below on this issue but remanded an issue under O. XLI, r. 25 on the question of limitation. I have been asked to re-consider the question and to disregard the opinion expressed by Stuart, J., in his remand order. On the side of the respondents it is contended that it is not open to me to do so and reference has been made to certain cases referred to by Mr. Agarwala on page 1055 of his Indian Practice, third Edition. As I understand the law, where a Court at the first hearing does not decide the case but merely remits certain specific issues it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order. I am supported in this view by the decision in *Masihunnissa* v. *Kaniz Sughra* (1) as well as by several older rulings of the Court such as those in *Mubarak Husain* v. *Bihari* (2), and *Lachman Prasad* v. *Jamna Prasad* (3). In the recent case it was held that it was open to the Court before which the case ultimately came to re-consider the view of the law on which the order of remand was based. By parity of reasoning, it is equally open to the Court before which the case comes to re-consider the view of the law taken in the same order on any other issue. There are authorities of other High Courts to the same effect, *e.g.*, *Ganendra Nath Roy Chowdhury* v. *Surja Kanta Roy Chowdhury* (4) and *Bara Estate Limited* v. *Anup Chandra* (5), the last being the decision of a Full Bench presided over by Sir Edward Chamier. A consideration of principle must show that this must be so. An order remanding issues under section 45 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand. It is quite otherwise with an order of remand passed under O. XLI, r. 23 for this is an order which does finally determine, subject to any right of appeal, the issues which it decides. On the merits of the issue the plea put forward by the appellant is two-fold. He urges, first, that by not paying the money within a reasonable time the decree-holder must be deemed to have waived his right to pay it. He had, it is urged, decided that the remaining property was sufficient for the purposes of his decree and that it was not worth while paying an additional amount for the purpose of being able to include in his execution application the property covered by the prior mortgages.

Secondly, it is urged that the decree must be literally construed and that as the decree says that the decree-holder shall not be able to sell the property until he pays the money a payment by the original mortgagor is of no avail to him.

The difficulty in the way of accepting the second contention is, that if it be allowed it would be open to the mortgagor by stepping in before the decree-holder and paying up the money himself absolutely to debar the decree-holder from executing this portion of his decree. The mortgagor was equally, in fact more than the decree-holder, under an obligation to pay this amount to the prior mortgagees, and it is doubtless on this ground that Stuart, J., held that the payment must be taken to have been made on account of the decree-holder.

As regards the first point, it does not appear that the Court which passed the decree intended to put any time limit, reasonable or otherwise, on the payment of this amount. It simply said to the decree-holder; "So long as you do not pay the amount, you cannot take out execution against this portion of the property." The order was passed for the protection of the prior mortgagees' rights. It was, therefore, open to the decree-holder to make the payment so long as the right to execute his decree had not become time-barred and that right

(1) 60 Ind. Cas. 975; 43 A. 377; 19 A. L. J. 139; 3 U. P. L. R. (A) 30.
(2) 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199.
(3) 10 A. 162; A. W. N. (1887) 295; 6 Ind. Dec. (N. S.) 109.
(4) 15 Ind. Cas. 39; 17 C. W. N. 462.
(5) 41 Ind. Cas. 337; 2 P. L. J. 663; 2 P. L. W. 711 (1917) Pat. 342.

was still open to him when the judgment-debtor stepped in and made the payment. It was suggested, and I was at first much impressed by the argument, that the decree-holder has taken an unfair advantage of a payment by the mortgagor which the decree-holder would not himself have made. On the other hand, it cannot be denied that the original liability is that of the mortgagor, and if the decree-holder himself had made the payment he would at once have been entitled to add the amount to his decree and to realise it from the mortgagor in addition to the amount of his own decree by sale of the entire mortgaged property. It does not, therefore, appear that any injustice has been done by the decree passed by the Court below. I am, therefore, unable to accept the appeal, which I accordingly dismiss with costs, including in this Court fees on the higher scale.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 399 OF 1920 AND 336 OF 1921.

March 26, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

HAYATUNNESSA CHOWDHURANI—DECREE-HOLDER—APPELLANT

versus

ACHIA KHATUN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, O. XXXIV, r. 6—Transfer of Property Act (IV of 1882), ss. 89, 90—Mortgage-decree—Preliminary and final decrees—Execution — Limitation—Properties, whether can be included in application for execution after expiry of limitation.

A preliminary decree upon a mortgage was passed on the 22nd November 1907 allowing six months' grace to the mortgagor. On the application of the decree-holder a final decree was made on the 4th July 1908; but the reliefs granted were not embodied in a formal decree, the order simply stating that the decree was made absolute as applied for;

Held, (1) that the preliminary decree was incapable of execution and that limitation for execution began to run from the date of the final decree, however informally it was expressed; [p. 1018, col. 1.]

(2) that no fresh decree was necessary to entitle the decree-holder to enforce his decree against properties other than those mentioned in the decree. [p. 1018, col 1.]

A decree-holder cannot, after the expiry of the period of limitation for execution of his decree; be allowed to amend a pending application for execution by adding to it a fresh list of properties against which he wanted to proceed. [p. 1018, col. 1.]

Gnanendra Kumar Rai Chowdhury v. *Shayama Sunder Jen*, 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398, distinguished.

Asgar Ali v. *Troilokya Nath Ghose*, 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.), followed.

Appeals against the orders of the District Judge, Noakhali, dated August 24, 1920 and May 11, 1921.

Babu *Dhirendra Lal Kastgir* (with him Babu *Nagendra Nath Bose*), for the Appellant.

Babu *Jatis Chandra Guha*, for the Respondent.

JUDGMENT.

Walmsley, J.—These two appeals are preferred by the decree-holder. The facts necessary for understanding the case are as follows: a preliminary decree upon a mortgage was passed on the 22nd November 1907, allowing six months' grace to the mortgagor. On the application of the decree-holder, a final decree was made on the 4th of July 1908; but the reliefs granted were not embodied in a formal decree in the form now prescribed by the new Civil Procedure Code. The Judge's order simply stated that the decree was made absolute as applied for. After various applications for execution, the application from which these appeals arise was presented on the 29th of June 1920. The learned Judge, by his order of the 11th May 1921, held that the application was barred by limitation. He overruled several objections preferred by the judgment-debtor; but, when he came to the last point which was to the effect that the application was presented more than 12 years after the date of the decree, he allowed that, and on that ground dismissed the application for execution. The learned Pleader who appears for the respondent, the judgment-debtor, has tried to uphold this order, first, on the ground that time must run from the date of the

preliminary decree and, secondly, on the ground that the decree-holder ought to have obtained a fresh decree before he could proceed to realize the debt by proceeding against properties other than the mortgaged properties. It appears to me that there is no substance in either of these arguments. The preliminary decree was incapable of execution and before the Procedure Code of 1908 came into force, it was often the case that decrees absolute were drawn up in an informal manner. Inasmuch, therefore, as the preliminary decree could not be executed, time must begin to run from the date of the final decree, however informally it was expressed. As to the second contention, there is no warrant for the view that a fresh decree was necessary before the decree-holder was entitled to enforce his decree against properties other than those mentioned in the decree. In my opinion, therefore, the appeal against the order of the 11th May 1921, that is, Appeal No. 336 of 1921, should be allowed.

Then we come to the earlier Appeal No. 399 of 1920. That is an appeal against the order of the 24th August 1920. The decree-holder made his application, as already mentioned, on the 29th of June 1920 in which he mentioned certain properties against which he wanted to proceed. On the 21st August he put in a petition asking for permission to be allowed to add several other properties to the list given in his original application. The learned Judge held that he was not entitled to do so. On behalf of the appeallant, our attention has been drawn to the case of *Gnanendra Kumar Rai Choudhury* v. *Shayama Sunder Jen* (1). The circumstances of that case appear to me to be very different from those in the present case and I think, we ought to follow the principles laid down in the Full Bench decision of *Asgar Ali* v. *Trollokya Nath Ghose* (2). Consequently, in my opinion, Appeal No. 399 of 1920 against the order of the 24th August 1920 should be dismissed.

The result of both orders will be that the decree-holder will be entitled to proceed with his application for execution against the properties mentioned in the application as it was at the time of presentation on the 29th of June 1920. As success is equally divided between the parties, there will be no order as to costs.

Ghose, J.—I agree.

Z. K. & W. C. A. *Order accordingly.*

(1) 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398.
(2) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 285 OF 1921.
April 6, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

RAJAGOPALA AIYANGAR—PLAINTIFF—APPELLANT

versus

SOUNDARARAJA AIYANGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Co-owner—Hindu Law—Joint family—Partition, partial—Member left in possession of undivided property, possession of, nature of.

Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him, however, in possession of certain properties not divided between the members, his possession will still continue to be the possession of the other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to the others. [p. 1019, col. 2]

Vaidyanatha Aiyar v. *Aiyasamy Aiyar*, 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 941, followed.

Such possession will not be treated as adverse or hostile unless it appears that the person in possession has repudiated the title of the other members and such fact of adverse holding is brought home to the other members of the family either by information to that effect given to them or by outward acts of exclusive ownership of such a nature as to give notice to the other members that adverse possession and *disseisin* are intended to be asserted [p. 1019, col. 2; p. 1020, col. 1.]

Jogendra Nath Rai v. *Baldeo Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, followed.

Second appeal against a decree of the Court of the Second Additional Subordinate Judge, Tanjore, in Appeal Suit No. 77 of 1920 (Appeal Suit No. 154 of 1920 on the file of the District Court,

Tanjore, preferred against a decree of the Court of the Principal District Munsif, Tiruvalur, in Original Suit No. 297 of 1918.

Messrs *N. R. K. Thathachariar* and *N. R. Govindachariar*, for the Appellant.

Mr. *T. Narasimha Iyenger*, for the Respondent.

JUDGMENT.—The plaintiff and the first defendant in this case are the surviving members of a joint family which became divided in 1904. The suit is for partition and delivery to the plaintiff of a half share in a plot of *nanja* land which, according to the plaintiff, was kept undivided at the time of the partition. The defendants denied that the suit property was family property at all, but this plea has been decided against them by both the lower Courts. The defendants' other plea was that they had acquired a prescriptive title to the plaint property by exclusive and hostile enjoyment since the time of partition. On this point also the District Munsif was against them and gave a decree for the plaintiff. The Subordinate Judge on appeal has decided that first defendant was in open adverse enjoyment of the suit land for over twelve years and the plaintiff's claim was, therefore, barred.

The learned Vakil for the appellants has argued that there is no evidence on record which could possibly support this finding, and after a careful consideration of the record of the suit, we think this plea must be allowed. The partition-deed, Exhibit A, gives a list of the suit properties to be divided in which the plaint property is not included. There is no specific mention of the plaint property in Exhibit A but there is a clause which says, 'If any lands are omitted such lands shall be divided by the holders of A and B Schedules in due proportion.'' We certainly think that no inference in favour of the defendants can possibly be drawn from the contents of Exhibit A. The other evidence adduced in defendants' favour is the oral evidence of four witnesses D. Ws. Nos. 1 to 4. The first and the second of these witnesses are the two defendants in the suit, the second defendant being the purchaser of the plaint land from the first defendant. But, quite apart from this, the evidence of all the witnesses amounts simply to this that the land was cultivated by tenants under the first defendant. There is nothing to indicate that the possession of the first defendant was in any way hostile or openly adverse to that of the plaintiff.

The law regarding acquisition of a prescriptive title in respect of joint property by one co-parcener against another has been clearly laid down in two cases quoted to us on the appellants' behalf in *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (1) the learned Judges say: "Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him, however, in possession of certain properties not divided between them, his possession will still continue to be the possession of the other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to the others." Neither in the record of this case nor in the judgment of the Sub-Judge is there anything that could possibly be construed into such an event. The other case is *Jogendra Nath Rai* v. *Baldeo Das* (2) in which the question was discussed at much greater length and the learned Judges say the fundamental rule is that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others; but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful and does not imply hostility as would the possession of a mere stranger" further on, "much stronger evidence, however, is required to show an adverse possession held by a tenant-in-common than by a stranger; a co-tenant will not be permitted to claim the protection of the Statute of Limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner, either by information

(1) 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 94.

(2) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

to that effect given by the tenant-in-common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and *disseisin* are intended to be asserted." These words of course apply with equal force to the case of a co-parcenery. If this test be applied to the present case there is absolutely nothing in the record from which an inference in the first defendant's favour could be drawn.

We must set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs throughout.

V. N. V. *Appeal allowed.*

W. C. A.

RANGOON HIGH COURT.

CIVIL REVISION PETITION No. 63 OF 1923.

May 11, 1923.

Present:—Mr. Justice Duckworth.

MAUNG CHIT HLAING—JUDGMENT-DEBTOR—APPELLANT

versus

N. A. R. M CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 151 152,—Mortgage suit—Accidental omission of item of mortgaged property from plaint and decree—Amendment of decree—Power of Court.

In a mortgage-deed drawn up under the direction of the mortgagor there was an accidental omission in describing one item of the mortgaged property. The omission was perpetuated in the plaint in a suit brought by the mortgagee on the mortgage-deed and was continued in the decree. Subsequently, at the instance of the decree-holder, the Court amended the decree so as to include the item which had been omitted:

Held, that the case was one of "an error arising in the decree from an accidental omission" within the meaning of section 152 of the Civil Procedure Code, and the Court had inherent power to make the amendment. [p. 1080, col. 2.]

Mahaboob Begum Sahiba v. *Lal Begum Sahiba*, 62 Ind. Cas. 652; 4 L. W. 445. *Somasundaram Chettyar* v. *Rama Krishna Kadir Velasami Naicker*, 22 Ind. Cas. 774; (1914) M. W. N. 107; 15 M. L. T. 102, relied on.

Jivan Sahai v. *Kalyan Mal*, A. W. N. (1906) 220, *Ahmed* v. *Shaik Essa*, 17 B. 657; 9 Ind. Dec. (N. S.) 431 and *Lakho Bibi* v. *Salamat Ali*, 20 A. 337; A. W. N. (1898) 59; 9 Ind. Dec. (N. S.) 576, distinguished.

Petition against the order of the District Court, Amherst, in Civil Suit No. 186 of 1921.

Mr. *Ko Ko*, for the Appellant.

Mr. *Das*, for the Respondent.

JUDGMENT.—After hearing learned Counsel, and reading the proceedings, I see no sufficient grounds for interference under section 115, Civil Procedure Code. The sale, I am told, has taken place, and there would certainly be no grounds for ordering a stay, even if such had not been the case.

There was, in my opinion, no misdescription of the mortgaged premises. Mr. Ko Ko has based all his arguments on the position that there was misdescription, and has quoted authorities, some of which if such had been the case, might have supported his claim. The mortgage-bond was drawn up by or under the direction of the applicant judgment-debtor, Maung Chit Hlaing, himself, and it was apparently by a mere oversight that the omission of the words "No. 2 of 1920-21 covered by freehold grants", between the words "holding" and "Nos." in the description of the mortgaged premises, was perpetuated in the plaint, and in the decree. The judgment, I may say, was silent as regards the description of the mortgaged property. It is clearly rather a case of a mere omission throughout, rather than a misdescription. It is in fact "an error arising in the decree from an accidental omission" which, in the first instance, was due to Maung Chit Hlaing himself. There never was, apparently, any dispute as to the actual property mortgaged, and it cannot, therefore, properly be said that there was any misdescription. In these circumstances, I consider that the learned Judge of the District Court was right in making use of the Court's inherent power under section 152, Civil Procedure Code.

Mr. Ko Ko has not alleged before this Court that properties other than those intended to be mortgaged by the bond, have been brought to sale under the decree, and he has not explained how the rights or positions of any third parties are involved.

The cases quoted by the learned Judge of the District Court, namely, *Mahaboob Begum*

CHAND MALL BABU v. BAN BEHARI BOSE.

Sahiba v. *Lal Begum Sahiba* (1) and *Somasundaram Chettyar* v. *Rama Krishna Kakir Velasami Naicker* (2), are adequate authorities for his action, in amending the decree the latter showing that the decree can be amended without a preliminary amendment in the actual plaint. There is nothing to show that he has acted illegally, or with material irregularity, or that he acted without jurisdiction.

The cases quoted by Mr. Ko Ko, to which I have already referred and which I do not consider apply to the present circumstances are *Jivan Sahai* v. *Kalyan Mal* (3), *Ahmed* v. *Shaik Essa* (4) and *Lakho Bibi* v. *Salamat Ali* (5). In the latter, the judgment was incorrect, and as the decree was in accordance with it, it was held that the decree could not be amended under section 206 Civil Procedure Code. In the Bombay case the decree was in accordance with an award and it was held that the decree could not be amended, as the real subject of attack was the award. In the Allahabad Weekly Notes case part of the subject-matter of the suit was described in the plaint and the decree as plot No. 182 instead of 184, and it was held that the decree could not be amended. In this latter case, if there was misdescription as apart from a mere clerical error, then I consider that the judgment of Aikman, J., was probably correct. The Bombay case is, of course, no guide at all in the present case nor is the case dealt with in 20 Allahabad. It would cause great hardship to the respondent if the amendment in this instance was disallowed as it would probably necessitate a suit to rectify the decree.

The application is dismissed with costs as also the application to stay sale. Advocate's fees 3 gold *mohurs*.

Z. K. & W. C. A. *Application dismissed.*

(1) 62 Ind. Cas. 652; 4 L. W. 445.
(2) 22 Ind. Cas. 774; (1914) M. W. N. 107; 15 M. L. T. 102.
(3) A. W. N. (1906) 220.
(4) 17 B. 657; 9 Ind. Dec. (N. S.) 431.
(5) 20 A. 337; A. W. N. (1898) 59; 9 Ind. Dec. (N. S.) 576.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 1 OF 1922.

March 29, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

CHAND MALL BABU—PLAINTIFF—APPELLANT

versus

BAN BEHARI BOSE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 6, object of—Mortgage-decree—Mortgaged property, portion of, not available for sale—Personal decree, whether can be passed—Contract Act (IX of 1872), ss. 43, 44—Joint judgment-debtors—Release of one judgment-debtor, effect of.

The object of rr. 5 and 6 of O. XXXIV of the Civil Procedure Code is, that the remedy of the mortgagee should, in the first instance, be against the property mortgaged and that such property should be exhausted before a personal liability is imposed upon the mortgagor. But the rules do not mean that if a portion of the property, however small, which is included in the mortgage-decree as a portion of what is to be sold, is destroyed or has ceased to be available for sale after the date of the decree, through no fault of the mortgagee, there can be no decree for personal liability against the mortgagor. [p. 1023, col. 1.]

Satish Ranjan Das v. *Mercantile Bank of India*, 48 Ind. Cas. 322; 45 C. 702, followed.

Where some of the mortgaged properties directed to be sold under a mortgage-decree were sold at the instance of the superior landlord under the Patni Regulation and in execution of a decree for arrears of rent, which constituted a prior charge on the properties, and they could, therefore, not be sold under the mortgage-decree:

Held, that the mortgagee could not be deprived of his right to apply for a personal decree under r. 6 of O. XXXIV of the Civil Procedure Code merely because some of the mortgaged properties directed to be sold under the decree had ceased to be available for sale owing to no default of the decree-holder. [p. 1023, col. 2.]

The release from liability of one of several joint judgment-debtors by the decree-holder does not affect the latter's right to proceed against the other judgment-debtors. [p. 1024, col. 1.]

Bhawani Koer v. *Darsan Singh*, 11 Ind. Cas. 450; 14 C. L. J. 354, *Krishna Charan Barman* v. *Sanat Kumar Das*, 34 Ind. Cas. 609; 44 C. 162; 25 C. L. J. 24; 21 C. W. N. 740 and *Moolchand* v. *Alwar Chetty*, 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449, relied on.

Badri Das v. *Inayat Khan*, 22 A. 404; A. W. N. (1900) 132; 9 Ind. Dec. (N. S.) 1305, *Kamta Prasad* v. *Syed Ahmad*, 1 Ind. Cas. 799; 6 A. L. J. 451; 31 A. 373 and *Darbari Mal* v. *Moola Singh*, 56 Ind. Cas. 139; 42 A. 519; 18 A. L. J. 628; 2 U. P. L. R. (A.) 160, not followed.

Appeal against the decree of the Subordinate Judge, Burdwan, dated September 19, 1921.

CHAND MALL BABU *v.* BAN BEHARI BOSE.

Babus *Mahendra Nath Roy* and *Surendra Nath Ghosal*, for the Appellant.

Babus *Amarendra Nath Bose, Durga Charan Roy Chowdhury, Profulla Kumar Guha*, and *Rama Prosad Mookerjee*, for the Respondent.

JUDGMENT.—This appeal is directed against the dismissal of an application under r. 6 of O. XXXIV of the Code of Civil Procedure of 1908. The facts material for the decision of the questions raised before us really lie in a small compass and may be briefly recited.

One Ananda Chandra Bose died leaving a widow and seven sons. Three of these sons died childless with the result that their interest in the ancestral estate was inherited by their mother. The position consequently was that the widow became entitled to a 3-7ths share and the remaining 4-7ths share was divided equally amongst the four sons. On the 16th April 1903 two of the sons executed a mortgage in favour of the appellant to secure a loan of Rs. 15,000. There were six properties given by way of security and what was hypothecated was the 2-7ths share of the two mortgagors in the properties mentioned. On the 19th April 1905 the widow and three of the sons executed another mortgage in favour of the appellant to secure a loan of Rs. 10,000. Two of these sons were executants of the earlier mortgage. There were twelve properties given by way of security and these included the six covered by the previous mortgage. The position consequently was that a 6-7ths share in the hypothecated properties was given by way of security, while the 2-7ths share of the two sons in six out of the twelve properties was covered by the earlier mortgage. On the 14th May 1915 a preliminary decree was made on the earlier mortgage; this decree was made final on the 22nd January 1916. On the 14th February 1918 a preliminary decree was made in the Trial Court on the basis of the later mortgage. The decree-holder preferred an appeal to this Court with the result that on the 8th May 1919 this Court increased the amount recoverable by the mortgagee from the mortgagor. This order was subsequently carried out by the Subordinate Judge in the manner following, namely, a final decree was made by him on the 30th August 1919 on the basis of the decree made by this Court. In the interval between the date of the preliminary decree by the Trial Court and the final decree made by that Court pursuant to the decree of that High Court, some of the properties had been sold. Two properties were sold under Regulation VIII of 1819 and in execution on the 15th May 1918 and the 22nd March 1919, respectively. The surplus sale-proceeds were applied in reduction of the sums due on the preliminary decrees under the two mortgages. The result was that when the final decree on the later mortgage was made on the 30th August 1919, it was found that Rs. 7,353-2-0 was still due. Since then, other properties have been sold for arrears of rent, for arrears of revenue, and in execution of the mortgage-decrees. The decree-holder maintains that the sale-proceeds so realised have not been sufficient to satisfy his claim, and he has consequently applied for a personal decree under r. 6 of O. XXXIV of the Civil Procedure Code. The application has been dismissed by the Subordinate Judge on the ground that the decree-holder has not complied with the requirements of its provisions.

Order XXXIV, r. 6 is in the following terms: "Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount." It is plain that the expression "any such sale" has reference to rule 5, sub-rule (2), which ordains that if payment is not made as directed by the preliminary decree, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4. Consequently, before the plaintiff can invoke the aid of the provisions of rule 6, he must establish that the mortgaged properties have been sold as contemplated by sub-rule (2) of rule 5. If this is construed according to the strict letter of the law, it may be possible to maintain that rule 6 cannot come into operation where the sale has taken place, not in execution of

the final decree as contemplated by rule 5 but otherwise, for instance, under proceeding taken in accordance with Regulation VIII of 1819. This contention has not been put forward and cannot be supported in the face of the decision in *Satish Ranjan Das* v. *Mercantile Bank of India* (1). In that case it was pointed out that the object of the rules obviously is that the remedy of the mortgagee should, in the first instance, be against the property mortgaged and that such property should be exhausted before a personal liability was imposed upon the mortgagor. But the rules surely cannot mean that if a portion of the property, however small, which was included in the mortgage, and, therefore, included in the mortgage-decree as a portion of what was to be sold, is destroyed or has ceased to be available for sale after the date of the decree, through no fault of the mortgagee, there can be no decree for personal liability against the mortgagor. We are of opinion that this interpretation of r. 6 of O. XXXIV is reasonable and should be adopted. In the case before us, it has not been urged that rule 6 has ceased to be applicable because some of the properties were sold at the instance of the superior landlord either under Regulation VIII of 1819 or in execution of a decree for arrears of rent which constituted a prior charge thereupon.

But it has been urged that the mortgagee is not competent to invoke the aid of rule 6, because there are other properties against which he is still bound to proceed before he can claim the personal remedy. Our attention has been invited to the fact that on the 6th January 1920 the mortgagee put up to sale a share of three properties in execution of the decree on the earlier mortgage and purchased them himself. Again, on the 1st March 1920 the mortgagee brought the remaining shares and the shares in the other properties to sale in execution of the decree on the later mortgage. The contention of the respondent is that the sale of a share of the three properties on the 6th January 1920 under the earlier mortgage, does not entitle the decree-holder to absolve that share from sale in execution of the decree on the later mortgage. The argument is that the share in question was subject to two mortgages and that the sale in execution of the decree on the first mortgage has not vested the property in the purchaser free from liability under the second mortgage. This is a point which requires further consideration. The question must be decided by reference to the circumtances under which the sale of the 6th January 1920 was held. If the sale was held under such conditions as to vest the property in the purchaser free from liability to sale under the subsequent mortgage, the decree-holder must be deemed to have done all that he could to bring the mortgaged properties to sale, so as to entitle him to the benefit of the provisions of O. XXXIV, r. 6. Without a fuller knowledge of all the facts than can be gathered from the record, we cannot affirm that the share subject to both mortgages, is or is not liable to be re-sold.

We shall next examine the other reason assigned by the Subordinate Judge why the mortgagee decree-holder should be deemed incompetent to avail himself of the remedy prescribed by O. XXXIV, r. 6. It appears that the mortgagee decree-holder has released from liability one of the mortgagors. The Subordinate Judge holds that the result of this is to deprive him of his right to a personal decree. This view is erroneous and is contrary to the provisions of sections 43 and 44 of the Indian Contract Act. As was pointed out in the case of *Bhawani Koer* v. *Darsan Singh* (2), the law under the Indian Contract Act is in this respect materially different from the rule recognized in the Common Law of England. The rule adopted by the Indian Legislature is that joint liability implies joint and several liability and that a creditor is entitled to a decree for the entire amount against any one of the debtors. This view is in accordance with that adopted in *Krishna Charan Barman* v. *Sanat Kumar Das* (3). The same view was followed by the Madras High Court in *Moolchand* v. *Alwar Chetty* (4), where it was ruled that the release of

(1) 48 Ind. Cas. 322; 45 C. 702.

(2) 11 Ind. Cas. 450; 14 C. L. J. 354.
(3) 34 Ind. Cas. 609; 44 C. 162; 25 C. L. J. 24; 21 C. W. N. 740.
(4) 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449.

one of several joint judgment-debtors does not affect the right of the decree-holder to proceed against the other judgment-debtors. We are not unmindful that there are cases in the Allahabad High Court, namely, *Badri Das* v. *Inayat Khan* (5), *Kamta Prasad* v. *Syed Ahmad* (6) and *Darbari Mal* v. *Moola Singh* (7), which may lend weight to the contention of the respondent; but the view we take is supported by principle as well as authority. We are clearly of opinion that the fact that the decree-holder has released Atul does not affect his position in any way. The limited question which requires investigation is, whether after the purchase of the properties brought to sale by the decree-holder on the 6th January 1920, he is still under an obligation to bring that specific share to sale in execution of the decree on the later mortgage; for this purpose, the decree-holder is in no worse position than a stranger purchaser.

We may add that it has been asserted before us that there are assets in connection with some of the sales for which the judgment-debtors are entitled to credit. This will be investigated by the Subordinate Judge. We may further add that we express no opinion upon the question, whether a person who holds two decrees on two mortgages is or is not competent to execute the decree on the subsequent mortgage reserving his rights under the prior mortgage; that question, as is well known, is not free from difficulty and has led to divergence of judicial opinion.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him for reconsideration on the lines indicated. The costs of this appeal will abide the result. We assess the hearing fee at three gold *mohurs*.

The amount in deposit on account of Court-fees will be returned to the appellant.

Appeal allowed; Case remanded.

Z. K. & W. C. A.

(5) 22 A. 404; A. W. N. (1900) 132; 9 Ind. Dec. (N. S.) 1305.
(6) 1 Ind. Cas. 799; 6 A. L. J. 451; 31 A. 373.
(7) 56 Ind. Cas. 139; 42 A. 519; 18 A. L. J. 628; 2 U. P. L. R. (A.) 160.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1174 OF 1921.
February 27, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

Seth GOBERDHAN DAS—PLAINTIFF—APPELLANT
versus
MAKUNDI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim proceedings—Claim, dismissal of, without investigation—Suit to establish title—Limitation.

Where a claim is rejected under O. XXI, r. 58 of the Civil Procedure Code, without investigation, on the ground that it has been preferred too late, and a suit is subsequently brought by the unsuccessful claimant to establish title, the suit falls under r. 63 of O. XXI, and is governed by Art. 11 of Sch. I to the Limitation Act. [p. 1025, col. 2.]

Venkataratnam v. *Ranganayakamma*, 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.), relied on

Article 11 of Sch. I to the Limitation Act applies to suits arising out of orders passed after investigation of the claim as well as to those arising out of orders in which the claim has not been investigated at all but has been rejected on the ground that it was preferred too late. [p. 1025, col. 2.]

Second appeal from a decree of the District Judge, Jhansi, dated the 27th of May 1921.

Mr. *P. L. Banerji*, for the Appellant.
Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession of a third share of a ruined house No. 445. The plaintiff's allegation was that the said one-third share was attached by Jaiki Prasad, father of Ajudhia Prasad, defendant No. 2, in execution of a decree of his against Chhote Lal, the tenant of the *khandhal*. The plaintiff *Zemindar* objected to the attachment on the ground that as soon as the house fell in ruins and the tenant had left the village, the site had reverted to him and was, therefore, not saleable. This objection was disallowed in the Execution Department as having been preferred too late. The property was sold by auction on the 17th of September 1919 and the defendant No. 1 purchased the property. The sale was confirmed on the 27th of November 1919. When the defendant No. 1 began to rebuild on the said land,

the plaintiff tried to stop him but the defendant did not listen to him, hence the present suit. The defendant No. 2, the son of Janki Prasad, decree-holder, was also made a party.

Several pleas were taken in defence and the Trial Court decreed the plaintiff's claim. We are not concerned with those pleas. The plea with which we are concerned is one of limitation. It was not raised in the Trial Court nor was it raised in the grounds of appeal before the learned District Judge. It was, however, raised before him in argument. He allowed it to be raised, accepted it and has dismissed the suit.

The plaintiff comes here in second appeal and his contention is that the rule of one year's limitation does not apply and the suit is not so barred. This plea of limitation does not raise any question of fact which it might be necessary to decide. It proceeds on the admitted facts of the case, namely, that the objection of the plaintiff was disallowed on the 15th of September 1919 and the present suit was not instituted until the 29th of October 1920. This suit was admittedly brought after the expiry of a year from the order of the Munsif refusing to hear the plaintiff's objection which he preferred in the Execution Department, on the ground that the objection had been made too late. It has been urged with great force by the learned Vakil for the appellant, that Art. 11 of the First Schedule of the Limitation Act of 1908 does not apply inasmuch as the objection taken by the *Zemindar* plaintiff under O. XXI, r. 58 was not investigated and, therefore, O. XXI, r. 63 does not apply. It is further contended that the rule of one year's limitation applies only to those orders which are passed after investigation of the claim and not to orders in which the claim has not been investigated at all but has been rejected on the ground that it was preferred too late. A large number of rulings under the old Act (No. XIV of 1882) were referred to by the learned Vakil for the appellant. It is, however, not necessary to discuss them because there has been an alteration in O. XXI, r. 63 as compared with section 283 of the Code of 1882. Section 283 of the old Code expressly mentioned the orders passed under sections 280, 281, and 282 of the Code, whereas the present r. 63 makes no mention of rr. 60, 61 and 62. The words of r. 63 read in their natural sense include all orders passed under the preceding rr. 58, 60, 61 and 62. This rule is not confined to the orders passed under rr. 60, 61, and 62 only. The present r. 63 runs as follows:—"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Section 283 of the old Code ran in the following terms: "The party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

In the old Code the only conclusive orders were those passed after investigation either in favour of or against the objector, but not those orders which were passed summarily dismissing the objection on the ground that it was made too late, as provided in section 278 of the old Code. The scope of rule 63 of the present Code is not, however, so confined as to exclude orders passed under rule 5 from its operation, and there is nothing in r. 63 to prevent the finality attaching to orders passed under O. XXI, r. 58 of the present Code of Civil Procedure.

It is contended on behalf of the appellant that the order passed in the present case was not against the objector plaintiff, but that it was an order refusing to investigate the claim without deciding it. The result of the order, however, was that the property was not released from attachment as the plaintiff objector desired, but was allowed to be sold and this is certainly an order adverse to the claimant who wanted to prevent the property from being sold. It was, therefore, certainly an order against the objector.

The only case exactly in point which we have been able to discover is the Full Bench case of *Venkataratnam* v. *Ranganaya-*

kamma (1), in which the same view of the law has been taken. We agree with the decision of the Full Bench referred to above and are of opinion that the present suit is barred by Art. 11 of the Indian Limitation Act of 1908.

We, therefore, dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 26 OF 1921

March 20, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

KANNATHAYAPARKUM PUTHULATH AMINA UMMA—DEFENDANT No. 4—APPELLANT

versus

ANANDRAVAN CHEPIYA RAYA RAPPAN NAPPIAR AND OTHERS—PLAINTIFFS No. 2 AND DEFENDANTS Nos. 2, 3, 6, 8, 9 AND LEGAL REPRESENTATIVE OF DEFENDANT No. 5—RESPONDENTS.

Malabar Tarwad—Kanom *granted by* Karnavan—Anandravans, *whether entitled to redeem—Collusion—Prejudice.*

The *anandravans* of a Malabar *tarwad* are entitled to maintain a suit for redemption of a *kanom* granted by their *karnavan* on proof of special circumtances, such as the existence of collusion between the *karnavan* and the *kanomdar* or prejudice to the *tarwad* interest by the continuance of the *kanom*

Mandoth Veetil Chappan v. *Puthanpurayil Ranu*, 15 Ind Cas. 587; 37 M. 420; 13 M. L. T. 118, *Ottaprakal Thazath* v. *Charichai Pallikal*, 55 Ind. Cas. 760; 43 M 393. 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N. 279; 27 M. L. T. 169, distinguished.

Second appeal against a decree of the Court of the Subordinate Judge, Tellicherry, in Appeal Suit No. 74 of 1920 preferred against a decree of the Court of the District Munsif, Payoli, in Original Suit No. 794 of 1917.

Mr. *K. P. M. Menon*, for the Appellants.

Mr. *K. Govinda Menon*, for the Respondents.

JUDGMENT.—The contest in both the lower Courts was practically confined to the question of whether the *Othi* document, Exhibit I, executed by the *karnavan* 1st defendant, in favour of 4th defendant (appellant) was valid and binding on the plaintiff's *tarwad*. This has been found in plaintiff's favour, and Mr. Menon, who appeared for appellant, has been unable to suggest any ground on which the finding could be questioned.

He has devoted his argument to a ground of appeal newly raised—that whatever view may be taken of Exhibit I plaintiffs, being only *anandravans*, should not be allowed to redeem the earlier valid and binding *kanom* effected by Exhibit A in opposition to the *karnavan*. He relies on the judgment in *Ottaprakal Thazath* v. *Charichai Pallikal* (1) in which it is stated that only under any special circumstances could the *anandravans* of a *tarwad* maintain a suit for redemption of a *kanom* granted by their *karnavan* as such a suit would amount to an act of interference in the *karnavan's* management of *tarwad* affairs.

The judgment does not define what would constitute "very special circumstances," nor does that in the unreported case, *Kathukutti Haji* v. *Kundan Menon* (S. A. No. 959 of 1917), which is referred to and followed. But from the discussion of the evidence in the reported case it may perhaps be inferred that collusion between the *karnavan* and the *kanomdar* or prejudice to the *tarwad's* interest by the continuance of the *kanom* would be sufficient. Both these circumstances were alleged in that case and found not to be proved.

In the present case, it is found that *karnavan* executed later *Othi* to 4th defendant, for consideration, no part of which was binding on the *tarwad* and we are given to understand that the fourth defendant has succeeded to the interests of the *kanomdar* under the earlier binding

(1) 55 Ind. Cas. 760; 43 M. 393; 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N. 279; 27 M. L. T. 169.

kamom, Exhibit A. These facts would be sufficient to justify an inference of collusion between defendants Nos. 1 to 4 and it is clear that 1st defendant having executed this improper *Othi*, Exhibit I, was in no position to maintain a suit on behalf of the *tarwad* for redemption of Exhibit A.

We think these circumstances are sufficient to justify the grant of the redemption decree in favour of plaintiff.

This appears to be in accordance with the decision in *Mandoth Veetil Chappan* v. *Puthanpurayil Ranu* (2). That suit was treated by the learned Judge as one by a member of a *tarwad* seeking to recover possession of properties mortgaged by his *karnavan*. He was allowed to do so without question, it being merely proved that the *karnavan* had effected another alienation not binding on the *tarwad*.

The second appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

(2) 15 Ind. Cas. 587; 37 M. 420; 13 M. L. T. 118.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 714 OF 1921.

February 27, 1923.

Present:—Mr. Justice MacColl.

MA ZAN NYEIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAUNG KYAW ZAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Partition suit—Appeal—Death of one of several respondents—Abatement, extent of.

During the pendency of an appeal by the plaintiffs in a suit for partition of land which was alleged to be in the joint possession of the parties, one of the defendants-respondents died and his legal representatives were not brought on the record:

Held, that the legal representatives of the deceased respondent were necessary parties to the appeal and as the appeal could not be heard in their absence it had abated *in toto*. [p. 1029, col. 2.]

Jamna v. *Sarjit*, 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919, relied on.

Lakhmichand Rewachand v. *Kachubhai Gulabchand*, 11 Ind. Cas. 559; 35 B. 339; 13 Bom. L. R. 517, *Chandarsang Versabhai* v. *Khimabhai Raghabhai*, 22 B. 718; 11 Ind. Dec. (N. S.) 1061, *Joy Gobind Laha* v. *Monmotha Nath Banerjee*, 33 C. 580, *Hem Kunwar* v. *Amba Prasad*, 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. S.) 1324, *Bai Full* v. *Adesang Pahadsang*, 26 B. 203; 3 Bom. L. R. 736, *Alla Bakhsh* v. *Madho Ram*, 23 A. 22; A. W. N. (1900) 183, *Ranga Srinivasa Chari* v. *Gnanaprakasa Mudaliar*, 30 M. 67; 2 M. L. T. 36, and *Mehdi Husain* v. *Sughra Begam*, 25 A. 206; A. W. N. (1903) 15, distinguished.

Second appeal against the judgment and decree of the District Court, Minbu, passed in Civil Appeal No. 75 of 1921, dated the 29th August 1921.

Mr. *Maung Su*, for the Appellants.

Mr. *Dutt*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants sued for a partition of certain lands which they said had descended from their grandfather, Maung Te Te, and were in the joint possession of the defendants and themselves. In their first plaint they claimed a third share, but as one of the defendants, Maung Pu Ton, relinquished his rights, they amended their plaint and claimed a half. The first Court decreed the claim, but the lower Appellate Court found that it was not proved that the lands had descended from Maung Te Te and reversed the decree and dismissed the suit. The plaintiffs-appellants appealed to this Court on the 26th of November 1921. On the 3rd of May 1922 it was discovered that the first defendant whose name had been entered in this appeal as a respondent had died in August 1921. Consequently, I passed an order that the appeal abated and I fixed the case for hearing as against the remaining respondents. It is now urged on behalf of those respondents that as the appeal has abated as against the first defendant, Maung Kyaw Zan, it must abate altogether because Maung Kyaw Zan's legal representatives are necessary parties. A number of rulings have been cited, but it is unnecessary to refer to more than one of them, namely, *Jamna* v. *Sarjit* (1), for the plaintiffs-appellants it is urged that this case is different because the plaintiffs-appellants allege that the land in suit is in the joint possession of themselves and the defendants and

(1) 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919.

it is urged that if the lower Appellate Court's decree dismissing the suit stands good then the plaintiffs-appellants will remain in joint possession. The plaintiffs-appellants' Counsel also has cited a number of rulings to which I will refer seriatim.

The first one was *Lakhmichand Rewachand* v. *Kachubhai Gulabchand* (2). That case was a partition suit and the plaintiff died after the preliminary decree and before partition had been effected. More than six months after his death his legal representative applied for a commission to effect partition and his application was dismissed on the ground that the suit had abated before the application was made. Scott, C. J., said, it is obvious that in a partition suit all the parties should be before the Court. The suit has actually reached the stage of a commission to divide the property and the applicant is a sharer. Nothng in the Code limits or affects the inherent power of the Court to make such orders as may be necessary for the ends of justice and, under O. I, r. 10, the Court may at any stage of the proceedings order that the name of any person whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added. "Accordingly, the legal representative was added as a defendant on the footing that he was bound by all the proceedings up to date."

I think there is a considerable difference between that case and the present one. In that case there was a decree for partition and that decree affected the defendants *inter se* and the defendants had a right to ask that the suit might proceed. In the present case there has been no adjudication as between the defendants. The suit has been dismissed altogether.

The next case cited is *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (3). In that case the appeal had been dismissed apparently because one of the appellants had died and no order directing the suit to abate as against the defendant who had died was made. The High Court held that the lower Appellate Court ought to have ordered the appeal to abate so far as the appellant who had died was concerned, and to have proceeded with the hearing so far as the remaining appellants were concerned, and, so far as the death of one of the respondents was concerned, that the lower Appellate Court ought to have proceeded under the provisions of section 368 of the Civil Procedure Code then in force and to have either declared that the appeal had abated as to him and proceeded against the rest of the respondents or else to have directed that the legal representatives should be placed upon the record. That case, therefore, does not help.

The next case s *Joy Gobind Laha* v. *Monmotha Nath Banerjee* (4). It was held that, where the liability of the defendants is joint and several and on appeal on the death of one of the defendants his legal representatives are not substituted in his place, the appeal abates only so far as the deceased defendant is concerned. Mitra and Geidt, JJ., said: "Our attention has been drawn to the case of *Hem Kunwar* v. *Amba Prasad* (5) which is one of the rulings cited by Mr. Dutt for the respondents as showing that f one of the defendants died and that no attempt was made to get his heirs substituted on the record, the appeal should abate. But that was a suit for possession of land and it does not appear that the interest of the several defendants could be discriminated. The liability of the defendants was not in that case joint and several as in the present case."

The next is *Bai Full* v. *Adesang Pahadsang* (6). In that case two of the respondents in an appeal in the District Court died pending the appeal and their legal representatives were not brought on the record. The Appellate Court ordered the appeal to abate as against all the respondents. It was held that the appeal should abate only as against the respondents who had died but as against the remaining respondents it should pro-

(2) 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L. R. 517.
(3) 22 B. 718; 11 Ind. Dec. (N. S.) 1061.
(4) 33 C. 580.
(5) 22 A. 430; A. W. N. (1908) 136; 9 Ind. Dec. (N. S.) 1324.
(6) 26 B. 203; 3 Bom. L. R. 736.

ceed. The suit was one for a share of an estate decreed by Will. Apparently, the lower Appellate Court did not go into the question whether the right to appeal against the remaining respondents survived or not, all that the High Court ordered to be done was that this point should be considered. Crowe, J., said: "The proper course, following the decision in *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (3), would appear to be to have declared that the appeal had abated as far as the second and fifth respondents are concerned and to have proceeded to hear the appeal on the merits as against the other respondents. It may be that at the hearing it will be found that the appeal did not survive against the remaining respondents, in which event the Asistant Judge will deal with it accordingly."

Alla Bakhsh v. *Madho Ram* (7) was a suit under section 283 of the Code of 1882. In that case, pending the appeal to the High Court, two of the defendants-respondents died and their legal representatives were not placed on the record. It was held that the appeal did not abate. In that case the respondents who died were purely formal parties.

Renga Srinivasa Chari v. *Gnanaprakasa Mudaliar* (8) was a very similar case. *Mehdi Husain* v. *Sughra Begam* (9) was a case in which a surety died. Obviously, the abatement of a suit as against the surety would not mean abatement of the suit as against the principal. In the present case the question is, whether the decree of the lower Appellate Court can be reversed, that is to say, whether the plaintiffs-appellants can be given any relief without Maung Kyaw Zan's legal representatives being parties. The contesting defendants all alleged that the land belonged solely to Maung Kyaw Zan and was in his possession. The dismissal of the suit is not, of course, the equivalent to a finding in Maung Kyaw Zan's favour on that point. What the lower Appellate Court found was that the plaintiff-appellant had failed to prove that the land had descended from Maung Te Te and that he was entitled to a share of it. As the appeal has abated as against Maung Kyaw Zan, his legal representatives must be entitled to remain in possession of whatever land was in his possession. What the plaintiffs-appellants are apparently claiming now is that they have a right to a share in some land which they say is in the possession of the other defendants-respondents on the ground that that land and the land in the possession of Maung Kyaw Zan's legal representatives are joint undivided ancestral property. But the other defendants-respondents, if they are in possession of any of the land in suit, must be entitled to have the whole of the land brought into hotchpot. It may be that they are in possession of their rightful share of the total. Why should they be compelled to give up a portion of that to the plaintiffs-appellants because they were not sufficiently diligent to bring Maung Kyaw Zan's legal representatives on to the record within the proper time? As the land in possesion of Maung Kyaw Zan's legal representatives cannot be brought into hotchpot, I am of opinion that the appeal must abate altogether and I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(7) 23 A. 22; A. W.N. (1900) 183.
(8) 30 M. 67; 2 M. L. T. 38.
(9) 25 A. 206; A. W.N. (1903) 15.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 53 OF 1922.
April 23, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Ramesam.

SURJIMULL MURLIDHAR CHANDICK —PLAINTIFF—APPELLANT

versus

ANANTA LAL DAMANI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), Sch. I, Art. 1—Statement of account whether acknowledgment—Intention.

In considering whether a document is an "acknowledgment" within the meaning of Art. 1 of Schedule I to the Stamp Act, the Court has to apply its mind to the question—looking at the document and the surrounding circumstances—as to what the intention was with which the docu-

SURJIMULL MURLIDHAR CHANDICK v. ANANTA LAL DAMANI.

ment was given, that is to say, whether it was meant to be a bare acknowledgment and a promise to pay to be used in evidence against the giver, or whether it was given for some other dominant purpose. [p. 1031, cols. 1 & 2.]

Where a document, while supplying evidence of a debt, contains other entries from which it is right to deduce that the intention was to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the document, although it contains a balancing item in the end, is not to supply evidence to the creditor. [p. 1030, col. 2.]

Brojender Coomar v. *Bromomoye Chowdhrani*, 4 C. 885; 3 C. L. R. 520; 2 Shome L. R. 177; 2 Ind. Dec. (N. S.) 560, *Brojo Gobind Shaha* v. *Goluck Chunder Shaha*, 9 C. 127, 4 Ind. Dec. (N. S.) 737, *Nund Kumar Shaha* v. *Shurnomoyi*, 15 C. 162; 7 Ind. Dec. (N. S.) 692 and *Ambica Dat Vyas* v. *Nityanund Singh*, 30 C. 687, relied on.

Sitaram v. *Ram Prosad*, 22 Ind. Cas. 858; 19 C. L. J. 87; 18 C. W. N. 697, *Mulji Lala* v. *Lingu Makaji*, 21 B. 201; Chitty's S. C. C. R. 482; 11 Ind. Dec. (N. S.) 136 and *Ramaswami Aiyar* v. *Gnanamani Nachiar*, 37 Ind. Cas. 984; 31 M. L. J. 851; (1917) M. W. N. 121; 5 L. W. 279, referred to.

Appeal from the judgment of Mr. Justice Phillips, dated the 28th February 1922, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 824 of 1920.

Messrs. *T. R. Ramachandra Iyer* and *K. V. Sesha Iyengar*, for the Appellant.

Messrs. *T. R. Venkatarama Sastry* and *K. Jagannada Iyer*, for the Respondents.

JUDGMENT.—This is an appeal from a decision of Phillips, J., deciding a case on the ground that a document acknowledging a debt was not admissible in evidence. The document is called a *Roka*. It shows credit entries and the balance due at the last account and interest thereon upto date, and debit entries of the amount paid off and a balancing item of Rs. 4,397-12-3, and then the words "balance payable up to *Kartik Sidh* 1st of *Sambat* 1974 (that is 15th November 1917) Rs. 4,397-12-3" and the signature of the defendant. The circumstances under which that document came into existence are clear from the correspondence, and I do not think that any evidence could be adduced which would give the Court any further assistance than is obtained from the correspondence. A letter, Exhibit B, was produced from the defendant stating that he had taken down the statement of account which had been sent for, and given it to Annajee, the plaintiff's mother, and promising on coming to Madras that he would prepare a fresh statement of account and give it to the plaintiff. When he came to Madras, in pursuance of that promise, the *Roka* was sent. The question is whether or not that is an acknowledgment within the definition of "acknowledgment" in the Stamp Act, for if it is, it has to be stamped, and if it is not stamped, it cannot be admitted in evidence and in such a case the Legislature has thought fit to impose what to my mind is an appalling penalty of the plaintiff losing his claim altogether; because there is no penalty provided by the payment of which to Government, the document can be admitted. Perhaps, in view of the seriousness of this provision, the draftsman of the Schedule has so worded it that it has left many loopholes, and has given rise to a conflict of judicial opinion when it comes to interpretation. The words are, "acknowledgment of a debt exceeding Rs. 20 in amount or value, written or signed by, or on behalf of a debtor in order to supply evidence of such debt." The first question that arises is whether any particular document is given to supply evidence of the debt. It is quite clear to my mind on the authorities that the question is whether it is given with the dominant intent to supply evidence of the debt and it has been held that, where the document contains other entries from which it is right to deduce that the intention is to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the sending of the document, although it contains a balancing item at the end, is not to supply evidence to the creditor, *Brojender Coomar* v. *Bromomoye Chowdhrani* (1), *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2), *Nund Kumar Shaha* v. *Shurnomoyi* (3) and *Ambica Dat Vyas* v. *Nityanund Singh* (4) are all instances of this. Cases quoted to the contrary are *Sitaram* v. *Ram Prosad Ram*

(1) 4 C. 885; 3 C. L. R. 520; 2 Shome L. R. 177; 2 Ind. Dec. (N. S.) 560.
(2) 9 C. 127; 4 Ind. Dec. (N. S.) 737.
(3) 15 C. 162; 7 Ind. Dec. (N. S.) 692.
(4) 30 C. 687.

(5) and *Mulji Lala* v. *Lingu Makaji* (6). In those two cases there was something quite different from the other cases and from this case. There, there was nothing but an acknowledgment of debt. In both those cases the words amounted to giving the figure, and the statement was that account having been taken, the balance due was so much, and I can understand the view in those cases that there was merely sending an acknowledgment of debt for the purpose of giving the other party an acknowledgment for use in evidence. The matter also came before this Court in *Ramaswami Aiyar* v. *Gnanamani Nachiar* (7). There, there was a somewhat complicated document containing a statement of the balance due by a *zemindar* to his agent and an acknowledgment by the *zemindar* that he had examined the account and found it correct, and releasing the agent from all claims against him. It was held by Abdur Rahim, Offg. C. J., first, that that was an acknowledgment within the meaning of the Stamp Act and, secondly, that it was a release, and being a release, it could not be looked upon as a document which was inadmissible though looked upon as an acknowledgment it would be inadmissible. With that part of the judgment Phillips, J., did not agree, because he did not think that it amounted to a release. He did, however, think that it amounted to an acknowledgment, but said that it did not matter in that case, because whether the document was admitted or not, it did not affect the merits of the case. It follows that this point in that case was not necessary for the decision. It seems to be in direct conflict with some of the cases in Calcutta quoted above, and, speaking for myself, so far as it relates to acknowledgment I do not agree with it. That being the state of the authorities, the Court has to apply its mind to the questions—looking at the document and the surrounding circumstances—what was the intention with which that document was given; was that meant to be a bare acknowledgment and a promise to pay to be used in evidence against the sender, or was it sent for some other dominant purpose? In my judgment, the answer must be that it was given with the intention that it was to be a statement of account as between the parties—containing entries of payments by the defendant as well as a statement of debts due from him, and also a statement of the calculation of interest which the defendant admitted that he was under a liability to pay. In these circumstances, in my judgment, the document is not an acknowledgment and ought to have been admitted.

The question is also raised whether or not it comes within the other exceptions in the Article, in that it contains a promise to pay the debt and a stipulation to pay interest. These two questions seem to be difficult and interesting; but in the view I take of the first point, it is not necessary to consider them. In my opinion, this judgment is wrong and must be set aside

It is suggested that we should direct a new trial of this issue of limitation. If I were satisfied that there would be anything to gain by such a course, I should order a new trial. But in this case I am not so satisfied, and I am clear that any evidence of intention given at this stage could not be of the least assistance to the Court. I think one has in the letter referred to and in the document itself so much to show that it is not a mere acknowledgment given with the intention of supplying evidence of the debt to the other side, that any amount of verbal evidence adduced would not affect the proper interpretation of the document.

This appeal must be allowed and the case must go back to the Original Side for disposal on Issues Nos. 2, 4 and 5 and the additional issues if the Court thinks it necessary.

The costs of this appeal must be paid by the respondents and the costs of the first trial, save in so far as the first defendant has been deprived of them, will abide the result of the second. The Court-fee paid on the appeal memorandum will be refunded to the appellant on application. The memorandum of objections is dismissed.

V. N. V. *Appeal allowed;*
W. C. A. *Case remanded.*

(5) 22 Ind. Cas. 858; 19 C. L. J. 87; 18 C. W. N. 697.
(6) 21 B. 201; Chitty's S. C. C. R. 482; 11 Ind. Dec. (N. S.) 136.
(7) 37 Ind. Cas. 984; 31 M. L. J. 851; (1917) M. W. N. 121; 5 L. W. 279.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 652 OF 1921.

March 20, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Panton.

ABINASH CHANDRA ROY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FULCHAND CHAUDHURI—AND OTHERS—DEFENDANTS—RESPONDENTS.

Joinder of parties—Rent suit against some of several heirs of tenant, whether maintainable.

On the death of one of several joint tenants leaving a number of heirs, no question can arise as to whether the liability of the heirs for the payment of rent is joint or several, because the bundle of rights and liabilities which was in the deceased, is, by operation of law, transferred to a number of parceners who constitute in law one heir. [p. 1033, col. 1.]

Ahinsa Bibi v. *Abdul Kader Saheb*, 25 M. 26 at p. 35, relied on.

A suit to recover rent against some only of the heirs of a deceased joint tenant is bad for non-joinder of necessary parties. [p. 1033, col 1.]

Appeal against a decree of the District Judge, Birbhum, dated the 7th December 1920, affirming that of the Munsif, Dubrajpur, dated January 28, 1920.

Babu *Pyari Mohan Chatterjee*, for the Appellant.

Babu *Bankim Chandra Mukherjee*, for the Respondent.

JUDGMENT.—The plaintiffs are the appellants before us and the facts, which have given rise to this appeal, are, shortly stated, as follows:—

The plaintiffs, who are the landlords, instituted a suit, being Suit No. 984 of 1919, in the Court of the Munsif at Dubrajpur for recovery of arrears of rent for the years 1322 to 1325 B. S. The *jote*, in respect of which the arrears of rent were claimed, stood in the names of two persons named Miran and Bishnu Chaudhuri. The parties, who were made defendants in the suit, contended that all the heirs of the said two recorded tenants had not been made defendants and accordingly the suit was incompetent.

The Court of first instance found that all the heirs of the said two recorded tenants were in possession of the *jote* and that a son of Bishnu Chaudhuri and the heirs of other sons of Bishnu Chaudhuri and the heirs of Miran Chaudhuri had not been made parties to the suit, and accordingly dismissed the suit, holding that it was bad for defect of parties.

The plaintiffs appealed to the learned District Judge of Birbhum, the appeal being numbered No. 19 of 1920. The lower Appellate Court observed as follows:—

"Then, as regards the facts of the individual cases under consideration, I find it is not the plaintiff's case that there are other heirs, nor is it a fact that they sued some but gave up others. Their standpoint is that they have sued those who are in actual enjoyment of the suit lands and they are not aware of others in similar position. Now, one of the guiding principles in all the cases referred to is, if a decree for rent be passed, it may act as *res judicata* and bind absent parties. There can be no such danger when a money-decree is passed. Whether the decree passed is under section 43 of the Contract Act or whether that section should be interpreted as strictly as it had been are points which are not strictly relevant. In the proved facts of the cases and the state of the law I have no doubt the orders passed are substantially sound and I am not inclined to interfere with them."

On behalf of the appellants it had been contended before us that, having regard to the view which was taken by the lower Appellate Court, a decree for money against the defendants ought, at any rate, to have been made by the lower Appellate Court and, secondly, that it should have been held that the defendants were jointly and severally liable for the arrears of rents due in respect of the said *jote* and that accordingly the suit was not liable to be defeated by reason of non-joinder of the other heirs of the parties referred to above.

The contention on behalf of the appellants, therefore, really amounts to this, namely, where a tenancy is created in favour of two persons jointly, each of them is jointly and severally liable for the entire rent. Now, so far as this broad proposition is concerned, there is, as has been pointed out in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (1), considerable

(1) 7 Ind. Cas. 840; 15 C. W. N. 1911; 12 C. L. J. 642.

diversity of judicial opinion. It has been observed in several cases that, in order to determine whether the liability is joint or several in matters of this description, the intention of the parties to the contract should be ascertained independently of the rule laid down in section 43 of the Indian Contract Act. On the other hand, it has been broadly stated in other cases that the landlord may maintain a suit for rent against any number of several joint tenants.

It is unnecessary for us, on the facts found by the learned Munsif in this case, to attempt to reconcile the two views referred to above. We think, the present case may be disposed of on the short ground that, assuming that one of several joint tenants is liable for the whole rent, on the death of one of such joint tenants leaving a number of heirs, no question can possibly arise as to whether the liability was joint or several, because the bundle of rights and liabilities which was in one such joint tenant is, by operation of law, transferred to a number of parceners who, as has been observed in *Ahinsa Bibi* v. *Abdul Kader Saheb* (2), constitute in law one heir. Now in this case, having regard to the facts found by the learned Munsif which have been referred to above and which need not be repeated here, and bearing in mind the above principle, it is impossible for us to hold that the suit was rightly constituted.

In this view of the matter the appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 25 M. 26 at p. 35.

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS NOS. 137 & 188 OF 1922 WITH CIVIL REVISION NOS. 209 & 210 OF 1922.

May 29, 1923.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Kulwant Sahay.

IN APPEAL NO. 188 OF 1922 & C. R. NO. 209 OF 1922.

BANWARI RAI—JUDGMENT-DEBTOR—PETITIONER—APPELLANT

versus

CHETHRU LAL RAI—JUDGMENT-DEBTOR—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 99, *O. III, r.* 4—*Rules as to* vakal tnamahs, *interpretation of*—Vakalatnamah *signed by person other than litigant, when proper.*

The rules as to *Vakalatnamahs* are more or less strict and they are made, no doubt, with a view to prevent fraud. But at the same time when it is clearly proved that no fraud has been committed and that what has been done has been done with full knowledge and acquiescence of the party himself, it was never intended by these rules where some mere formal matter has not been complied with or where there has been some irregularity in presenting the case before the Court and where such formality or irregularity in no way affects the merits of the case that that should be taken as a matter of vital importance and it was for this very reason that section 99 of the Civil Procedure Code was passed.

Where an application by one *B.* to set aside a sale in execution on the ground of fraud and material irregualrity in conducting the sale was filed by a Pleader who was engaged not by *B.* himself but by one *T.* whom he had instructed to do so and who had signed the *Vakalatnamah* on behalf of *B*:

Held, (1) that the authority given to *T.* to file the petition must be taken to include the authority to instruct a Pleader; [p. 1036 col. 1.]

(2) that the irregularity in this case was a trivial one and was covered by section 99 of the Civil Procedure Code. [p. 1036, col. 2.]

Appeal from an order of the District Judge, Bhagalpore, dated the 16th March 1922, reversing that of the Munsif, Banka, dated the 30th July 1921.

Messrs. *S. P. Sen*, *Jaffar Imam* and *Nirsu Narayan Sinha*, for the Petitioner, Appellant.

Mr. *Naresh Chandra Sinha*, for the Opposite Party, Respondent.

JUDGMENT.

Dawson Miller, C. J.—These two appeals are brought from two decisions of the District Judge of Bhagalpore, reversing an order of the Munsif setting aside

a sale. The facts which give rise to the present dispute may be shortly stated.

The Banaili Raj are the proprietors of an estate named Kharana. Held under them is a *ghatwali* tenure belonging to Chatu Lal Rai and Banwari Rai, the former having a twelve-annas interest in the *ghatwali* tenure and the latter a four-annas interest. The landlords, in the year 1920, obtained a decree for rent against their tenants and, in August of that year, applied for execution of the decree by a sale of the tenure. On the 27th of December the property having been previously attached and a sale proclamation issued, the tenure was sold for a sum of Rs. 1,451 and purchased by one Satish Chandra Rai, a grandson of Chatru Lal Rai, one of the judgment-debtors. Subsequently, on the 12th of February 1921, an order for delivery of possession to the purchaser was given. On the 14th March 1921 Banwari Rai, one of the judgment-debtors, applied to set aside the sale alleging that he had only a few days earlier come to know of the sale. His application, which was headed as an application under O. XXI, r. 90, sought to have the sale set aside both on the ground of material irregularity and fraud in publishing and conducting the sale, and on the ground that the tenure had been purchased by one of the judgment-debtors himself and, therefore, under the provisions of section 173 of the Bengal Tenancy Act, it was competent to the Court in such a case to set aside the sale on the ground.

It would appear that there is some dispute or antagonistic feeling between Banwari Rai and his fellow-tenant Chatru Lal Rai, and the suggestion made supported by evidence before the Munsif, was that Chatru Lal Rai in collusion with the decree-holders or persons acting on their behalf, had suppressed the service of notices; had got the sale brought about in the absence of any notice to the other judgment-debtor, Banwari Rai, and had in fact purchased the property himself through his grandson Satish Chandra Rai. That was the allegation upon which the application for setting aside the sale was mainly based. The learned Munsif who heard the application came to the conclusion that there had been fraud and material irregularities in the publication and conduct of the sale, and that Banwari Rai, one of the judgment-debtors, had suffered material injury thereby, the property having been sold for considerably less than its worth. He accordingly set aside the sale both on the ground of fraud and material irregualrity, and on the ground that the property had been purchased by the other judgment-debtor, Chatru Lal Rai, through his grandson.

From that decision there were two appeals to the District Judge, one by the decree-holders and the other by Satish Chandra Rai, the purchaser. The learned Judge, without going into the merits of the case, in consequence of a point which was taken before him in appeal, remanded the case to the Munsif in order that he might come to a conclusion upon certain issues which had not been put forward. The point which was raised before the learned District Judge was, that the application for setting aside the sale presented on the 14th March 1921 had been presented by a Pleader whose *Vakalatnamah* had not been properly signed in accordance with the provisions of the Civil Procedure Code, and that, therefore, there was no proper application before the Court for setting aside the sale and the Munsif had no jurisdiction to act in the matter.

It appeared that Banwari Rai, when he first received some information that the property had been sold, was not very certain as to whether it was true or not, and thereupon he instructed one Tilakdhari Rai, his nephew, to proceed to Banka and find out for a fact whether the sale had really taken place, and instructed him that, if the sale had taken place then, to file a petition for setting it aside. Tilakdhari having arrived at Banka and having ascertained that the sale had taken place, then proceeded to take necessary steps for filing a petition to have the sale set aside. Under the Rules in the Civil Procedure Code it is provided in O. III, r. 1, that 'any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recog-

nised agent, or by a Pleader duly appointed to act on his behalf." Now, Tilakdhari was not a party within the meaning of that rule, nor was he the recognised agent of the party, because, by r. 2 of the same Order, the recognised agents by whom appearance and applications may be made are persons holding powers-of-attorney authorising them to make such applications and persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which the appearance or application is made. The only other way, therefore, of properly presenting the application for setting aside the sale was to engage a Pleader for that purpose. Tilakdhari accordingly engaged a Pleader to act on behalf of his uncle Banwari Rai. He signed the *Vakalatnamah* in the name of Banwari Rai, by the pen of Tilakdhari Rai, and, acting upon the instructions given, the Pleader duly filed the application to set aside the sale. As already stated, no objection to this was taken before the learned Munsif. The question was raised for the first time when the matter came on appeal before the learned District Judge that the *Vakalatnamah* was not properly executed by or on behalf of Banwari Rai and, therefore, the appointment of the Pleader was bad and the Court had no jurisdiction to hear the application, and r. 4 of O. III, Civil Procedure Code, is relied upon. That rule provides that, "the appointment of a Pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognised agent or by some other person duly authorised by power-of-attorney to act in his behalf." It is contended, and not disputed, that Tilakdhari was not the recognised agent, nor was he a person duly authorised by power-of-attorney to act in the matter; but it is contended on behalf of the appellant that the *Vakalatnamah* was, in the circumstances which have been proved, signed by the party himself, or, at all events, that the circumstances were such that it must be taken to have been signed by him. Even if there were some irregularity in the actual execution of the *Vakalatnamah*, it was merely such an irregularity as did not in any way go to the merits of the case and it was one which came within the provisions of section 99 of the Civil Procedure Code, and the order of the learned Munsif ought not to be set aside on that ground. The learned Munsif, after the case was remanded to him to consider this question and to take evidence upon it, had the parties before him, and Banwari Rai and Tilakdhari gave evidence. The evidence of Banwari Rai, which the Munsif accepted, was to this effect that he asked his nephew to go to Banka, as I have already stated, and make enquiries, and if the sale had been held then to file a petition for setting it aside. In these circumstances, the learned Munsif considered that the *Vakalatnamah* was a proper one and binding and that, in any event, if there was an irregularity then it was not such an irregularity as went to the merits of the case and came within the purview of section 99 of the Code and ought not to be treated as sufficient to permit of the sale being set aside. The learned District Judge on appeal, on the other hand, came to the conclusion that the provisions of the Civil Procedure Code were imperative, and as they had not been complied with there was no proper presentation of the petition in the Execution Court. He, therefore, set aside the order of the learned Munsif, the effect of which had been to set aside the sale, with the result that the sale in fact became valid. From that decision in both the appeals Banwari Rai, the judgment-debtor, has appealed to this Court.

A preliminary point was taken that no appeal lay to this Court, but that was not persisted in and was abandoned, as it was realised that in one or other of these cases, at all events, an appeal would lie.

It is quite true that, under O. III, r. 4, a *Vakalatnamah* must be signed either by the party himself or by his recognised agent or some other person duly authorised by power-of-attorney to act on his behalf. The circumstances show that it was not literally signed by him, although it was signed by his name, and I have no hesitation in coming to the conclusion, upon the facts found and accepted by the learned

BANWARI RAI *v.* CHETHRU LAL, RAI.

District Judge, that Tilakdhari was authorised to sign the *Vakalatnamah* instructing the Pleader, because he was authorised to file an application in order to have the sale set aside. He could not file the application himself, the only way in which he could put it before the Court was by instructing a Pleader, and, therefore, it must be taken that the authority given to him to file the petition included the authority to instruct a Pleader. Banwari Rai from the start has always accepted the authority given to his Pleader to file a petition and has never, from the first, challenged it; in fact, when he was called as a witness before the Munsif he offered there and then to sign the *Vakalatnamah* in order to cure the defect, although the Munsif thought at that time that he had no power to allow him to do so, as the case had been sent back to him on remand merely to come to certain findings after taking evidence. There can be no doubt whatever in my mind that what was done by Tilakdhari in this case was done with the full knowledge and acquiescence and under the instructions of Banwari Rai who has accepted it and acted upon it. It is true, as I have already said, that the *Vakalatnamah* which had on it Banwari's name was not in fact signed by that person, but it seems to me from the facts of this case that irregularity was clearly one which comes within the purview of section 99 of the Civil Procedure Code. The rules with regard to entering appearance and filing applications and with regard to the appointment of Pleaders for that purposes are, no doubt, salutory rules and certain formalities have to be performed. The rules are more or less strict and they are made, no doubt, with a view to prevent fraud. But, at the same time, when it is clearly proved that no fraud has been committed and that what has been done with full knowledge and acquiescence of the party himself, I do not think that it was ever intended by these rules, where some mere formal matter has not been complied with or where there has been some irregularity such as in the present case in presenting the case before the Court, and where such formality or irregularity in no way affects the merits of the case that that would be taken as a matter of vital importance, and it seems to me that it was for this very reason that section 99 of the Civil Procedure Code was passed. I have no hesitation in coming to the conclusion that in this case the irregularity was a trivial one, and as regards the actual facts of the case was one within the meaning of section 99 and that the learned District Judge ought not to have allowed it to affect his judgment in this case.

The result is, that his order will be set aside, the case will be referred back to the learned District Judge to come to a conclusion upon the facts which up to the present have not been considered by him.

There are two appeals in this case and two applications in revision as the parties apparently were uncertain as to the right of appeal. Appeal No. 137 is an appeal from the decision of the District Judge in the appeal presented by the decree-holders and Civil Revision No. 210 is a revision application in that appeal. Appeal No. 188 is an appeal from the decision of the District Judge in the case in which the auction-purchaser was the appellant before him and Civil Revision No. 209 is a revision application in that appeal. It is only necessary that one of these appeals should go back for hearing that is Appeal No. 137. With regard to the other appeal, that is to say the appeal in the case in which the auction-purchaser was the appellant before the District Judge, Appeal No. 188, it seems clear that there was no appeal on his behalf from the decision of the Munsif to the District Judge but as there is a civil revision application asking that the decision of the District Judge should be set aside on the ground that he had no jurisdiction to hear that appeal, we think that that application should be granted.

The appellant is entitled to his costs against the respondents who have appeared in Appeal No. 137 and Civil Revision No. 209. With regard to the other appeal, that is to say, Appeal No. 188 and Civil Revision No. 210 there will be no order as to costs in this Court.

Kulwant Sahay, J.—I agree.

Order accordingly.

M. D. J. & K. S. D.

MA LUN ME v. MA KIN.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 335 OF 1922.
March 13, 1923.
Present:—Mr. Justice Heald and Mr. Justice Lentiagne.

MA LUN ME AND OTHERS—APPELLANTS
versus
MA KIN AND OTHERS—RESPONDENTS.

Buddhist Law—Marriage—Several wives—Part of property put in name of one wife, effect of—Divorce.

Marriage among Buddhists, even in Burma, is ordinarily a permanent bond, which subsists until it is broken, and the burden of proving that it has been broken lies on the person alleging it. [p. 1037, col. 2.]

***Thein Pe* v. *U Pet*, 3 L. B. R. 175 (F.B.), relied on.**

Where a man has a considerable amount of property, and several wives, the fact that he puts part of his property into the name of one wife does not, on the face of it, go far towards showing that the other wives have been divorced. [p. 1038, col. 1.]

First appeal against a decree of the District Court, Insein, in Civil Regular No. 6 of 1922.

Mr. *Keith* and Mr. *Davies*, for the Appellants.

JUDGMENT.—The first respondent, Ma Kin, was admittedly the first wife of Hla Baw, Deputy Superintendent of Police, and the other two respondents are admittedly his daughters by her.

The first appellant was a second wife of Hla Baw and the rest of the appellants, except the last, are her children by him. There was another daughter by her, who was joined as a defendant and signed the first written statement, but it appears that she eloped during the trial and she did not sign the amended written statement and has not joined in the appeal.

The 6th appellant, who is described in the Memorandum of Appeal as a daughter of the first appellant Ma Lun Me, is really Hla Baw's daughter by his third wife Ma Ye Ge who is dead.

Respondents sued appellants for administration and for their share of Hla Baw's estate.

Appellants replied that the first respondent was a divorced wife, that if she was not divorced she was not a wife who was entitled to inherit her husband's estate, and that even if she was a wife who was entitled to inherit she could only claim inheritance in respect of property which was acquired by her and Hla Baw jointly. As for the 2nd and 3rd respondents, appellants alleged that because they were children of a divorced wife and had not maintained filial relations with their father they could not inheirt and that in any case they could not inherit while their mother was alive.

The Trial Court held that in view of appellant's admission that the first respondent was Hla Baw's wife, the burden of proving the divorce which they set up was on them, and holding that, they failed to prove it, and that the fact that the couple, who both had ample means, lived separately was not sufficient in the special circumstances of the case to warrant an inference that the marriage-tie had ever been broken, found that the first respondent was a wife of Hla Baw, and as such was one of his heirs. The learned Judge accordingly made a preliminary decree for an account to be taken and for the administration of the estate, and directed the Commissioner, by whom the necessary enquiries were to be made, to ascertain what share of the various classes of property of which the estate consisted, the first respondent was entitled to receive.

Appellants appeal against that preliminary decree on the ground that the separate living of the couple raised a presumption of divorce, and that all the requisites for divorce under Buddhist Law being admitted, the lower Court was wrong in putting on them the burden of proving the divorce, and ought to have held that the divorce was proved. They suggested further that the lower Court had failed to appreciate the importance of documents which showed that certain properties alleged to have formed part of the estate of Hla Baw had stood in the name of the first appellant, and they alleged that they omitted to put in evidence certain documents which they had intended to put in.

As for the first of these grounds of appeal a reference to the Full Bench ruling of the Chief Court in the case of *Thein Pe* v. *U Pet* (1) and particularly to the judgment of the learned Chief Judge, is sufficient to dispose of it. Marriage even in Burma is ordinarily a permanent bond which subsists until it is actually broken, and the burden of proving that it has been broken

(1) 3 L. B. R. 175 (F. B.).

is obviously on the person alleging it. The evidence in this case is certainly insufficient to prove that there was any severance of the marriage-tie and the lower Court was undoubtedly right in holding that the first appellant was not divorced but continued to be Hla Baw's wife upto the time of his death.

As for the suggestion that the lower Court failed to appreciate the importance of documents showing that some of the property had stood in the first appellant's name, it is difficult to see how that fact, if it is a fact, would strengthen appellant's case that there was a divorce. Where a man has a considerable amount of property and several wives, the fact that he puts part of his property into the name of one wife does not, on the face of it, go far towards showing that the other wives have been divorced.

As for the allegation that appellants failed to bring on the record all the evidence which was available, even if it is true, can hardly be held to be a good ground of appeal.

The Trial Court was clearly right in making an administration decree, and the appeal must be dismissed under the provisions of O. XLI, r. 11.

W. C. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPLELATE DECREE
No. 1251 OF 1921.
May 26, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

BHAIRAB CHANDRA DUTT AND OTHERS —DEFENDANTS—APPELLANTS

versus

KALI KUMAR DUTT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 96, 100—Appeal—Order for re-trial—Decree.

An order made by an Appellate Court directing a re-trial of a case with reference to an entry in the Record of Rights which was published after the decree of the first Court is a decree reversing the decree of that Court and as such, is appealable under section 96 of the Civil Procedure Code read with section 100. [p. 1038, col 2, p. 1039, col. 1.]

Appeal against the decision of the District Judge, Tipperah, dated the 2nd March 1920, reversing that of the Subordinate Judge, Tipperah, dated the 10th August 1918.

Babu *Jyotir Bhushan Bhattacharjee,* for the Appellants.

Babu *Upendra Kumar Roy,* for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for partition against an order for re-trial of the matters in controversy. The defendants resisted the claim of the plaintiffs in the primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and their predecessors had been in separate possession for more than a century. The Subordinate Judge held in favour of the defendants and dismissed the suit. Upon appeal the plaintiffs asked for permission to adduce in evidence an entry in the Record of Rights which had been finally published on the 5th August 1919 long after the decree of dismissal had been made by the Trial Court on the 10th August 1918. The District Judge came to the conclusion that before the matters in difference were finally decided, the entry in the Record of Rights should be taken into account. In this view, he allowed the appeal, set aside the decree of the Court of first instance and directed a re-trial of the suit with reference to the entry in the Record of Rights and such other evidence as might be adduced by both the litigants. Against this order for re-trial, the defendants have preferred this appeal.

On behalf of the plaintiffs, a preliminary objection has been taken that the appeal is incompetent because the order was not and could not have been made under O. XLI, r. 23, Civil Procedure Code. We are of opinion that there is no force in this contention. The order does not purport to have been made under O. XLI, r. 23. It has been made in the exercise of inherent power of the Court, as explained by the Full Bench in *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Ltd.* (1). The order so made is a decree which reverses the decree of the Court of first instance and deprives the plaintiffs of the valuable right they had acquired thereunder. The appeal is, consequently

(1) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49 (F. B.).

competent, not as an appeal from order under O. XLIII, r. 1, sub-rule (*u*) but as an appeal from a decree under section 96 of the Code, read with section 100. Indeed, the appellants have described this appeal not as an appeal from an order but as an appeal from a decree. The preliminary objection cannot be sustained and must be overruled.

The appellants have assailed the order of the District Judge on the ground that additional evidence should not have been allowed to be adduced in contravention of the principle recognised in O. XLI, r. 27 of the Code, as explained in *Kessowji Issur* v. *Great Indian Peninsular Railway Co.* (2). We are of opinion, that the District Judge has not disregarded the principle enunciated in O. XLI, r. 27. That rule authorises the Court to afford opportunity to a party litigant to adduce additional evidence if the Appellate Court requires a document to be produced or a witness to be examined to enable it to pronounce judgment or for any other substantial cause. In the case before us, there is such a substantial cause. The Record of Rights proceedings were in progress during the pendency of the trial in the Court of first instance, but the order for final publication had not then been made. It was, consequently, impossible for the plaintiffs to produce the decision of the Revenue Authorities. The order for final publication was made during the pendency of the appeal in the Court of the District Judge. At this stage alone, it became possible for the plaintiffs to bring before the Court the decision of the Revenue Authorities. The appellants have, however, contended that, in view of the decisions of this Court in *Kumar Sarat Kumar Roy* v. *Sripati Chatterjee* (3) and *Baid Nath Sahay* v. *Nanku Mahton* (4), the decision of the Revenue Authorities should not be used in evidence. These decisions are clearly distinguishable as the subsequent judgment which the Court was called upon to receive in evidence was not a judgment *inter partes*. In the case before us, the order of the Settlement Authorities has been pronounced in proceedings which are *inter partes*. It is, no doubt, not conclusive: but a presumption attaches to the order finally published under the Bengal Tenancy Act. Consequently, the decisions in *Young* v. *Kershaw* (5) and *Nundo Lal Mullick* v. *Punchanon Mukherjee* (6), which disapprove of the reception of additional evidence in proceedings in review, cannot be applied to the circumstances of this case. The course adopted by the District Judge is, in our opinion, eminently reasonable and is well calculated to avoid that ultimate conflict between the decision of the Civil Court and the decision of the Revenue Authorities which would inevitably arise if this suit were decided without reference to their proceedings.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.

K. S. D. & W. C. A. *Appeal dismissed.*

(2) 34 I. A. 115; 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435 (P. C.).
(3) 50 Ind. Cas. 119; 23 C. W. N. 242.
(4) 29 Ind. Cas. 219.
(5) (1899) 81 L. T. 531; 16 T. L. R. 52.
(6) 42 Ind Cas 484; 45 C. 60; 21 C. W. N. 1076; 26 C. L. J. 187.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1586 OF 1921.
February 22, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Sheikh AHMAD HUSAIN—PLAINTIFF—APPELLANT

versus

Sheikh MUHAMMAD FASIHULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Delay in filing appeal—Refusal to extend time—Discretion, exercise of—Appeal, second—Interference by High Court.

Where a lower Appellate Court exercises a judicial discretion and refuses to extend the time limited for filing an appeal, the High Court will not interfere in second appeal, even if it might, had it been the lower Appellate Court, have taken another view of the matter. [p. 1040, col. 2.]

When, however, a Judge purporting to exercise such discretion does so under the view that there is no general rule, when in fact there is one which he ought to follow as being binding on him, he misdirects himself as to the law to be applied to the case, and cannot be said to have exercised a judicial discretion. In such a case the High Court should either remand the case or exercise the discretion itself. [p. 1040, col. 2.]

Budhu v. *Dewan*, 28 Ind. Cas. 265; 37 A. 257; 13 A. L. J. 286; *Brij Indar Singh* v. *Kanshi*

Ram, 42 Ind. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.), referred to.

Second appeal from a decree of the District Judge, Gazipur, dated the 5th August 1921.

Dr. *M. L. Agarwala*, Messrs. *Muhammad Yusaf* and *U. S. Bajpai*, for the Appellant.

Mr. *K. K. Varma*, for the Respondents.

JUDGMENT.—The facts out which this appeal has arisen are as follows. The plaintiff brought a suit in the Court of the Subordinate Judge of Ghazipur on the 15th of January 1920. After the evidence had been recorded arguments were heard on the 16th December 1920 and judgment was reserved. Judgment was delivered on the 21st March 1921, dismissing the plantiff's suit. We presume that the Court adopted the proper procedure prescribed in O. XX, r. 1 and gave the parties or their Pleaders notice of the date on which the judgment was to be delivered, but in any case it is admitted by the appellant that he knew, as a matter of fact, that his suit had been dism ssed on the 27th March 1921. The decree was not signed by the presiding officer until the 2nd April. No application was put in for a copy until the 13th April. An application was then filed in the Court of the Subordinate Judge. It was returned, apparently on the 18th April, on the ground that the record had been sent to the District Judge's Record-room, and on that date it was presented in the Court of the District Judge. The copy was ready on the 20th April and posted on the Notice Board. It was not taken delivery of until the 25th April which was the last day of limitation. The Memorandum of Appeal was filed on the 3rd May 1921, ten days beyond time. The appellant applied to the District Judge to extend the time under section 5 of the Indian Limitation Act and his application was accompanied by an affidavit. The learned District Judge considered the affidavit and came to the conclusion that, even if it was true as the appellant said, that from the 19th April until the 1st May he and his *karinda* were both seized with illness which incapacitated them from doing any business, nevertheless the appellant had shown much laches in attempting to procure the copy of decree which it was essential for him to obtain before he could file his appeal; that as he did not apply for the copy until three days before the period of limitation expired, it was at his own risk that he delayed so long; and the learned District Judge in the exercise of his discretion refused to extend the period and dismissed the appeal.

From this order of dismissal the plaintiff comes here in second appeal and he argues that although it has been laid down in several rulings of this Court that where the lower Appellate Court exercises a judicial discretion in such matters and decides not to extend the time, this Court will not interfere in second appeal even if it might have, had it been the lower Appellate Court, taken another view. It has been argued that in this case there really has been no exercise of discretion on the part of the District Judge and reliance has been placed on *Budhu* v. *Dewan* (1) and on the recent Privy Council ruling in *Brij Indar Singh* v. *Kanshi Ram* (2). In that case it was said that where a Judge purporting to exercise such discretion does so under the view that there is no general rule, when in fact there is one which he ought to follow as being binding on him, he misdirects hin self as to the law to be applied to the case; he cannot exercise a judicial discretion, and an Appellate Court should either remand the case or exercise the discretion itself. It seems to us there is no conflict at all between these rul ngs and having regard to the judgment of the learned District Judge in this case we think he has exercised a discretion and dismissed the application on its merits.

In this view of the case the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. & W. C. A. *Appeal dismissed.*

(1) 28 Ind. Cas. 265; 37 A. 267; 13 A. L. J. 286.
(2) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 59 OF 1923.
March 14, 1923.
Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.
MAKBUL AHMAD—PETITIONER
versus
A. J. L. ALLEN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 451, 454—European British subject—Trial by Jury—Claim, when to be made—Waiver, effect of.

Section 451 of the Criminal Procedure Code gives an accused European British subject the right to claim trial by Jury any time before he is called on to enter upon his defence. Therefore, where an European British subject waives this right at an earlier stage, he can re-consider and cancel his waiver before he is called on to make his defence. [p. 1042, col. 1.]

Emperor v. *Sallivan*, 24 A. 511; A.W.N. (1902) 142, relied on.

Section 454 of the Criminal Procedure Code does not in express terms deal with a case where the right to claim trial by Jury has been asserted but subsequently withdrawn. It applies only to a case where no claim has been made which would be valid under section 451 of the Code. [p. 1042, col. 1.]

Per *Suhrawardy, J.*—Section 454 of the Criminal Procedure Code is an explanatory corollary to sect on 451 of the Code. Their joint import is that an European British subject may claim to be tried by a Jury at any time before he enters on his defence, but if he does not do so, he must be considered to have relinquished such right and shall not be allowed to assert it again. [p. 1042, col. 1.]

There is no express provision in the Criminal Procedure Code that the right to claim trial by Jury once waived cannot be asserted at any time before the accused is called upon to enter on his defence. What the Code lays down is that once he has allowed the opportunity to pass he cannot avail himself of the privilege again. [p. 1042, col. 2.]

Criminal Revision.

Messrs. *K. N. Chowdhury*, Counsel, and *M. A. S. M. Akram*, for the Petitioner.

Babu *Bir Bhushan Dutt*, for the Opposite Party.

JUDGMENT.

Newbould, J.—On the complaint of the petitioner the opposite party, Mr. A. J. L. Allen, was summoned to answer a charge of having committed an offence punishable under section 297, Indian Penal Code. The case was on the file of Babu J. P. Dass, Sub-Deputy Magistrate. Before him on the 24th October before any evidence was taken the opposite party claimed to be tried by an European Judge. He was required to adduce evidence that he was an European British subject. On the 4th November he satisfied the Trying Magistrate on this point, and the records were submitted to the District Magistrte. On the 11th November the case came up for hearing before Mr. D. K. Mittra, Additional District Magistrate, and the opposite party then said that he did not want to be tried by a Jury. Prosecution witnesses were examined-in-chief on different dates. On the 13th December the accused was examined and a chrage framed and the case adjourned to the 6th January for cross-examination of prosecution witnesses. On that date the charge was slightly amended and the opposite party claimed to be tried by Jury. The case was, therefore, adjourned and Jurors were summoned for the 2nd February. On the 8th January the petitioner objected to the opposite party being allowed to exercise the right of claiming trial by Jury. This objection was overruled and it is against this order that the petitioner has obtained the present Rule.

On behalf of the petitioner reliance is placed on the provisions of section 454, Criminal Procedure Code. The portion of the section relevant to this contention runs as follows:—" If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried... .." he shall be held to have relinquished his right to be dealt with as such European British subject and shall not assert it in any subsequent stage of the same case.' It is contended that the opposite party having expressly waived his right to be dealt with as an European British subject on the 11th November is prevented by the provisions of this section from claiming this right at a subsequent stage of the case on the 6th January.

For the opposite party it is contended that section 454, Criminal Procedure Code, must be read with section 451, clause (2), which provides for a warrant-case like the present. " If a claim is made under sub-section (1)... at the time when the Magistrate calls upon the accused under section 256 to enter upon his defence, the Magistrate shall forthwith issue the necessary orders for the trial by a Jury as aforesaid.' It is urged that this gives an accused European British

subject the right to claim trial by Jury any time before he is called on to enter upon his defence. Under section 256, Criminal Procedure Code he cannot be called on to enter upon his defence until after all the prosecution witnesses have been examined, cross-examined and re-examined. The opposite-party's claim on the 11th November was, therefore, made within the time provided by law and was rightly allowed by the Magistrate.

We hold that this contention on behalf of the opposite party should prevail. Section 454 Criminal Procedure Code, does not in express terms deal with a case like the present when the claim has been made but subsequently withdrawn. The section clearly applies to the case when no claim has been made which would be valid under section 451, Criminal Procedure Code when the law allows an accused to reserve his claim until he is called on to make his defence we see no reason why he should not be allowed to re-consider and cancel a previous waiver, provided he does so within the time allowed. On behalf of the petitioner several rulings were cited but none of them have any bearing on the only point that arises in this Rule, the right of an accused European British subject to cancel a waiver. The opposite party's contention is, however, supported by a decision of the Allahabad High Court, *Emperor* v. *Sullivan* (1).

We, therefore, hold that the Magistrate's order was right and discharge this Rule.

Suhrawardy, J.—I agree. Reading sections 451, and 454 Criminal Procedure Code, together, it seems to me that the latter section is an explanatory corollary to the former. Their joint import may be thus expressed:—An European British subject may claim to be tried by a Jury at any time before he enters on his defence but if he does not do so, he must be considered to have relinquished such right and shall not be allowed to assert it again. The latter provision may be deduced from the wording of section 451 itself but the Legislature by enacting section 454 intended to make *ex cautela* the meaning of this special legislation clear by saying that the right, personal to the accused, would be lost if not asserted before a certain point of time. There is no express provision of law that the right once waived cannot be assertd at any time before the accused is called upon to enter on his defence but what the Code lays down is that, once he has allowed that opportunity to pass, he cannot avail himself of the privilege again. I am fortified in my view by the provisions of clause (3) of section 451. If the accused asserts the right at any earlier stage of the proceedings, *i. e.*, before he enters on his defence, the Magistrate shall adopt the special procedure if he finds that there will be a sufficient case to go before a Jury. If express waiver at an earlier stage was intended to be irrevocable, there should have been some corresponding, procedure laid down. But the law is silent about express waiver and it has been found necessary to determine judicially that the right may be expressly waived. *Barindra Kumar Ghose* v. *Emperor* (2) and *Queen-Empress* v. *Bartlett* (3).

I agree in discharging this Rule.

Z. K. *Rule discharged.*

(1) 24 A. 511; A. W. N. (1902) 142.

(2) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.

(3) 16 M. 308; 2 Weir 579; 5 Ind. Dec. (N. S) 922.

RANGOON HIGH COURT.

CRIMINAL APPEAL NO. 62 OF 1923.

February 1, 1923.

Present:—Mr. Justice Maung.

NGA WAIK—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 307, 352—Attempt to commit murder, what constitutes—Presenting unloaded gun and pulling trigger—Offence

The act which is punishable under section 307 of the Penal Code must be an act which is itself capable of causing death.

Jiwan Das v. *King-Emperor*, 30 P. R 1904 Cr. 1 Cr. L. J. 1078, relied on

A person can be convicted under section 307 of the Penal Code only if he has done the last proximate act necessary to constitute the completed offence of murder and the comple-

SARAT CHANDRA GHOSH *v.* EMPEROR.

tion of the offence is only prevented by some cause independent of his volition.

Queen-Empress v. *Niddha*, 14 A. 38; A. W. N. (1891) 176; 7 Ind. Dec. (N. S.) 397, relied on.

Accused levelled a gun at the complainant and pulled the trigger, but the gun being unloaded, there was no report or discharge:

Held, that the accused could not be convicted of an offence under section 307 of the Penal Code inasmuch as his act could not *per se* possibly cause death and that he was only guilty of an assault under section 352 of the Code.

Criminal appeal from an order of the Special Power Magistrate, Moulmein, dated the 16th December 1922, passed in Criminal Trial No. 109 of 1922, convicting the appellant for an offence punishable under section 307 of the Indian Penal Code.

JUDGMENT.—The appellant was convicted and sentenced to suffer seven years' rigorous imprisonment under section 307 of the Indian Penal Code. His offence, as charged, was 'that he did an act, to wit, attempted to shoot Maung Maing with a gun, with such intention and under such crircumstances that if by that act he caused the death of Maung Maing, he should have been guilty of murder."

The facts are as follows:—The complainant was seated on the *Verandah* of his house when the appellant rushed towards him from the road, levelled a gun at him and pulled the trigger. There was no report or discharge. Complainant took fright and ran out of his house but stumbled and fell a short distance away. The appellant followed up, and, aiming at the prostrate complainant, pulled the trigger of his gun a second time. As in there was no result. Then the complainant got up and escaped. The appellant also fled and was not arrested till some days later. The gun has not been found and there is no evidence to show that it was loaded at the time when the complainant was attacked as stated.

Section 307 deals with attempt to murder and provides:—"Whoever does any act with such intention or knowledge, and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished, etc."

In the present case, it cannot be assumed, without evidence, that the gun was loaded, and it is quite possible that the appellant was merely trying to frighten the complainant. The appellant's act must, therefore, be held to have been nothing more than presenting an unloaded gun at another person and pulling the trigger. The act which is punishable under section 307 must be an act which is itself capable of causing death: *Jiwan Das* v. *King-Emperor* (1). The act of the appellant could not *per se* possibly cause death.

Had the gun been loaded and had the complainant's escape from death or injury been due to a misfire, the appellant would doubtless have been guilty of the offence charged, because he would have done the last proximate act necessary to constitute the completed offence and the completion of the offence would have only been prevented by some cause independent of his volition: *Queen-Empress* v. *Niddha* (2).

Here, however, since there was no proof that the gun was loaded, the conviction under section 307 cannot be sustained. The appellant was, nevertheless, guilty of an assault on the complainant. The conviction is, therefore, altered to one under section 352 and the sentence reduced to three months' rigorous imprisonment. The maximum sentence is inflicted because the appellant, a proclaimed absconder, is shown to have borne a grudge against the complainant for having, as he suspected, given information to the authorities as to his whereabouts.

Conviction altered.
Sentence reduced.

K.

(1) 30 P. R. 1904 Cr.; 1 Cr. L. J. 1078.
(2) 14 A. 38; A. W. N. (1891) 176; 7 Ind. Dec. (N. S.) 397.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 925 OF 1922.
November 28, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

SARAT CHANDRA GHOSH AND OTHERS —PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Punishment—Offences not distinct—Separate

PARAKUZHIYIL AYAMAD *v.* EMPEROR.

sentences, legality of—Penal Code (Act XLV of 1860), ss. 71, 147, 225—Criminal Procedure Code (Act V of 1898), s. 35.

Having regard to the provisions of section 71 of the Penal Code and section 35 of the Code of Criminal Procedure, a person convicted of offences under section 147 and under section 225 of the Penal Code would not be liable to separate punishment for each offence where the common object of the unlawful assembly of which the accused was a member was the commission of the offence punishable under section 225, Penal Code. Such offences are not distinct offences for which separate sentences can be passed.

Criminal revision against an order of the Additional District Magistrate, Midnapur, dated the 10th October 1922.

Babus *Manmatha Nath Mukherjee* and *Jatis Chandra Guha*, for the Petitioners.

JUDGMENT.—This Rule was granted only on the ground that the separate sentences passed on the petitioners were illegal. They were convicted of offences punishable under sections 147 and 225, Indian Penal Code, and sentenced to three months rigorous imprisonment on each count, the sentences to run consecutively. In the charge of rioting, punishable under section 147, Indian Penal Code, the common object of the unlawful assembly is set out "to resist the execution of law by forcibly rescuing a prisoner (accused), Lalu Kabiraj, from the lawful custody of two constables Harun Rashid and Srimanta Bera." In the second charge, of an offence punishable under section 225, Indian Penal Code, the words used to describe the offence are "intentionally rescued or attempted to rescue a prisoner, Lalu Kabiraj, from the lawful custody of constables Harun Rashid and Srimanta Bera." It might be argued that rioters being members of an unlawful assembly with the common object of committing an offence and the actual commission of that offence are separate and distinct offences. But even accepting this contention we must hold, having regard to the provisions of section 71 of the Indian Penal Code and section 35 of the Code of Criminal Procedure, that a person convicted of such offences would not be liable to separate punishment for each offence. This follows from the illustration to section 35, Criminal Procedure Code. When the offences of committing house-breaking with intent to commit theft and the actual commission of theft are declared by law not to be distinct offences within the meaning of section 35, Criminal Procedure Code, it follows that the two offences of which the petitioners have been convicted are not distinct offences for which separate sentences can be passed. This view is supported by the authority of the decisions in the cases, *Bhup Singh* v. *Emperor* (1) and *Alim Sheikh* v. *Shahazada Singh Burkundaz* (2).

We accordingly make this Rule absolute and direct that the sentences of three months' rigorous imprisonment passed on the petitioners under sections 147 and 225, Indian Penal Code, will run concurrently and not consecutively.

B. N. *Rule made absolute.*

(1) 8 C. W. N. 305; 1 Cr. L. J. 139.
(2) 8 C. W. N. 483; 1 Cr. L. J. 365.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 1438 OF 1922.

March 27, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

PARAKUZHIYIL AYAMAD AND OTHERS —PRISONERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 141, 149, 307—Criminal Procedure Code (Act V of 1898), s. 537—Unlawful assembly—Common object—Charge—"Harassing Hindus", whether sufficiently clear—Irregularity—Failure of justice.

Where the common object in regard to offences under sections 149 and 307 of the Penal Code was stated in the charge to be "harassing Hindus" and in the prosecution thereof Hindus were attacked with guns and swords:

Held, (1) **that the language of the charge was sufficient to satisfy the requirements of section 141 of the Penal Code and to give the accused persons a sufficiently clear idea of the charge against them;** [p. 1045, col. 2.]

(2) **that the band of harassers being armed with swords and guns each of them may be credited with the knowledge that murder was likely to be committed in the course of harassing.** [p. 1046, col. 1.]

Referred Trial No. 88 of 1922, not followed.

Where the language of a charge is alleged to be defective, it is the duty of the Appellate Court to determine whether there is any error, omission

PARAKUZHI YIL AYAMAD.

of irregularity in the charge which has in fact occasioned a failure of justice within the meaning of section 537, Criminal Procedure Code. [p. 1045, col. 2.]

The phrase "harassing" implies infliction of injury on person and property. [p. 1045, col. 2.]

Per *Odgers, J.*—In a case of unlawful assembly it is necessary that the accused should have reasonably distinct notice of the common object imputed to them and of the manner in which that common object is to be brought within the language of section 141 of the Penal Code. [p. 1046, col. 1.]

Appeal against the judgment of the Court of the Special Judge, Malabar, Calicut, in Case No. 65 of 1922.

The Public Prosecutor, for the Crown.

JUDGMENT.

Ayling, J.—This case arises out of the Moplah Rebellion. The appellants have been convicted of offences under sections 149 and 307 of the Indian Penal Code. The prosecution evidence shows that on 18th February 1922 a band of about 25 armed Moplahs, including the appellants, came to the *paramba* of Prosecution Witness No. 2 where he, along with Prosecution Witnesses Nos. 3 and 4, was engaged in husking cocoanuts. The prosecution witnesses fled, but were pursued by the Moplahs with cries of 'shoot the dog." The first accused fired and wounded Prosecution Witness No. 2 but not seriously and the prosecution witnesses managed to escape. On the very same day, Prosecution Witness No. 2 gave a complaint, Exhibit B, naming the present appellants. The latter belong to the same *amsom* as the prosecution witnesses, and are all well-known to them. No personal enmity is shown: and there seems to be no reason why the identification of the appellants should not be accepted. The evidence of the single defence witness examined is immaterial.

The appellants were not represented before us; but the learned Public Prosecutor has deemed it his duty to draw our attention to a point in connection with the charge, which might be argued in their favour. The charge runs thus:

"That you, on or about the 18th day of February 1922, at Puttur, Calicut Taluq, formed an unlawful assembly with the common object of harassing Hindus in prosecution of which accused No. 1 fired at and hit Chairyamana Nayar, and thereby committed an offence punishable under sections 148 and 307, Indian Penal Code; and within my cognizance."

In a similar case, Referred Trial No. 88 of 1922, Oldfield and Devadoss JJ., appear to have held that the definition of common object of the unlawful assembly in the charge was too general, and that the charge contained no averment on which the accused could be held responsible for the main offence charged (murder). They, therefore, set aside the conviction and ordered a re-trial.

It is unnecessary to say that we treat this decision with the greatest respect. It is, however, not reported and, therefore, not binding on us; and we conceive that it is our duty to determine whether, in the case before us, there is any error, omission or irregularity in the charge which has in fact occasioned a failure of justice within the meaning of section 537 of the Code of Criminal Procedure.

No objection was raised by the accused either in the lower Court or in their appeal petition, but as they have been unrepresented throughout, we lay no stress on this. The question is, whether the phrase 'with the common object of harassing Hindus" either did not fall within the five heads of section 141 of the Indian Penal Code or was too general to give the accused an idea of what they were charged with; or was such, that shooting at a man could not be said to be done in prosecution of that common object.

We do not think any of these things can be said. The Special Judge has explained in his judgment, that by the phrase "harassing" he meant "vexing by repeated attacks" and the commission against Hindus of various offences such as criminal force, theft, etc., "which are the object of these gangs when they assemble." It is a matter of common knowledge that at this late stage of the Rebellion the efforts of the rebels were directed against their Hindu fellow subjects as well as against Government, and I should myself understand the word 'harass" to imply the infliction of injury on Hindus on person and property. I think it is in general accord with the definitions quoted in the judgment in Referred Trial No. 88 of 1922 from the

Oxford and the Century Dictionaries as illustrating the meaning of the word.

Such a meaning would fall within the scope of clause (3) of section 141, "to commit mischief or criminal trespass or *other offence*" and where, as in the present case, the band of harassers are armed with swords and a gun, I think each one of them must be credited with the knowledge that murder was likely to be committed in the course of this harassing.

It is possible to suggest a more definite and more appropriate phrase; but I think the phrase used is sufficient to satisfy the requirements of the section, and to give the accused persons a sufficiently clear idea of the charge against them.

I would, therefore, confirm the convictions and the sentence of the first accused who actually fired. I would reduce the sentences of the others to seven years' transportation.

Odgers, J.—I agree with the judgment of my learned brother, and were it not that the Public Prosecutor has raised an important point of pleading wherein we are constrained to differ from a decision of a Bench of this Court, which, however, as has just been pointed out, is not binding on us, I should have said nothing. As it is, I only refer to the question as to whether the charge of unlawful assembly with the common object of harassing Hindus is too general and, therefore, unfair or unjust to the accused. The learned Special Judge explains that by "harassing" he meant 'vexing by repeated attacks' "a phrase which I use to include the various offences against Hindus of criminal force, theft, etc." I respectfully agree with the passage in the judgment in Referred Trial No. 88 of 1922 (the decision referred to) "What is necessary is that the accused shall have reasonably distinct notice of the common object imputed to them and of the manner in which that common object is to be brought within the language of section 141." In other words, does "harassing Hindus" fairly fall within the purview of the expression "to commit any mischief or criminal trespass or other offence" in section 141? In my opinion it does. It is matter of common knowledge that one of the main objects of the Moplah Rebellion came to be the conversion of Hindus to Islam and to force them to this by attacks on their persons and property. The accused are said to be five of twenty-five Moplahs who attacked with guns and swords four Hindus husking cocoanuts. I would hold that "harass" in its dictionary meaning of 'to annoy by repeated attacks, to harry lay waste, devastate, plunder—to trouble, vex by repeated attacks"—is within the language of section 141 (3) and that this expression does convey to the accused the common object of the assembly alleged and the manner in which it is sought to bring the common object within the language of the Indian Penal Code. The plea was never raised at any stage by the accused and I think it is quite clear that not only were they not in fact under any disadvantage by reason of the language of the charge but they have no ground for complaint in law for the reasons I have given.

V. N. V. *Conviction confirmed.*

Z. K. & W. C. A.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 239 OF 1922.

June 29, 1922.

Present:—Mr. Justice Lindsay.

SHIBOO—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—High Court, power of, to grant leave to compound offence.

A High Court has power in revision to allow the composition of an offence in a case in which a Court of Appeal can allow a composition, as section 439 of the Criminal Procedure Code authorizes the High Court to exercise any of the powers conferred on a Court of Appeal. [p. 1047, col. 1.]

Husain Khan v. *Emperor*, 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546, followed.

Criminal revision from an order of the Sessions Judge, Agra, dated the 13th May 1922.

Pandit *Uma Shankar Bajpai*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

RANGI SAH v. B. N. W. RAILWAY CO.

JUDGMENT.—I think this application must be allowed. The applicant is a young boy named Shiboo, who was convicted on a charge under section 323 of the Indian Penal Code and sentenced to receive ten stripes. At the same time, his father was convicted of a similar offence and received an appealable sentence.

The father appealed and when the case came up before the learned Sessions Judge the parties to the case compounded. The learned Judge made an order for composition.

The boy had no right of appeal and the learned Sessions Judge was, therefore, asked to deal with the case in revision. He came to the conclusion that it was not possible for him to deal with the matter in this way and he refers to a ruling of this Court—*Husain Khan* v. *Emperor* (1) The ruling, however, does not seem to me to affect the matter which I have now before me

Section 439 authorises the High Court to exercise any of the powers conferred on a Court of Appeal, and if a Court of Appeal can allow the composition of an offence, it follows that the High Court can allow the same in revision too. There is nothing, therefore, to prevent the parties from compounding the offence. On the merits the learned Judge was obviously of the opinion that the case ought to be compromised but he thought that he had no authority in law to permit a composition.

In this connection, I may refer the learned Judge to the ruling in *Ram Piyari* v. *Emperor* (2). This is a fit case in which composition ought to be allowed as the parties have made up their differences. I allow the application and set aside the conviction and sentence on Shiboo, minor.

W. C. A. *Application allowed.*

(1) 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546.

(2) 5 Ind. Cas. 696; 32 A 153; 7 A. L. J. 103; 11 Cr. L. J. 203.

PATNA HIGH COURT.

CRIMINAL REVISION No. 213 OF 1923.

May 7, 1923.

Present:—Mr. Justice Macpherson.

RANGI SAH—PETITIONER

versus

B. N.-W. RAILWAY CO.—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 137—Obstruction to public way or place—Railway land, whether public place—Bona fide *claim—Procedure.*

The obstruction to which section 133 of the Criminal Procedure Code is applicable must be an unlawful obstruction in any way which is or may be lawfully used by the public or in any public place. There is no warrant for the view that Railway land is necessarily a public place, especially Railway land which is outside the Railway fencing at a Railway Station. [p. 1048, col. 1.]

In taking evidence under section 137 of the Criminal Procedure Code, in a case where the public nature of the way is disputed, it is incumbent on the Magistrate, even where he finds that the claim of title to the land in question on the part of the person showing cause is not justified, to determine further whether the claim is nevertheless a *bona fide* claim, and if he finds in the affirmative, to stop proceedings and give such person time to establish his claim in the Civil Court. [p. 1048, col 2.]

Luckhee Narain Banerjee v. *Ram Kumar*, 15 C. 564; 7 Ind. Dec. (N. S.) 960. *Imrat Ali* v. *Sheikh Amjad Ali* 39 Ind. Cas. 292; 2 P. L. J. 67; 3 P. L. W. 404; 18 Cr. L. J. 452, relied on.

Application from an order of the Sub-Divisional Officer, Chapra, dated the 10th March 1923.

Messrs. *Nirsu Narayan Sinha* and *Bhuvaneshwar Pd. Sinha*, for the Petitioner.

JUDGMENT.—This is an application to revise an order made by the Sub-Divisional Office of Chapra under the provisions of section 133 of the Code of Criminal Procedure. The proceedings appear to have their origin in a letter from the Assistant Engineer of the Bengal North-Western Railway dated the 16th August 1922, to the Land Acquisition Deputy Collector in which it was stated that the present petitioner Rangi Sah, had encroached on Railway land by building a tiled-roof verandah at the west end of the Sonepur Station yard. The Land Acquisition Officer issued a notice to Rangi Sah, who denied that he had encroached upon Railway land. The proceedings were sent from the Land Acquisition Deputy Collector to the Sub-Divisional

RANGI SAH *v.* B. N. W. RAILWAY CO.

Officer with the suggestion that action should be taken under section 133. The Sub-Divisional Officer issued notice under that section on the 29th October and again on the 18th December and finally after a report by a *kanungo*, on the 21st February 1923. The notice on the last mentioned date set out that the present petitioner having built a verandah (*osara*) and house encroaching 90 ft. *into* 5 ft. on Railway land must either remove the encroachment by the 28th February or show cause on that date.

The petitioner, as he had done on three previous occasions, denied the encroachment stating that the land was his own and shown in his name in the Survey records and in particular stated that the well which was close by was an old well belonging to him. He claimed that evidence should be taken. The Sub-Divisional Magistrate then took evidence and in his order found as follows :

"On the whole I am satisfied that there has been an encroachment the width of which is 5 ft. from the present fencing and the length of which is about 90 ft. from the Railway fencing up to the District Board road."

He accordingly directed the opposite party to remove the encroachment within a week of receipt of notice.

In the first place, it is not clear from the proceedings that the case properly falls under section 133 at all. The obstruction to which section 133 is applicable is

"An unlawful obstruction.....in any way which is or may be lawfully used by the public or in any public place."

There is no warrant for the view that Railway land is necessarily a public place especially Railway land which, as in this instance, is outside the Railway fencing at a Railway Station. There is indeed a finding of fact that the petitioner has encroached on the Railway land left outside the Railway fencing, but there is no finding that the land encroached upon is in a way or that if it is in a way, it is on one which is or may be lawfully used by the public. The observation which the Magistrate makes when discussing the question why the land is outside the fencing,

"It is said that it appears to have been done for the sake of the public to use the well"

cannot be considered to be a finding that there is a way over the land encroached upon.

In the next place, even if the section be applicable, the procedure of the learned Magistrate was not in accordance with the rule firmly engrafted by the Courts upon the conduct of an enquiry under section 137 in a case where the public nature of the place from which the unlawful obstruction is to be removed, is disputed as it is by the petitioner. It is true that this procedure does not appear to be warranted by the section, but even where judicial opinion on the point has been adverse, it has been recognised that it is too late to go back on the long line of previous decisions following *Luckhee Narain Banerjee* v. *Ram Kumar* (1) and it has been accepted in this Court in *Imrat Ali* v. *Sheikh Amjad Ali* (2) and other cases. In taking evidence under section 137, in a case where the public nature of the way is disputed, it is incumbent on the Magistrate, even where he has found, as in the present instance, that the claim of title to the land in question on the part of the person showing cause is not justified, to determine further whether the claim is nevertheless a *bona fide* claim, and if he finds in the affirmative, to stop proceedings and give such person time to establish his claim in the Civil Court. The Sub-Divisional Magistrate failed to find that the petitioner's claim, even though not justified, was not *bona fide* (it appears to obtain support from the recent Record of Rights), and on this ground also his proceedings cannot be sustained.

In view of the manner in which notices under section 133 have been drawn up, and failure of the Magistrate to follow the procedure sanctioned by decisions of the Courts, the proper order in this case is to set aside the order of the Magistrate leaving it open to him to take fresh proceedings according to law if so advised. He has seen the place and should be in a position to say whether the encroachment is an obstruction on a way and whether the

(1) 15 C. 564; 7 Ind. Dec. (N. S.) 960.
(2) 39 Ind. Cas. 292; 2 P. L. J. 671; 3 P. L. W. 404; 18 Cr. L. J. 452.

way, if there be a way, is or may be lawfully used by the public. If he takes action he should only issue notice after clearly making up his mind as to the form the proceedings are to take, so that on the fifth notice to the petitioner, a final order according to law may be passed. If it is a case of mere encroachment on Railway land the Railway Company should be referred to the Civil Court.

The application is allowed and the order of the Sub-Divisional Magistrate, dated the 10th March 1923, is set aside.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 285 OF 1922.
July 3, 1922.
Present:—Mr. Justice Lindsay.
ASHIQ HUSAIN KHAN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 349, 350—Criminal force, offence attended by—Criminal Procedure Code (Act V of 1898), s. 522.

Where a person is obliged to run away by reason of some others rushing at him with sticks and *lathis*, and using threats towards him, the act of the latter amounts to a resort to criminal force as defined in sections 349 and 350 of the Penal Code, and if by such act the person attacked is deprived of property, an order under section 522, Criminal Procedure Code, restoring the property to him is justified.

Criminal revision from an order of the District Magistrate, Fatehpur, dated the 4th April 1922.

Maulvi *Mukhtar Ahmad*, for the Applicant.

Munshi *Surendra Nath Varma*, for the Opposite Party.

JUDGMENT.—This is an application in revision to set aside an order passed under section 522 of the Code of Criminal Procedure under the following circumstances :—

The applicant and two others were charged by one Altaf Hussain of an offence under section 447 of the Indian Penal Code, *i. e.*, the offence of criminal trespass. The complainant alleged that he was in possession of certain fields and that when he went to them one morning he found the accused and their servants ploughing the fields and uprooting his sugarcane crop. He remonstrated and stood in front of the ploughs to stop the ploughing, whereupon the accused who were armed, with sticks and *lathis* rushed at him with threats and chased him out of his fields. This prosecution story was accepted and the accused were convicted. The conviction was upheld in appeal. After the order in appeal had been passed the complainant applied to the Magistrate to be restored to possession and an order was passed accordingly under section 522, Criminal Procedure Code. The District Magistrate refused to interfere in revision with this order and hence the present application.

The argument here, as it was in the Courts below, is that no order could legally have been made under section 522, inasmuch as it was not shown that the dispossession of the complainant, Altaf Hussain, was effected by the use of criminal force. It is contended that, even if criminal force was used, the dispossession was complete before any such force was resorted to. But it is denied that there was in fact any use of criminal force. The District Magistrate in his order in revision thought that criminal force was not used, but I do not agree. It was proved that the complainant who had halted in front of the ploughs was obliged to run away by reason of the accused's rushing at him with sticks and *lathis* and using threats towards him. That, I hold, was a resort to criminal force as defined in sections 349 and 350 of the Indian Penal Code. It must be taken, therefore, that the offence of which the accused were convicted was one "attended by criminal force" to quote the language of section 522.

As for the argument that the dispossession was not occasioned by criminal force, I am unable to entertain it. It is not, in my opinion, correct to say that the accused had actually secured peaceable possession before the complainant arrived on the scene. The complainant came up while

the acts of criminal trespass were still in progress and he had not already been effectively dispossessed. That only took place when the complainant was actually driven off his lands and, as has been shown, the act which drove him away was the use of criminal force by the accused.

In these circumstances, I hold that the order under section 522, Criminal Procedure Code, was justified and there is no case, therefore, for interference in revision.

I may also add that it has been brought to my notice that in proceedings taken under section 145 of the Code of Criminal Procedure an order giving possession of these same lands to Altaf Hussain has been made, and on the 16th of June 1922, Ryves, J., refused to interfere with this order (See Criminal Reference No. 306 of 1922, decided on the 16th of June 1922). This fact is an additional reason for refusing the present application which I dismiss accordingly.

W. C. A. *Application dismissed.*

RANGOON HIGH COURT.

CRIMINAL REFERENCE No. 8 OF 1923.

March 12, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

EMPEROR—PROSECUTOR

versus

NGA PO CHIT—ACCUSED.

Criminal Proceduer Code (Act V of 1898), s. 520—Order for disposal of property—District Magistrate, jurisdiction of, to annul order passed by First Class Magistrate—Contract Act (IX of 1872), s. 187—Person in possession of goods for sale, whether can pledge goods.

The Legislature intended in the case of section 520 of the Criminal Procedure Code, to confer concurrent jurisdiction on the District Magistrate and the Court of Session; so that where neither of them has had any opportunity of exercising jurisdiction under that section, an applicant may go for redress to either and the Court which first obtains seisin of the case has power to act in the matter. [p. 1052, col. 2.]

The possession required in section 178 of the Contract Act is juridical possession of the goods and not mere custody of them. [p. 1053, col. 1.]

Seager v. *Huhma Kessa*, 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837, relied on.

Dulabdass v. *Ma Win*, 59 Ind. Cas. 965; 3 U. B. R. (1920) 217, dissented from.

A person who is given possession of goods by the owner in order that he might sell them for and on behalf of the latter has such possession of the goods as is contemplated in section 178 of the Contract Act, and a pledge made by him of the goods in favour of a person who acts in good faith is valid. [p. 1053, col. 1.]

Kong Lone v. *Ma Kay*, 4 L. B. R. 13; 6 Cr. L. J. 125, *Stephen Aviet* v. *King-Emperor*, 4 L. B. R. 25; 6 Cr. L. J. 135, *Annamalai Chetty* v. *Mrs. Basch*, 65 Ind Cas. 1000; 11 L. B. R 217, 23 Cr. L J. 216; (1922) A. I. R. (L. B.) 17, *Naganada Davay* v. *Bappu Chettiar*, 27 M. 424; 14 M. L. J. 69, relied on.

Reference made by the Sessions Judge, Bassein Division.

ORDER OF REFERENCE.

May Oung, J.—In Criminal Regular Trial No. 286 of 1922 of the Court of the First Additional Magistrate of Ingabu one Nga Po Chit was convicted of the offence of criminal breach of trust in respect of three sewing machines belonging to Messrs. The Singer Sewing Machine Company. The accused was an empoylee of the Company and was in charge of the firm's shop at Kyingan. He admitted that he had pawned the three machines at the shop of Taing Lwaing, a pawnbroker of the same town. After judgment had been delivered, the Company's representative applied for the return of the machines to him, but the learned Magistrate holding that the pawn-broker had received them in good faith, directed their return, under section 517, Criminal Procedure Code, to Taing Lwaing.

Nga Po Chit did not appeal against the conviction and sentence passed on him, but the Singer Company, after a short interval, applied under section 520, Criminal Procedure Code, to the District Magistrate, Henzada, praying that the order of the Magistrate might be set aside and that an order might be passed directing that the three machines be restored to them. This application was wrongly registered as an appeal.

The learned District Magistrate held that Nga Po Chit could not give the pawn-broker a better right than he himself possessed over the goods and that that right was strictly limited; he also considered that the good faith of the pawn-broker was immaterial. The machines were accordingly given to the Singer Company.

EMPEROR v. NGA PO CHIT.

Apparently, the pawn-broker took no further action, but the matter has now been brought to the notice of the High Court by the Sessions Judge, Bassein Division, who has recommended that the order of the District Magistrate be set aside and that of the Additional Magistrate restored on two grounds, namely :—

(*i*) that the District Magistrate has no jurisdiction to entertain the application under section 52c, Criminal Procedure Code;

(*ii*) that, as held in *Annamalai Chetty* v. *Mrs. Basch* (1), the pawn-broker, having acted in good faith, was entitled to have the goods returned to him.

Notices have been issued to the parties and learned Counsel for the Company has been heard. Taing Lwaing submitted a petition praying that the sewing machines be returned to him, but did not appear at the hearing to support it.

The first point for decision is whether the District Magistrate had jurisdiction to entertain the Company's application.

Section 520, Criminal Procedure Code, provides that *any Court* of Appeal, confirmation reference or revision may direct any order under section 517, section 518, or section 519, passed by a Court subordinate thereto to be stayed pending consideration by the former Court, and may modify alter or annul such order and make any further orders that may be just.

This is not, however, the only section of the Code under which the order of a Subordinate Court under sections 517-519, can be re-considered by a higher Tribunal. Under clause (*d*) of section 423, sub-section (1), an Appellate Court may, in disposing of an appeal, make any amendment or any consequential or incidental order that may be just and proper. There can be no doubt that this includes a power to make an order for restoration of property, since such an order is consequential or incidental. Hence, if, in the case under review, Nga Po Chit had appealed to the Court of Session which was the Court to which appeals from the Additional Magistrate lay, there is similarly no doubt that the Appellate Tribunal could, under either of the provisions quoted above, have confirmed or reversed the original order in regard to the sewing machines. But since Nga Po Chit did not appeal the question arises whether the Court of the District Magistrate as a Court of Revision had power to act under section 52c. It cannot be gainsaid that the Court of Additional Magistrate is a Court subordinate to the District Magistrate for the purposes, for instance, of section 435.

The learned Sessions Judge has referred to *In re Laxman Rangu Rangari* (2) in which an order of the District Magistrate acting under section 520 was set aside on the ground of want of jurisdiction. In that case there had been an appeal against the conviction to the Sessions Court, which confirmed the conviction and did not interfere with the order as to disposal of property. Subsequently, the District Magistrate, on an application by the complainant under sections 435 and 520, revised the order without notice to the other side. Chandavarkar, J., held that "the Court of Revision such as that of the District Magistrate can only interfere where there was no appeal to the Sessions Court. Here there was an appeal to the Sessions Court and the Sessions Court did exercise its jurisdiction." Hence the District Magistrate's jurisdiction as a Court of Revision was ousted. Heaton, J., went further and held that, where the case is one in which an appeal lies, the only Court which can deal with the order regarding the disposal of property under section 520 is the Court of Appeal. With all respect, I am unable to concur in the latter view. The Legislature, in my opinion, intended in the case of section 520, as in some other sections, to confer concurrent jurisdiction on the District Magistrate and the Court of Session; hence where neither of them has had any opportunity of exercising jurisdiction under that section an applicant may go for redress to either and the Court which first obtains seisin of the case has power to act in the matter. In this, I am in agreement with the decision in *Emperor* v. *Hussain Shah* (3) (as cited in Sanjiwa

(1) 65 Ind. Cas. 1000; 11 L. B. R. 217; 23 Cr. L. J. 216; (1922) A. I. R. (L. B.) 17.

(2) 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169.

(3) 17 C. P. L. R. 107.

EMPEROR *v.* NGA PO CHIT.

Row's All India Digest, Criminal, 1836 to 1915, Volume I, column 2030). Thus, where, as in this case, no appeal from the Original Court's order has been preferred, it is open to any party interested to apply to the District Magistrate under section 435 and when the District Magistrate has called for and examined the record, he has power to act under section 520.

As to the second point urged by the learned Sessions Judge, the decision may turn on the question whether Nga Po Chit was or was not a servant of the Singer Company. Exhibit A, the agreement between the Company and its local managing salesman, shows that the latter was to devote his whole time to the Company's business in return for a certain salary and sundry commissions on collections and that he was authorised to sell and hire out the Company's sewing machines, parts and accessories and none other under instructions from the Company. He was not to be in any way an agent of the Company and was bound to account to the Company for all cash, stock, books, etc.

Under section 178 of the Indian Contract Act, a person who is in possession of goods may make a valid pledge of such goods, provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly and provided that the goods have not been obtained by the pawnor by means of an offence or fraud.

Here there is no question that Nga Po Chit had obtained the sewing machines dishonestly and it may be assumed that Taing Lwaing received the goods in good faith.

But there is another and more important point involved. The section requires that the pawnor should have been "in possession" of the goods, and it has been held in *Seshappier* v. *Subramania Chettiar* (4) repeatedly that judicial possession and not mere custody is meant by this expression, so a servant entrusted by his master with the custody of goods during his absence, or a wife in charge of her husband's jewellery as custodian on his behalf, cannot make a valid pledge under the section. See *Biddomoyee Dabee* v. *Sitaram* (5) and *Seager* v. *Hukma Kessa* (6). Can a salesman who is a whole time servant of the owner be said to be in possession of the goods entrusted to him for sale? In the Madras case quoted above and in the Burma case cited by the learned Sessions Judge, the goods had been entrusted by the owner to the pawnor for sale; in both cases, however, the pawnor was not the owner's employee but a person carrying on his own business and there was no reason to suppose that he had no power to do whatever he pleased with the goods. I have not been able to find any case in which a person in the position of Nga Po Chit was held entitled to make a valid pledge. At the same time, it is clear that Nga Po Chit was not a mere custodian but had authority to sell. The point is not free from difficulty and it is of great importance to the retail trade of the country. I, therefore, refer to His Lordship the Chief Justice for decision by a Bench, Full or otherwise, as he may determine, the following question:—

"Can a person who is in possession of goods for sale as a whole time servant in charge of a branch of a retail trading Company make a valid pledge of such goods under section 178 of the Indian Contract Act?"

Mr. *Gaunt* Assistant Government Advocate, for the Crown.

Mr. *McDennoll*, for the Singer Sewing Machine Company.

JUDGMENT.

Robinson, C. J.—The facts are fully stated in the order of reference by my brother May Oung and I need not repeat them. As regards the jurisdiction of the District Magistrate, I entirely agree with him. No appeal having been filed there is nothing to bar the jurisdiction of the District Magistrate as a Court of Revision in passing the order that he did.

Coming to the question referred it invovles the consideration of the meaning of the expression "in possession" under section 178 of the Indian Contract Act. It has

(4) 34 Ind. Cas. 751; 40 M. 678; 30 M. L. J. 587; 19 M. L. T. 386.

(5) 4 C. 497; 3 C. L.R. 398; 2 Ind. Dec. (N.S.) 316.

(6) 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837.

been often held that possession required in section 178, is similar to the possession required by section 108 of the Contract Act in regard to sales, that is to say, the possession must be juridical possession of the goods and not mere custody. See *Seager* v. *Hukma Kessa* (6). Thus, a servant or a wife, having mere custody of chattels belonging to the master or husband—custody which is only intended for the safe keeping of the chattels—would not be such a possession as is contemplated by section 178, that section making a clear distinction between possession and custody. On this matter I am unable, with all respect, to agree with the opinion of my brother Heald, expressed as Judicial Commissioner of Upper Burma, in the case of *Dulabdass* v. *Ma Win* (7). The possession of the accused in this case is similar to the possession of a person who is given property in order that he might sell it on behalf of the owner. For instances of such possession, we may refer to the cases of *Kong Lone* v. *MaKay* (8) and *Stephen Aviet* v. *King-Emperor* (9) and also to the case of *Annamalai Chetty* v. *Mrs. Basch* (1). Another similar case is that of *Naganada Davay* v. *Bappu Chettiar* (10) where the owner lent a jewel on hire to the defendant who pledged it and it was held that the pledgee was liable to pay the owner the value of the jewel; it was held that a person entrusted with the jewel, an agent for sale, had such possession as is contemplated by section 178 of the Contract Act, and that the appellant, being the pawnee, acting in good faith, is entitled to the protection afforded by the section.

In the present case Po Chit was given possession of the sewing machines by the owner in order that he might sell them for and on behalf of the owner. His possession is not a mere custody for safe keeping, but for the definite purpose of sale, and any sale made by him would have bound the owner and given the purchaser a good title to the goods. He would have had such a possession of the goods as is contemplated by section 108 of the Contract Act, and, in my opinion, he would also have such a possession of them as contemplated by section 178 of that Act. The fact that he disposed of the goods contrary to the instructions of the owner makes no difference to the character of the possession which vested in him. His possession is very analogous to the possession of a factor or agent which is the possession which is contemplated in section 178. If, therefore, the pawnee acted in good faith and had no ground for doubting the authority of Po Chit to pledge the goods he would be entitled to the protection granted by section 178. The correctness or otherwise of the order of the District Magistrate would, therefore, depend on whether the pawnee acted with due care and attention. Kyangin, where this branch has been opened, is a small place and I find it hard to believe that the pawnee was not aware that Po Chit was merely acting for and on behalf of the Singer Sewing Machine Company. It appears to me that he must have been aware that Po Chit was in charge of this branch for the purpose of selling the machines and he had no ground whatever for imagining that the owner had or was likely to have authorised him to pledge. It appears that he took two machines from Po Chit in pledge and one from Po Chit's wife. It appears to me to be more than doubtful whether the pawnee, therefore, acted in good faith. Indeed, I would have no hesitation in holding that he did not so act. Under these circumstances, in my opinion, the order of the District Magistrate was justified and should not be disturbed, and I would, therefore, pass no orders on the reference by the learned Sessions Judge.

May Oung, J.—I concur.

Z. K. *Order accordingly.*

(7) 89 Ind. Cas. 965; 3 U. B. R. (1920) 217.
(8) 4 L. B. R. 131; 6 Cr. L. J. 125.
(9) 4 L. B. R. 251; 6 Cr. L. J. 135.
(10) 27 M. 424; 14 M. L. J. 69.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 313 OF 1922.
July 7, 1922.
Present:—Mr. Justice Ryves.
EMPEROR—PROSECUTOR
versus
DULLA AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 247, 403—Acquittal under s. 247 bars subsequent proceedings.

An order of acquittal under section 247 of the Criminal Procedure Code operates as a bar under section 403 to the entertainment of a complaint charging the same accused with having committed the same offence, on the same allegations of fact.

Reference.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is a reference by the learned District Magistrate of Farrukhabad. It appears that three persons were acquitted by an Honorary Magistrate under section 247 of the Criminal Procedure Code because on the day fixed for the hearing of the case the complainant did not appear. The complainant filed another complaint charging the same accused with having committed the same offence on the same allegations of fact before the same Magistrate. He referred the point as to whether, having regard to section 403 of the Criminal Procedure Code, he could try the case again and having been directed to do so by the Sub-Divisional Officer, issued proceedings against the accused. The learned District Magistrate has referred the case to this Court recommending that further proceedings be quashed on the ground that under section 403 of the Criminal Procedure Code the accused persons cannot be again tried. This was the view taken by this Court in *Empress* v. *Bhawani Prasad* (1). The same view was taken in the case of *Panchu Singh* v. *Umor Mahomed Sheikh* (2) and *In re Guggilapu Peddaya of Palakot* (3). Following these decisions

(1) A. W. N. (1885) 43.
(2) 4 C. W. N. 346.
(3) 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 1 Cr. L. J. 41.

I accept the reference and direct that the papers be returned.

Reference accepted.

W. C. A.

PATNA HIGH COURT.

CRIMINAL REVISION No. 244 OF 1923.
May 30, 1923.
Present:—Mr. Justice Macpherson.
BANSIDHAR MARWARI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 476—Prosecution on evidence recorded under s. 202, legality of—Penal Code (Act XLV of 1860), s. 211—Complainant not given opportunity to produce all evidence—Prosecution, legality of.

Section 476 of the Criminal Procedure Code is wide enough to cover the consideration of other than legal evidence and a prosecution can legally be directed upon evidence recorded under section 202 of the Code. [p. 1056, col. 1.]

In re Kachi Madar Labhai, 10 Ind. Cas. 619; 10 M. L. T. 47; 21 M. L. J. 795; (1911) 2 M. W. N. 9; 12 Cr. L. J. 323, dissented from.

A prosecution for an offence under section 211 of the Penal Code is not necessarily illegal merely because the complainant was not given an opportunity to adduce all his evidence in support of his case. [p. 1056, col. 1.]

Revision from an order of the Sub-Divisional Officer, Monghyr, dated the 16th April 1923, and that of the Deputy Magistrate, Monghy, dated the 16th April 1923.

Mr. *G. C. Pal*, for the Petitioner.

JUDGMENT.—This Rule was issued to the District Magistrate of Monghyr to show cause why the order of the Sub-Divisional Magistrate of Monghyr, directing, under section 476 of the Code of Cri-

minal Procedure, the prosecution of the petitioner Bansidhar Marwari under section 211 of the Indian Penal Code in respect of a case instituted on complaint in the Court of the Sub-Divisional Magistrate on the 11th January 1923 against the Junior Sub-Inspector of Lakhisarai, Anant Ram, and Anant Ram's men, should not be set aside.

The facts, in chronological order, are briefly as follows:—The house of Anant (otherwise Ananti or Anti) Ram Marwari, adjoins that of the petitioner and his family, and there had been ill-feeling between these neighbours over a privy situated in the house of the former, which adjoins some land of the latter. On the 7th January Anant Ram lodged information with the Sub-Inspector of Police of Lakhisarai, who was on deputation at Barhi Station in connection with the passing of the Viceroy's train, that the petitioner, a relation, and three peons were making preparation to close the drain of the privy as petitioner's brother had gone to Monghyr to institute a suit on the subject, that the informant protested and the present petitioner abused him and directed his peons to assault him with *lathis* if he spoke again, that the informant ran away and concealed himself in his shop on the other side of the road and his assailants then trespassed into his shop. As he was busy, the Sub-Inspector's record of the First Information did not reach the *Thana* until 4 P. M. on the 9th. Meantime, on the 8th, a member of petitioner's family, Marlidhar Marwari had instituted a civil suit in the Munsif's Court at Monghyr and had applied for a temporary injunction restraining Anant Ram and the other defendants from making or constructing any drain on the land in suit. The injunction, however, was not granted until the following day. On that day, the 9th January, about 3-15 P. M. Sat Narayan, a cousin of the petitioner, telegraphed to the Magistrate in charge, Monghyr, that the Sub-Inspector of Police had caught the three peons of petitioner who had been watching that Anant Ram should not open a drain to the privy, had taken him to *hajat* and had then directed Anant Ram to open the drain and the drain had been opened. On the 10th the petitioner filed the complaint in respect of which he has been prosecuted and was examined on solemn affirmation on the 11th. He stated that at 1 P. M. on the 9th the Sub-Inspector arrested his three peons whom he had posted to prevent an escape channel being made to the privy of Anant Ram, took them to Anant Ram's shop, bound them and marched them to *hajat* and had the escape channel for the privy opened by Anant Ram's orders.

The Magistrate directed a local enquiry by Lieutenant Sahi, Deputy Magistrate, who reported on the 17th January that the case of *Anant Ram* v. *Bansidhar* should proceed and the complaint against the Sub-Inspector might be dismissed. The escape channel, he found, was an old one, the occurrence of the 7th January true and the Sub-Inspector's arrest of petitioners' peons on the 9th unexceptionable.

The three peons were placed on trial on a charge under section 448. The parties, however, compromised that case and the accused were acquitted. Thereafter, the Sub-Divisional Magistrate took up consideration of the complaint, and, relying on the report of the Deputy Magistrate that it was intentionally false and made as a defence to the true case against the petitioner's peons, dismissed it under section 203, and called upon the complainant to show cause why he should not be prosecuted for maliciously instituting a false case in his Court. Cause was shown by the petitioner and his Pleader heard, and the Magistrate having set out that there was no reason for distrusting either the Enquiring Magistrate's or the Sub-Inspector's conclusions and evidence, held that there was reliable evidence to prove that the petitioner's statements that there was no escape channel, that he told his servants to prevent anyone making such a channel, and that the Sub-Inspector had such a channel opened by Anant Ram's men under Anant Ram's orders were deliberately and maliciously false and that the case was brought knowing

BANSIDHAR MARWARI *v.* EMPEROR.

that there was no just or lawful ground for such a charge, and he accordingly made the order in respect of which the revisional jurisdiction of this Court is invoked.

Mr. G. C. Pal, on behalf of the petitioner contends (1) that no prosecution could legally be directed upon evidence recorded under section 202, (2); that a prosecution for an offence under section 211 is illegal if the complainant has not been given an opportunity to adduce all his evidence in support of his case, and (3) that no prosecution should proceed pending the decision of the Civil Court regarding the civil rights of the parties.

The first contention is, in my opinion, not well-founded. The opinion of Sundara Aiyar, J., in *In re Kacki Madar Labhai* (1), is quoted in support of the proposition. This opinion is shorn of authority by the fact that in the same case Ayling, J., expressed the contrary view, remarking that the wording of section 476 is wide enough to cover the consideration of other than strictly legal evidence, and by the further fact that, when Sundara Aiyar, J., expressed the opinion that it would be illegal to grant a sanction under section 195 based solely on an investigation conducted under section 202 whether by a Police Officer or by the Magistrate himself, Spencer, J., again expressed a contrary view. In my opinion the correct view was expressed by Ayling, J.

(1) 10 Ind. Cas. 619; 10 M. L. T. 471; 21 M. L. J. 795; (1911) 2 M. W. N. 9; 12 Cr. L. J. 323.

The third contention also is without merit. The history of the matter, as set out above, shows that delay in determining whether the petitioner committed an offence under section 211 as a counter-blast to an occurrence which took place prior to the institution of the civil suit, is strongly contra-indicated.

The second proposition also cannot be accepted in the broad form in which it is stated. But there are certain special circumstances in this case. The Magistrate, as he states, acted partly on the Police report which was submitted by an Officer whose conduct was assailed. Again, it cannot be assumed that the charge under section 448 was true because it was compromised. It was, moreover, compromised before the defence evidence was recorded. Accordingly, the Magistrate would have exercised a sound discretion in accepting the evidence to establish the truth of his complaint which the petitioner preferred when showing cause against the proposed order under section 476. There are also points in the cross-examination of witnesses in the case under section 448 which appear to merit consideration.

In all these circumstances, I hold that the order for prosucution should be set aside. But it will be open to the Sub-Divisional Magistrate to pass an order under section 476 if, after hearing any evidence,—which the petitioner adduces—he considers that the ends of justice require such order.

Order set aside.

K. S. D.

END OF VOLUME 74.

GENERAL INDEX.

VOLUME 74—1923.

—— :-o:-O-:o-: ——

Acts—General.

Act 1856—XV. *See* HINDU WIDOW'S RE-MARRIAGE ACT.
—— 1859—XIV. *See* LIMITATION ACT.
—— 1860—XLV. *See* PENAL CODE.
—— 1865—X. *See* SUCCESSION ACT.
—— 1869—IV. *See* DIVORCE ACT.
—— 1870—VII. *See* COURT FEES ACT.
—— 1870—XXI. *See* HINDU WILLS ACT.
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1873—X. *See* OATHS ACT.
—— 1874—II. *See* ADMINISTRATOR-GENERAL'S ACT.
—— 1876—VII. *See* LAND REGISTRATION ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1877—XV. *See* LIMITATION ACT.
—— 1878—I. *See* OPIUM ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—II. *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—V. *See* EASEMENTS ACT.
—— 1882—XIV. *See* CIVIL PROCEDURE CODE.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1897—IX. *See* PROVIDENT FUNDS ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—II. *See* STAMP ACT.
—— 1901—II. *See* TOLLS (ARMY) ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.
—— 1913—III. *See* ADMINISTRATOR-GENERAL'S ACT.
—— 1913—VII. *See* COMPANIES ACT.
—— 1918—VII. *See* INCOME TAX ACT.
—— 1920—V. *See* PROVINCIAL INSOLVENCY ACT.
—— 1920—XXVI. *See* LIMITATION AND THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT.

Acts—Bengal.

Act 1859—XI. *See* BENGAL LAND REVENUE SALES ACT.
—— 1880—IX. *See* BENGAL CESS ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1888—III. *See* CALCUTTA SUBURBAN POLICE ACT.
—— 1897—V. *See* BENGAL ESTATES PARTITION ACT.
—— 1911—V. *See* CALCUTTA IMPROVEMENT ACT.

Acts—Bihar and Orissa.

—— 1914—IV. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT.

Acts—Bombay.

—— 1876—X. *See* BOMBAY REVENUE JURISDICTION ACT.
—— 1879—V. *See* BOMBAY LAND REVENUE CODE.

Acts—Burma.

—— 1898—III. *See* BURMA MUNICIPAL ACT.
—— 1920—II. *See* RANGOON RENT ACT.

Acts—Madras.

—— 1864—II. *See* MADRAS REVENUE RECOVERY ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.

Acts—Punjab.

—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1911—III. *See* PUNJAB MUNICIPAL ACT.

Acts—U. P.

—— 1871—XXXII. *See* OUDH CIVIL COURTS ACT.
—— 1876—XVIII. *See* OUDH LAWS ACT.
—— 1886—XXII. *See* OUDH RENT ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.
—— 1913—II. *See* BUNDHELKHAND ALIENATION OF LAND ACT.
—— 1912—IV. *See* U. P. COURT OF WARDS ACT.
—— 1916—II. *See* U. P. MUNICIPALITIES ACT.

Ordinance.

Ord. 1922—I. *See* MALABAR (RESTORATION OF ORDER) ORDINANCE.

Regulations.

Reg. 1814—XXIX. *See* BENGAL GHATWALI LANDS REGULATION.

—— 1825—XI. *See* BENGAL ALLUVION AND DILUVION REGULATION.

—— 1827—XVI. *See* BOMBAY REGULATION.

Statutes.

1915 (5 & 6 GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.

Adjacent lands—*Tree standing on one falling down on the other—Owner of adjacent property, right of.*

If a tree standing on one person's land falls down, and part of it when fallen lies on another person's property tha person is entitled to call upon the owner of the property where the tree stands to remove that portion of the tree which has fallen on his (the latter's) property and if he does not do so, he can remove it himself. **Pat** MAHABALI DASIN *v.* MANU MANDAL **828**

Administration—*Decree for administration of estate —Subsequent decree on mortgage—Decree directing sale of mortgaged property after discharge of debts by Receiver—Execution of mortgage-decree, whether can proceed at once.*

One *F.* executed three deeds of gift in favour of two of her sons and one of her daughters. These gifts were set aside after her death on the suits of her remaining heirs for recovery of possession of their legal shares in the estate and a preliminary decree for administration of the estate was made and a Receiver appointed for the purpose One of the sons in whose favour one of the deeds of gift wa executed mortgaged some of the property. The mortgagee brought a suit on the mortgage and obta ned a decree directing sale of as much of the mortgaged p operty as was found after the liquidation of debts to be the property of the mo tgagor. The decree-holder took out execution of the decree:

Held, that the execution of the mortgage-decree could not be taken out so long as the debts due by the estate had not been paid off. **Pat** FIRM OF SHYAM LAL GOKUL CHAND *v.* JAMIL AHMAD **487**

Administrator-General's Act (II of 1874), s. 52 —*Administrator-General's Act (III of 1913), s. 42—Rules framed by Madras Government, r. 11 (3) (c)—Administration commenced under Act of 1874—Fees payable to Administrator-General—Computation, method of—Interpretation of Statutes.*

In the case of the administration of an estate which commenced before the 1st April 1914, the amount which the Administrator-General is to receive is a percentage on the value of the assets distributed, provided they have, before distribution, been collected by him; with the result that if there is a rise in the value of the estate since collection he gets a larger amount by way of commission, and if there is a fall in the value of the estate his commission decreases proportionately.

Per *Schwabe, C. J.*—The first principle of the interpretation of a Statute is to take the

Administrator-General's Act—1874—concld.

ordinary interpretation of the words, and it is only in cases in which there might be more than one ordinary interpretation of the words that the Court has to look to anything outside to arrive at the meaning. **M** ADMINISTRATOR-GENERAL, MADRAS *v.* V. V. RAMIAH, 43 M. L. J. 347; (1922) M. W. N. 571; 16 L. W. 711; (1922) A. I. R. (M.) 491 **182**

Administrator-General's Act (III of 1913), s. 42. *See* ADMINISTRATOR-GENERAL'S ACT, 1874 **182**

Adoption—Adoptive father reserving free power of management, effect of. *See* HINDU LAW—MITAKSHARA **220**

Adverse possession—*Assertion of under-proprietary title by tenant in judicial proceedings—Limitation, commencement of.*

A person who is in possession of land as a tenant cannot, by a mere assertion in a judicial proceeding and the lapse of twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the land. **P C** MOHAMMAD MUMTAZ ALI KHAN *v.* MOHAN SINGH, (1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383 **476**

——*Burden of proof.*

Where a suit for possession is resisted on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years; rather the burden of proof is on the defendant to prove his title by adverse possession.

Secretary of State v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.) and *Jai Chand* v *Girwar Singh*, 52 Ind. Cas. 366; 17 A. L. J. 814; 41 A. 669, relied on. **A** RAGHA MAL *v.* ABDUS SATTAR, 1923 A. I. R. (A.) 565 **879**

——*Co-owner—Hindu Law—Joint family—Partition, partial—Member left in possession of undivided property, possession of, nature of.*

Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him, however, in possession of certa n properties not divided between the members, h s possession will still continue to be the possession of the other members of the family though they may have been divided, t ll some event happens which renders his possession exclusive or hostile to the others.

Vaidyanatha Aiyar v. *Aiyasamy Aiyar*, 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 941, followed.

Such possession will not be treated as adverse or hostile unless it appears that the person in possession has repudiated the title of the other members and such fact of adverse holding is brought home to the other members of the family either by information to that effect given to them or by outward acts of exclusive ownership of such a nature as to give notice to the

Adverse possession—contd.

other members that adverse possession and *disseisin* are intended to be asserted.

Jogendra Nath Rai v *Baldeo Das*, 35 C. 961; 12 C. W. N. 127; 6 C L. J. 735, followed. **M** RAJAGOPALA AIYANGAR *v.* SOUNDARARAJA AIYANGAR, (1923) M. W. N. 636; 45 M. L. J. 476 **1018**

——— *Co-owners—Ouster — Limitation, commencement of—Acquisition of limited interest.*

Where possession can be referred to a lawful title it cannot be said that it is illegal and that it is adverse to a co-owner. In order to have the Statute of Limitation run against a co-owner there must be actual ouster or some act equivalent to ouster.

Defendant, a co-sha er landlo d of the plaintiffs, obtained a decree for his share of the rent in respect of a non-trans erable occupancy holding in the possession of a tenant and in execution of the decree purchased the land himself and entered into possession. More than twelve years after the plaintiffs sued for joint possession with the defendant;

Held, (1) that the purchase by the defendant did not confer any title on him and when he went into possession such possession was illegal against his co-sharers and was equivalent to an ouster of the plaintiffs and limitation commenced to run against them as regards the right to possession of the land from the date when the defendant took actual possession and that the suit was, therefore, barred by limitation;

(2) that although the defendant did not deny the plaintiffs' right to receive rent according to their sha es he acquired by adverse possession the limited interest of a tenant. **C** BHAIRABENDRA NARAIN ROY *v.* RAJENDRA NARAIN ROY, 50 C. 487; (1924) A. I. R. (C.) 45 **193**

———, Finding of, whether finding of law or fact. *See* PLEADING **51**

——— *Hindu widow in possession—Presumption of separation, whether arises—Reversioners, right of, when extinguished.*

Unless it is clearly shown that when a Hindu w dow took possession she professed to do it as claiming only the limited estate of a widow, it would be impossible to hold that the rights of the reversioners were not extingu shed, after the lapse of the statutory period.

Lachhan Kunwar v. *Manorath Ram*, 22 C. 445; 22 I. A. 25; 5 M. L. J. 1; Rafique and Jackson's P. C. No. 136; 6 Sar. P. C. J. 523; 11 Ind. Dec. (N. S.) 297 (P. C.), fo lowed.

Satgur Prasad v. *Raj Kishore Lal*, 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.), relied on.

Baijnath Prasad Singh v. *Tej Bali Singh*, 38 Ind. Cas 894; 14 A. L. J. 913; 38 A. 590, distingu shed.

The mere fact that a widow's name is entered in the revenue papers does not necessar ly raise the pre umption that she is the widow of a separated Hindu. **A** UMAN SHANKER *v.* AISHA KHATUN **869**

——— *Intermittent user—Pond—Possession, whether follows title.*

User of an intermittent nature accompanied by no assertion of right is a very common phenomenon in this country and arouses no opposition. Such user does not amount to adverse possession.

In the case of an ordinary natural depression which for some months each year after the rains holds rain water and is not susceptible of actual physical possession by the legal owner, possession must be deemed to follow title, unless the usurper can prove long and continuous exclusion of the rightful owner. **L** BHURU *v.* DATU RAM, (1922) A. I. R. (L.) 59; 4 L. L. J. 461 **282**

——— Khoti khasgi *lands—Partition, absence of—Division among different branches, effect of.*

Where there has been no general partition of *khoti khasgi* lands, members of different branches would hold their shares for reasons of convenience and not for the purpose of partition in the strict sense of the term, and no member of a branch would acquire title by adverse possession in any of the lands. **B** MOHIDDIN *v.* IBRAHIM, **161**

——— Limitation, commencement of. *See* LIMITATION ACT, SCH. I, ART. 144 **153**

——— *User of vacant land—Pleadings—New issue in appeal—Objection not raised by other party, effect of.*

In a suit for possession of land it appeared that the land in suit had been lying unoccupied for many years and the Municipal Board had been using it for depositing refuse. It was found, however, that some ten years before suit the Board made it *pucca*. The Trial Court decreed the suit but on appeal the Board raised the plea that even if the possession of the Board was not found to be adverse, it was entitled to the benefit of section 51 of the Transfer of Property Act. Notice of this plea being raised was given to the plaintiff who took no objection to it. In second appeal before the High Court it was urged that this plea ought not to have been allowed to be raised :

Held, (1) that as the issue was raised with notice to, and consent of, the plaintiff it could have been entertained by the Appellate Court;

(2) that until the land was made *pucca* the acts alleged on the part of the Mun cipal Board were not sufficient to amount to dispossession of the plaintiff or to constitute adverse possession.

Framji Cursetji v. *Goculdas Madhowji*, 16 B. 338; 8 Ind. Dec. (N. S.) 703, followed. **A** MAQBUL HUSAIN *v.* AHMAD HUSAIN, (1923) A. I. R. (A.) 557 **251**

Agra Tenancy Act (II of 1901), ss. 4, 158—" *Land,*" *meaning of—Proprietary rights, whether can be acquired in groves.*

"Land," as defined in section 4 of the Tenancy Act, is lim ted to land which is let or held for

Agra Tenancy Act—contd.

agricultural purposes, and does not include areas covered by groves.

Kesho Parsad Singh v. *Sheopargash Ojha*, 64 Ind. Cas. 248; 19 A. L. J. 749; 44 A. 19; 3 U. P. L. R. (A.) 117; (1922) A. I. R. (A.) 301 (F. B.), followed.

Section 158 of the Tenancy Act has not application to groves, and proprietary rights therein cannot be acqu red. A KESHO DASS *v.* HANUMAN PANDAY, 21 A. L. J. 576; 45 A. 640 **924**

——— **ss. 4 (5), 58, 63, 194 (3)**—*Co-sharer entitled to collect rent—Ejectment suit by him, if maintainable.*

A co-sharer who is entitled to collect the entire rent of a tenant is, for the purposes of the Agra Tenancy Act, a land-holder and is entitled to eject the tenant.

Jhamman v. *Farrukhabad*, Sel. Dec. No. 2 of 1910, followed.

Section 194, sub-section(3), applies only to cases where one of two or more co-sharers is not entitled to sue alone. A MUNESHAR TEWARI *v.* MAHESHA KUERI **197**

——— **ss. 8, 23 to 30**—Thekedar, *whether tenant—Fixed-rate tenancy, creation of—Pleadings—Events happening during pendency of suit, consideration of—Technical objections, value of.*

A *thekedar* is a tenant for the purpose of applying the provisions of the Agra Tenancy Act, and the provisions of sections 23 to 30 of the Act regarding the right of sub-letting are applicable to a *thekedar*.

Natha v. *Miankhan*, 2 Ind. Cas. 552; 6 A. L. J. 649, followed.

A fixed-rate tenant is defined in section 8 of the Agra Tenancy Act and a person who does not come within the definition cannot be classed as a fixed-rate tenant.

A fixed-rate tenancy cannot be created by contract.

Bachchi v. *Bachchi*, 28 A. 747; 3 A. L. J. 513; A. W. N. (1906) 219, followed.

Courts sit for the purpose of administering justice and where the rights of the parties are clear, a Court is not debarred from doing justice by a merely technical objection.

Plaintiffs brought a suit for possession of property on the basis of a gift from their father. The suit was dismissed on appeal although in the meantime their father had died and his right to the property in suit and the plaintiff's right of succession to their father were admitted :

Held, that the plaintiff's suit must be decreed on the basis of inheritance and they must not be relegated to a fresh suit merely because they had not asked for an amendment of the plaint or because an amendment would affect the nature of the suit. A INDER DEO RAI *v.* RAM CHARITTER RAI, (1923) A. I. R. (A.) 560 **971**

——— **s. 9**, *scope of—Entry as to fixed-rate tenancy in Revenue papers—Presumption, whether rebuttable.*

The presumption about the correctness of the entry made at the time of the last revision of records before the commencement of the Agra Tenancy Act, mentioned in section 9 of the Act, is conclusive only to show that the land was a fixed-rate tenancy at the time the entry was made. There is no presumption that the nature of that land can never in future be altered. The mere fact that the land continues to be recorded as a fixed-rate tenancy cannot necessarily mean that it has ever remained such a tenancy; and evidence can be adduced to show that it has altered its nature subsequent to the date of the entry. Such an alteration may be effected by surrender, ejectment, express agreement with landlord or merger.

Per *Sulaiman, J.*—Section 9 of the Agra Tenancy Act in terms is not confined to a dispute between landlord and tenant. It is quite general in its scope and is applicable to all cases where a dispute as to the nature of tenancy arises no matter whether that dispute arises against a landlord or not.

Per *Lindsay, J.*—The scope of section 9 of the Agra Tenancy Act is strictly limited and the rule laid down in that section can only be applied in litigation arising between a landlord and tenant, when the matter in issue between the landlord and tenant is the nature of a tenancy.

Jainath Pathak v. *Kalka Upadhya*, 13 Ind. Cas. 643; 34 A. 285; 9 A. L. J. 238, relied on. A SHEO NANDAN *v.* BALGOBIND MISRA, 21 A. L. J. 697 **647**

——— **ss. 10, 34**—*Transfer by proprietor, effect of—Usufructuary mortgage of proprietary rights—Sale of equity of redemption—Position of vendee—Vendee in possession by arrangement with vendor—Suit for arrears of rent, whether maintainable.*

When a proprietor makes a transfer, he loses his *sir* and *khudkasht* rights under section 10 of the Agra Tenancy Act even in the land which he has been cultivating for 12 years and becomes an ex-proprietary tenant.

When a proprietor executes a usufructuary mortgage of his land and then sells the equity of redemption, the vendee does not acquire *khudkasht* rights in the holding.

If the vendee by private arrangement with his vendor, obtains cultivatory possession of the holding he can be sued by the land-holder for arrears of rent under section 34 of the Agra Tenancy Act. A GULAB SINGH *v.* SHIB LAL, 21 A. L. J. 331; (1923) A. I. R. (A.) 347 **286**

——— **s. 22**—*Joint cultivation determined—Person in joint cultivation of holding or part thereof, whether can redeem mortgage.*

If one parcel of a holding is mortgaged and another parcel is free from the mortgage, and a person is joint in cultivation with the mortgagor in the latter, that is enough to give him a right to redeem the former.

If the entire holding is mortgaged the fact that a person was in joint cultivation with the mortgagor before the mortgage would equally give him a right to redeem the mortgage.

Jointness in cultivation is determined by the fact of cultivation itself and not by its extent. A GANESH DIN *v.* LACHMAN SINGH **755**

Agra Tenancy Act—contd.

——— s. 34—*Squatter in possession without consent of landlord—Occupancy rights, when accrue*—Zemindar, *whether can sue for ejectment.*

Where a squatter has been in possession of land without the consent of the landlord his occupation for any number of years would not vest him with the rights of an occupancy tenant; but occupancy rights would commence to accrue from the date the squatter commences to pay rent.

The question as to when a presumption arises that the possession of a tenant is without the consent of the landlord depends upon the facts of each case.

It is open to the *zemindar* to treat a squatter as a tenant by bringing a suit for ejectment against him.

Babu Sat Narain Prasad v. *Ram Kumar*, Sel. Dec. No. 3 of 1910, followed. A CHHAJJU *v.* JHABBA **681**

——— s. 36—*Rent, whether includes produce of grove—Suit by grove-holder for value of fruit wrongfully appropriated by* zemindar—*Jurisdiction.*

The produce of a grove which the grove-holder is liable to render to the *zemindar* comes within the definition of rent.

Raghubir Rai v. *Madho*, 41 Ind. Cas. 908; 15 A. L. J. 623; 39 A. 605, followed.

Plaintiff, a grove-holder, sued the *zemindar* claiming the value of fruit wrongfully appropriated by the latter:

Held, that the intention of the framers of the Tenancy Act was to include a case like the present within the jurisdiction of the Revenue Court. A RABI PRATAB NARAIN SINGH *v.* RAM PRASAD BHARTHI, 21 A. L. J. 646 **502**

——— ss. 95 (a) 167—*Suit for declaration of occupancy rights against* zemindar *and co-tenant —Jurisdiction of Revenue Court.*

Having regard to the provisions of section 167 of the Agra Tenancy Act, a suit by a tenant under section 95 (*a*) of that Act against the landlord and a co-tenant, for a declaration of occupancy rights is cognisable by a Revenue Court, and not by a Civil Court. A KHAIRUDDIN *v.* SAHU GULAB DAS **220**

——— s. 164—*Co-sharers—Suit for profits—Gross rental—Arrears, whether can be allowed —Compensation paid in Land Acquisition proceedings, whether recoverable.*

In a suit for profits against a *lambardar* it was found that the amount of arrears was probably large, the village was cannal irrigated, the bulk of the tenants were occupancy tenants, and the defendant had not filed proper and correct accounts. The Court passed a decree allowing profits on the basis of gross rental:

Held, that, under the circumstances of the case, the decree was a proper one.

Where, in a suit for profits against a *lambardar*, the Court gives a decree on the baiss of gross rental, it cannot allow in addition any sums collected on account of arrears of previous years.

A co-sharer cannot in a suit for profits, recover his share of the compensation paid to the *lambardar* under the Land Acquisition Act, in respect of the acquisition of a plot of land, as the amount of compensation cannot properly be treated as *sewai* income. A CHHAMMI LAL *v.* SUKHRANI KUNWAR, (1923) A. I. R. (A.) 537 **19**

Agra Tenancy Act—concld.

——— ss. 165, 177 (e)—*Suit for profits—Question whether defendant entitled to share in profits, whether question of title—Appeal, whether lies—Revenue papers, entry in, value of—Alteration of entry after institution of suit, effect of.*

The question arising in a suit for profits whether the defendant is a mortgagee of the proprietary right or has no right in the share in dispute is a question of title within the meaning of section 177 (*e*) of the Agra Tenancy Act and, therefore, an appeal lies in such a suit even where the value of the suit is below Rs. 100.

Kalyan Mal v. *Samad*, 18 Ind. Cas. 244; 35 A. 157; 11 A. L. J. 118, followed.

In a suit for profits the entry of the plaintiff's name in the Revenue papers as a proprietor must be taken as conclusive in his favour irrespective of the fact whether it does or does not correctly represent the mutation order on which it is based.

Durga Parshad v. *Hajari Singh*, 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 (F. B.), followed.

Where the plaintiff in a suit for profits is a recorded co-sharer at the date of the institution of the suit, his right to a decree will not be taken away by an order subsequently passed by the Revenue Court removing his name from the *khewat* even though the order is based on a finding that the original entry was wrong.

Lachman Prasad v. *Shitaba Kunwar*, 59 Ind. Cas. 639; 43 A. 177; 18 A. L. J. 1008; 2 U. P. L. R. (A) 386, followed. A DHIRJA *v.* MITHAN LAL, (1923) A. I. R. (A.) 562 **914**

Amendment of plaint—Discretion of Court—Amendment, effect of. *See* CIVIL PROCEDURE CODE, S. 153 **317**

Appeal (Civil)—*Appeal against dismissal of application to set aside* ex parte *decree—Failure to file copy of dismissal order—Appeal, competency of.*

In an appeal against an ultimate order dismissing an application to set aside an *ex parte* decree, for non-compliance of the conditional order granting re-hearing, it is incumbent on the appellant to file a copy of the order of dismissal along with a copy of the conditional order. His failure to do so, however, is a technical defect and would not on that ground render the appeal incompetent. O INDAR SINGH *v.* GURDAYAL SINGH **86**

———, *competency of—Order of Special Judge refusing to set aside abatement of an appeal —Bengal Tenancy Act (VIII of 1885), ss. 105, 109 A.*

An appeal lies to the High Court from an order of a Special Judge refusing to set aside the abatement of an appeal pending before him and arising out of a suit under section 105 of the Bengal Tenancy Act. C KRISHNADAS ACHARJEE CHOWDHURY *v.* SAMSAN ALI SHEIKH, 37 C. L. J. 139; (1923) A. I. R. (C.) 431 **925**

Appeal (Civil)—concld.

——— Joint decree, appeal against—Some decree-holders not made party, effect of. *See* CIVIL PROCEDURE CODE, O. XXII, R. 4 **14**

———Mortgage suit—Order granting personal decree—Court-fee payable. *See* COURT FEES **21**

———, new issue in—Objection not raised by other party, effect of. *See* ADVERSE POSSESSION **251**

——— *Objection to document admitted by First Court, whether entertainable.*

It is too late in appeal to object to the admissibility in evidence of documents, for instance, answers to interrogatories, which have been admitted without objection in the First Court. *Shahzadi Begam* v. *Secretary of State*, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.), followed. **L** RAM CHAND *v.* BANK OF UPPER INDIA, LIMITED, DELHI, 3 L. 59; 24 P. W. R. 1922; (1922) A. I. R. (L.) 281 **187**

——— Order on application for substitution made after expiry of limitation, whether appealable. *See* CIVIL PROCEDURE CODE, O. XXII, R. 3 **17**

———(**First**)—*Printing documents—Practice—Adjournment for printing, whether can be granted.*

The practice of the Lahore High Court with regard to the printing of records in first Appeals is, that the oral evidence is printed at the expense of the appellant, whereas documents are printed at the expenses of the party desiring it.

It is not the duty of an appellant to get those documents printed on which the respondent relied in the Court below.

In the absence of a reasonable excuse for the failure of a party to get the necessary documents printed the Court will not adjourn the hearing of a case to enable it to get them printed. **L** KARTAR SINCH *v.* LABH SINGH, 5 L. L. J. 190; (1923) A. I. R. (L.) 355 **685**

———(**Second**)—Adverse possession, finding of—Finding of fact or law. *See* PLEADINGS **51**

——— *Error as to admissibility of evidence.*

When the defect in the judgment of the lower Appellate Court is due to an error as to the admissibility of evidence, its findings can be impeached in second appeal. **C** TARA KUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH, 36 C. L. J. 389, (1923) A. I. R. (C.) 261 **383**

——— *Finding based on inferences from documents, whether one of fact.*

A finding based on inferences to be derived from documentary evidence is a finding of fact and cannot be disturbed in second appeal. *Lachman Lal* v. *Kanhaya Lal*, 22 C. 609; 22 I. A. 51; 6 Sar. P. C. J. 558; 11 Ind Dec. (N. S.) 405 (P. C.), followed. **O** BINDESHRI PANDE *v.* SHEO RATAN PANDE, 9 O. & A. L. R. 443 **811**

——— *Finding of fact — Inference drawn from facts.*

Appeal (Second)—concld.

Where a Court of first appeal draws an inference from the facts of a case that the consideration for a bond sued on was the withdrawal of a non-compoundable case, the High Court cannot, in second appeal, question the correctness of the inference. **Pat** R. S. BION *v.* SHEO GULAM LAL **843**

——— *Finding of fact — Wrong inference from facts—Gift, incomplete for want of acceptance.*

In second appeal it is not the business of the High Court to assess the value of evidence relied upon by the lower Appellate Court. Nor does a wrong inference from facts entitle the Court to interfere with a finding of fact in second appeal.

A finding that a gift was incomplete for want of acceptance by the donee before revocation is a finding of fact and cannot be disturbed in second appeal. **O** NANHU *v.* RAM DAYAL 9 O. & A. L. R. 460 **818**

——— *New point, whether can be raised.*

A new plea involving questions of fact cannot be raised in second appeal. **O** RAGHO PERSHAD *v.* SECRETARY OF STATE FOR INDIA, 9 O. L. J. 629; (1923) A. I. R. (O.) 114 **369**

——— *Proprietary rights, finding as to extent of—Finding of fact—Pleadings—Court, duty of—Costs—Clerical error—High Court, power of, to correct.*

A finding as to the extent of the proprietary rights of a vendor in immoveable property sold by him, arrived at upon a review of the entire evidence, is a question of fact, and cannot be challenged in second appeal.

The duty of a Trial Court is to do no more than try out a litigation on the pleadings of the parties and on the facts raised and put in issue before it, and not to anticipate and meet before hand any objection to a plaintiff's suit which may possibly be raised at the stage of second appeal.

Where a suit is tried out on a particular basis, the decision arrived at ought not in second appeal to be interfered with upon a plea which was not merely not raised by the defendant in the Courts below, but which is contrary to and inconsistent with the position there taken up by the defendants.

Where a High Court is seised of a matter as a Court of Appeal it has power to correct a clerical error as to costs. **A** IQBAL HAIDAR KHAN *v.* WASI FATIMA BIBI, 45 A. 53; (1923) A. I. R. (A.) 358 **1004**

——— Question of applicability of s. 41, Transfer of Property Act—Question of fact or law. *See* PLEADINGS **307**

——— Remand order, form of. *See* CIVIL PROCEDURE CODE, O. XLI, R. 25 **392**

Approver—*Complicity not proved—Statement, whether admissible.*

The statement of an alleged approver who is not proved to have participated in the offence is not admissible against the accused. **O** SANT RAM *v.* EMPEROR, 9 O. & A. L. R. 324; 24 Cr. L. J. 799 **543**

Arbitration—*Agreement to refer to arbitration in England—Award—Judgment on award in default—Suit on judgment, whether maintainable in India—Suit on award—Irregularity in procedure, whether good defence.*

By a contract in writing made in London the parties agreed to refer any differences arising out of their transaction "to arbitration in London in the usual manner" and to abide by the award. Differences having arisen the dispute was referred by the plaintiff to an arbitrator in London. The defendant did not, however, take any part in the arbitration and the artitrator gave his award in favour of the plaintiffs who recovered judgment in an English Court and then brought the present suit to recover the amount:

Held, (1) that the action upon the judgment could not be maintained as the judgment had been entered in default of appearance and the action had not been tried on the merits;

(2) that the suit was, however, maintainable on the award and any defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both the parties had agreed to be bound. **P C** OPPENHEIM *v.* MAHOMED HANEEF, 45 M. 496; 26 C. W. N. 642; 30 M. L. T. 291; 4 U. P. L. R (P. C.) 36; 16 L. W. 33; (1922) A. I. R. (P. C.) 120; (1922) M. W. N. 396; 43 M. L. J. 422; 24 Bom. L. R. 1245; 36 C. L. J. 444 **616**

——— *Award—Decree on award—Amendment of award—Executing Court, jurisdiction of.*

Where there has been a valid reference to arbitration, the decision of the arbitrator is final; where, however, there is, on the face of the award, a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. An execution Court has no such jurisdiction. **A** HAR PRASAD *v.* RAGHUBAR DAYAL, 21 A. L. J. 541; 45 A. 628 **817**

——— *Award, partial, validity of—Intention of parties—Party preventing completion of award, whether can object—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Award, whether can be recorded as adjustment.*

There is no rule of law that a partial award is invalid. The question has to be decided on the intention of the parties, the matter being a subject of contract between them.

Where one of the parties prevents the completion of the award by his own conduct, he cannot afterwards plead that the award is incomplete; the principle being that when a party to a contract wrongly prevents a thing being done by another party, that thing is deemed to be done.

Mackay v. *Dick*, (1881) 6 App. Cas. 251; 29 W. R. 541, followed

Where, after the time for submission of an award had expired the Court on application recorded the award under O. XXIII, r. 3 of the Civil Procedure Code:

Held, that the Court must be deemed to have exercised its powers to supersede the arbitration and deal with the suit and the order was, therefore, perfectly valid. **M** ALAGU PILLAI *v.* VELUCHAMI, (1923) M. W. N. 331, 509; 32 M. L. T. 369; 18 L. W. 261; 45 M. L. J. 76; (1923) A. I. R. (M.) 576 **609**

——— *Irregularity in proceedings—Failure to object—Waiver.*

A party to an arbitration having knowledge of an irregularity in the proceedings cannot lie by without objection and take his chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object. **R U** GUNAWA *v.* U. PYINNYADIPA, 1 R. 15; 2 Bur. L. J. 30; (1923) A. I. R. (R.) 187 **6**

——— *Reference to several arbitrators—Award made by some arbitrators, validity of.*

On a reference to several arbitrators together, when there is no clause providing for an award made by less than all the arbitrators being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for, as the office is joint, if one refuse or omit to act, the others can make no valid award. It is not enough that all the arbitrators join in deliberations, for the concurrence of all the arbitrators in the award is essential, and an award made by some only of the arbitrators is invalid.

United Kingdom Mutual Steamship Assurance Association v. *Housten*, (1896) 1 Q. B. 567; 65 L. J. Q. B. 484, *Gurupathappa* v. *Narasingappa*, 7 M. 174; 2 Ind. Dec. (N. S.) 707, *Muhammad Abid* v. *Muhammad Asghar*, 8 A. 64; A. W. N. (1886) 2; 4 Ind. Dec. (N. S.) 1068, *Lala* v. *Abdus Samed*, 17 Ind. Cas. 320; 16 O. C. 94, *Gur Bakhsh Singh* v. *Chutta Singh*, 47 Ind. Cas. 960; 5 O. L. J. 471, *Lachhman Prasad* v. *Pran Nath*, 65 Ind. Cas. 339; 8 O. L. J. 585; (1922) A. I. R. (O.) 108, relied on. **O** NAND KISHORE *v.* KISHORI LAL, 10 O. L. J. 29; 9 O. & A. L. R. 544; (1923) A. I. R. (O.) 181; 26 O. C. 350 **299**

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—*Alluvion and diluvion—Emerging of land on opposite bank of river—Land, whether can be treated as accretion to estate—Estate permanently settled—Liability to pay revenue for accretion—Sale in default of payment of revenue—Notice to proprietors, whether necessary—Bengal Land Revenue Sales Act (XI of 1859).*

In a suit by the Secretary of State claiming a declaration of title and posssession over the lands comprised in *Mahal* Turk Ballia, a revenue paying estate on the roll of the Collector of Shahabad, it appeared that the *mahal* was originally settled with proprietors in 1793. Owing to a change in the course of the river Ganges, it became diluviated and after some years emerged on the opposite bank and eventually became fit for cultivation. In 1911, it was sold for non-pay

Bengal Alluvion and Diluvion Regulation—concld.

ment of arrears of revenue and in the absence of bidders was purchased on behalf of the Government. The defendant claimed the land as his own as an alluvial accretion to his *zemindari* and as such exempt from any revenue. He also disputed the right of the Crown to sell, contending that the revenue claimed was not payable, and also challenged the validity of the sale upon the ground of defective and irregular procedure:

Held, that the defendant was not entitled to hold the land as part of his estate free from revenue merely because it happened to adhere to his land;

(2) that there was nothing to prove an estoppel against the plaintiff precluding him from treating such lands as outside the terms of the Settlement;

(3) that the sale was a valid sale under the provisions of the Bengal Land Revenue Sales Act, 1859, notwithstanding the fact that no formal notice was served on the proprietors demanding payment of the revenue. **Pat** KESHAVA PRASAD SINGH *v.* SECRETARY OF STATE FOR INDIA **881**

Bengal Cess Act (IX of 1880), ss. 47, 54. *See* BENGAL TENANCY ACT **547**

Bengal Estates Partition Act (V B. C. of 1897), ss. 7, 25, 29—*Partition, private, proof of—Separate shares—Acquiescence — Declaration, suit for, maintainability of.*

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors-in-interest were parties to the original partition.

Where parties have held separate shares for a very long time and have acquiesced in the Survey Record of Rights recording separate possession and ownership for a number of years, it is conclusive proof that they have acquiesced in the original partition of the estate among their predecessors-in-interest and that they have been holding their lands in accordance with the original partition.

If parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings are lost in antiquity and no deed of partition is forthcoming, is not a reason for disturbing divisions which have existed for such a long period.

Manoo Chaudhry v. *Munshi Chaudhry*, 43 Ind. Cas. 393; 3 P.L.J. 188; 5 P.L.W. 97, followed.

Sections 25 and 29 of the Bengal Estates Act have no application to a suit for a declaration that there has been a partition between the parties such as is contemplated by section 7 of the Act, and that the Collector has, therefore, no jurisdiction to proceed to make a partition. **Pat** NARSINGH THAKUR *v.* BISHUN PARGASH SINGH, 1 P. L. R. 258; (1923) A. I. R. (Pat.) 441 **642**

Bengal Ghatwali Lands Regulation (XXIX of 1814), applicability of. *See* GHATWALI TENURE **668**

Bengal Land Revenue Sales Act (XI of 1859). *See* BENGAL ALLUVION AND DILUVION REGULATION **881**

Bengal Tenancy Act (VIII of 1885), ss. 3 (5), 153—*Bengal Cess Act (IX B. C. of 1880), ss. 47, 54—Suit for recovery of cess—Appeal, whether lies.*

A suit for the recovery of cess was dismissed by a Subordinate Judge on the ground that the plaintiff was not entitled to recover cess from the tenant defendants as he had not served the notices contemplated by section 54 of the Bengal Cess Act. The amount claimed did not exceed Rs. 100:

Held, that sections 3 (5) and 153 of the Bengal Tenancy Act, read with section 47 of the Bengal Cess Act, rendered an appeal incompetent in the case.

Watson & Co. v. *Sreekristo Bhumick*, 21 C. 132; 10 Ind. Dec. (N. S.) 720, *Debendra Prasad Ghose* v. *Paresh Nath Mitter*, 4 C. L. J. 119, distinguished.

Mohesh Chunder Chuttopadhya v. *Umatara Deby*, 16 C. 638; 8 Ind. Dec. (N. S.) 421, *Rajani Kant Nag* v. *Jageshwar Singh*, 20 C. 254; 10 Ind. Dec. (N. S.) 172, followed. **C** BARENDRA KISHORE *v.* TRAILAKHYA NATH ROY, 37 C. L. J. 521; (1923) A. I. R. (C.) 673 **547**

——— **s. 50,** *presumption under, rebuttal of.*

A sub-division of a tenure does not affect the continuity of the tenure or render inapplicable the provisions of section 50 of the Bengal Tenancy Act.

A slight variation of rent, even though not explained, does not deprive the tenant of the benefit of the presumption under section 50 of the Bengal Tenancy Act. **C** TARA KUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH, 36 C. L. J. 389; (1923) A. I. R. (C.) 261 **383**

——— **ss. 52 (1) (b), 188**—*Rent, meaning of—Suit by co-sharer landlord for his share of rent—Tenant, whether can claim abatement.*

Rent under the Bengal Tenancy Act means, whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the holding by the tenant. That, which is payable by a tenant not to his landlord, which must mean the whole body of landlords, but only to one of them is not rent.

A suit by a co-sharer landlord for that which is payable to him by a tenant on account of the use or occupation of his share of the land is not a suit contemplated by the Bengal Tenancy Act, the decree passed in such a suit is not a decree under the Bengal Tenancy Act, and such a decree is executable under the Civil Procedure Code and not under the Bengal Tenancy Act.

In a rent-suit by a co-sharer landlord, who under an arrangement between himself, his co-sharer landlords and the tenants, was entitled to collect his share of the rent separately, the defendants claimed a reduction of the rent proportionate to a deficiency in the area of their holding;

Held that the tenants could claim the abatement of rent in this suit. **Pat** KESHO PRASAD SINGH *v.* RAMDENI SINGH, 2 Pat. 183; (1923) A. I. R. (Pat.) 397; 4 P. L. T. 689 **454**

——— **ss. 105, 109**—*Enhancement of rent—Application under s. 105, withdrawal of, effect of—Suit for enhancement in Civil Court, maintainability of.*

Bengal Tenancy Act—concld.

There is no provision in the Bengal Tenancy Act that an application made under section 105 of the Act and subsequently withdrawn has the same effect as if it had never been made.

An application for enhancement of rent made to a Revenue Officer under section 105 of the Bengal Tenancy Act, bars a subsequent suit in the Civil Court for the same relief, by virtue of the provision contained in section 109 of the Act, and it is immaterial that the application under section 105 had been withdrawn and the permission of the Revenue Officer for the institution of a civil suit obtained.

Chiodith v. *Tulsi Singh*, 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 467, *Aswini Kumar Aich* v. *Sarada Charan Basu*, 37 Ind. Cas. 253; 24 C. L. J. 79, *Kamini Sundari* v. *Abdul Halim*, 47 Ind. Cas. 420; 28 C. L. J. 254, *Saraj Kumar Acharji* v. *Umed Ali*, 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 19; (1922) A. I. R. (C.) 251, distinguished.

Abeda Khatun v. *Majubali Chowdhury* 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304, followed. **C** SASI KANTA ACHARJYA *v.* SALIM SHEIKH, 50 C. 625; 27 C. W. N. 987; (1923) A. I. R. (C.) 624; 50 C. 65 **1001**

——— **s. 173 (2)**—*Sale in execution of decree —Purchase by judgment-debtor, whether void.*

A sale in execution of a decree to the judgment-debtor himself is not void but voidable under sub-clause (2) of section 173, Bengal Tenancy Act, and remains valid until duly set aside.

Gopal Chunder Mitra v. *Ram Lal Goshain*, 21 C. 554; 10 Ind. Dec. (N. S.) 1000, followed. **Pat** MUHAMMAD AMIRUL HASAN *v.* MUHAMMAD JEWAD HUSSAIN, 5 P. L. T. 13 **769**

——— **s. 182**—*Landlord and tenant—Part of homestead used for keeping cattle, nature of—Termination of tenancy—Notice to quit.*

Where a settled *raiyat* uses a piece of land adjacent to his homestead for keeping cattle used for the purposes of agriculture, the land so used is either governed by section 182 of the Bengal Tenancy Act, or is used for purposes of agriculture. In either case the tenancy is not governed by the provisions of the Transfer of Property Act and cannot be validly terminated by a notice to quit.

Dina Nath Nag v. *Sashi Mohan Dey Tarafdar*, 31 Ind. Cas. 16; 22 C. L. J. 219; 20 C. W. N. 550, followed. **C** GIRIS CHANDRA *v.* BHABATARAN SHAKARI, 37 C. L. J. 524; (1923) A. I. R. (C) 667 **552**

Bihar and Orissa Public Demands Recovery (Act IV of 1914). *See* CRIMINAL PROCEDURE CODE, ss. 195, 439 **713**

Bombay Land Revenue Code (Bombay Act V of 1879), s. 83—*Tenant in possession for long time —Presumption of permanent tenancy—Signing of* kabuliyat *by tenant, effect of.*

The mere fact that, during the currency of his holding, a tenant signs a *kabuliyat* in favour of the landlord, which purports to be in terms an agreement for an annual tenancy, will not necessarily displace the presumption of the tenancy being a permanent one, where it is proved that the tenant has been in occupation of the land for so long that one cannot ascertain the commencement of the tenancy. But each case of this class must stand entirely on its own facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of section 83 of the Bombay Land Revenue Code. But that can be rebutted by the landlord by the production of a *kabuliyat*. Again, the effect of the *kabuliyat* can be destroyed by further evidence on the part of the tenant.

Where a person having obtained possession as Court purchaser determined to establish his right to the village lands and took *kabuliyats* from the tenants:

Held, that, under the circumstances of the case, the signing of the *kabuliyat* by the tenants destroyed any presumption about the permanent nature of their holdings. **B** VIJBHUKHANDAS KASHIDAS *v.* ISHWARDAS JAGJIVANDAS, 25 Bom. L. R. 431; (1923) A. I. R. (B.) 397 **292**

Bombay Regulation (XVI of 1827), ss. 19, 20—*Tenant of service* watan *lands—Adverse possession—Permanent tenancy, acquisition of.*

A person who has always claimed to be, and is, a tenant of service *Watan* lands cannot acquire any title to a permanent tenancy in the lands by adverse possession as against the *Watandar* from whom he holds the lands. **P C** MADHAVRAO WAMAN SAUNDALGEKAR *v.* RAGHUNATH VENKATESH DESHPANDE, 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C) 205; 33 M. L. T. 389; 47 B. 798 **362**

Bombay Revenue Jurisdiction Act (X of of 1876), s. 11—*Bombay Land Revenue Code (Act V of 1879), s. 203—Application for* sanad, *refusal of —Appeal, failure to prefer—Declaration, suit for, maintainability of.*

Plaintiff, who was the purchaser of certain property, having failed to get possession of it, applied to the Collector for a *sanad*. The application was refused on the ground that plaintiff's vendor had not proved his title at the time of the Suburban Survey enquiry and the property had become Government property. Plaintiff, thereupon, brought a suit for declaration of his title and the grant of a *sanad*:

Held, that the plaintiff having failed to appeal under section 203 of the Bombay Land Revenue Code from the refusal of the Collector to grant a *sanad*, his suit was barred by the provisions of section 11 of the Bombay Revenue Jurisdiction Act. **B** PATEL AMBARAM KUBERDAS *v.* SECRETARY OF STATE FOR INDIA, (1923) A. I. R. (B.) 416 **196**

Bond—*Money payable on certain date—Suit instituted prior to that date—Decree, whether legal —Revision—Provincial Small Cause Courts Act (IX of 1887), s. 25.*

In an appeal against a decree for a sum of money due on a bond, it appeared that according to the bond the money was made payable on a

Bond—concld.

certain date and the suit was instituted before the due date:

Held, (1) that the bond being the basis of the plaintiff's claim no decree could be given because neither party contemplated any performance of the contract before the due date;

(2) that the decree given by the lower Court being illegal the High Court could interfere in revision. **Pat** BIBI NASIBAN *v.* EKNAM NARAYAN SINGH, 4 P. L. T. 606 **938**

Buddhist Law—*Burmese — Ancestral property—Joint estate—Onus—Presumption.*

The question of the burden of proof in respect of the jointness or otherwise of ancestral property in the hands of Buddhist co-heirs depends on the facts of each case.

Ma Hnin Zi v. *Ma Hnin Ye*, S. J. L. B. 22, dissented from.

There is no presumption under the Buddhist Law that property left by a person long deceased is part of an undivided estate among his heirs. According to the circumstances of the case, it may require much or very little evidence to sufficiently prove that the property is undivided but, when land has been in exclusive possession of others for a long period the person asserting that it forms part of an undivided estate should be required to prove the fact.

Maung Lu Pe v. *Maung Lu Gale* 2 U. B. R. (1897-1901) 418, relied on. **L B** MAUNG SHWE LAL *v.* MA KYWE (1923) A. I. R. (R.) 92 **9**

——— *Inheritance — Child of divorced wife when disentitled to inherit—Child living separate from father at his request, rights of.*

It is settled law that if a child on the divorce of his mother accompanied by partitioned of property goes to live with her and ceases to be a member of his father's household, he is debarred from inheriting from his father.

A child, however, who, on the divorce of his mother, merely at his father's request lives separately from him, is not included amongst the six classes of children who are not entitled to inherit. **R** MA NGWE KIN *v.* MA HME 1 R. 421 (1923) A. I. R. (R.) 206 **100**

——— *Marriage—Several wives—Part of property put in name of one wife, effect of—Divorce.*

Marriage among Buddhists, even in Burma, is ordinarily a permanent bond, which subsists until it is broken, and the burden of proving that it has been broken lies on the person alleging it.

Thein Pe v. *U Pet*, 3 L. B. R. 175 (F.B.), relied on.

Where a man has a considerable amount of property, and several wives, the fact that he puts part of his property into the name of one wife does not, on the face of it, go far towards showing that the other wives have been divorced. **R** MA LUN ME *v.* MA KIN, 2 Bur. L. J. 671 (1923) A. I. R. (R.) 155 **1037**

——— *Succession — Parentage, determination of—Evidence of general repute, value of—Devolution of shares—Grandchild v. step-grandmother.*

In determining the parentage of a person for purposes of succession, evidence of general repute is of considerable importance, where the deceased has not left any blood relations and the events material for the decision of the question happened very long ago.

Semble.—The share of a grandchild as against the step-grandmother in the absence of any issues of the second marriage is one-half of the "*payin*" and one-eighth of the "*lettet-pwa.*" **R** MA HMUN *v.* MA NGWE THIN, 1 R. 34 (1923) A. I. R. (R.) 171 **104**

Bundhelkhand Alienation of Land Act (II of 1903), ss. 6, 17, 22—*Execution of decree—Reference to Collector—Collector, powers of—Civil Court, whether can question Collector's act—Third parties, whether bound by Collector's order—Co-sharer in undivided* patti, *decree against—Mortgage, usufructuary, of specific plots, whether can be granted.*

Section 6 of the Bundhelkhand Alienation of Land Act provides various ways in which the Collector can exercise the powers given to him by the Act. It is entirely within his discretion which of those ways he shall adopt, and no Civil Court can question the exercise of his discretion in this matter.

Section 22 of the Bundhelkhand Alienation of Land Act, does not cover any act which is done by the Collector in excess of the powers conferred on him by the Act.

Where the Collector acts in excess of his powers under the Act, or where his order affects the rights of third parties, the Civil Court has jurisdiction to scrutinise it and to grant the necessary relief in respect of it.

A decree against a co-sharer in an undivided *patti* was transferred to the Collector under section 17 of the Bundhelkhand Alienation of Land Act. The Collector selected certain plots out of the undivided *patti*, the area of which he considered corresponded to the share of the judgment-debtor, and granted a usufructuary mortgage of the plots to the decree-holders:

Held, (1) that the Collector had no power to transfer to the decree-holders the actual possession of plots of which the judgment-debtor himself was not in actual possession;

(2) that the only right which the Collector could transfer was the right to which the judgment-debtor himself was entitled, namely, the right to receive his share of the rents;

(3) that the mere fact that the judgment-debtor happened to be a *lambardar*, that is, the agent of the co-sharers for the purposes of collection did not in any way increase or alter his personal rights as proprietor. **A** PRAG NARAIN *v.* JWALA PRASAD, 21 A. L. J. 355; (1923) A. I. R. (A.) 458; 45 A. 450 **666**

Burden of proof—*Alienation of ancestral property, suit to set aside—Plaintiff member of joint Hindu family—Defendant, duty of—Practice.*

Where in a suit by a son to set aside an alienation by his father of ancestral property on the ground that the transaction was without legal necessity it is either admitted or proved that the plaintiff is a member of a joint

Burden of proof—concld.

Hindu family, and that the ancestral property had been transferred without the plaintiff's consent and not apparently in lieu of any antecedent debt, or at an auction-sale, the burden lies on the defendant transferee to justify the alienation.

Jamna v. *Nain Sukh*, A. W. N. (1887) 116; 9 A. 493; 5 Ind. Dec. (N. S.) 766 and *Sukhdeo Jha* v. *Jhapat Kamat*, 54 Ind. Cas. 946; 1 P. L. T. 49; (1920) Pat. 67; 2 U. P. L. R. (Pat.) 39; 5 P. L. J. 120, discussed and distinguished. A BAIJNATH RAI *v.* GOKUL RAI, 21 A. L. J. 659; (1924) A. I. R. (A.) 37 **498**

Burma Municipal Act (III of 1898), ss. 51, (8), 63 —*Specific Relief Act (I of 1877), s. 56 (i)—Municipal Tax—Injunction.*

Where a notification of the imposition of a tax under the Burma Municipal Act has been published, a Civil Court is debarred from enquiring whether the tax has been legally imposed.

Municipal Committee v. *Gurthi Lengayya* S. J. L. B. 405, relied on.

A suit for an injunction to restrain a Municipality from imposing a tax under the Burma Municipal Act is not maintainable, but under section 63 of that Act an assessee has the right to object to the assessment before a Sub-Committee of the Municipality, and can claim a reference to the High Court on the question of his liability to, or the principle of, assessment. L B CHAN HTOON AUNG *v.* AKYAB MUNICIPALITY, (1923) A. I. R (L. B) 75 **34**

Burmese Buddhists—*Marriage—Re-marriage of father—Partition.*

Amongst Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle the children of the first marriage, and where the claims of the children of the first marrriage have been settled they can make no further claim. L B MAUNG PO LUN *v.* MA E MAI, (1923) A. I. R. (R.) 57 **47**

Calcutta Improvement Act (V of 1911), s. 63. *See* TRANSFER OF PROPERTY ACT, S. 55 (1) (*a*) **996**

Calcutta Suburban Police Act (III of 1888), s. 47 (A.) *See* CRIMINAL PROCEDURE CODE, S. 172 **261**

Carriage by sea—*Bill of Lading—Damage to goods—Suit for damages—Burden of proof*

A Bill of Lading which states that the goods are shipped in 'good order and condition is a clean Bill of Lading and affords primary evidence that the goods, when shipped, were not damaged, and the burden of proving that the goods were damaged before being loaded lies on the ship-owners. If the goods are delivered in a damaged condition the ship-owners are liable for the damage in the absence of proof that the goods were loaded in a damaged condition but in a condition in which the ship-owners could not have discovered the damage by an external examination.

The Peter Der Grosse, (1876) 1 P. D. 414; 34 L. T. 749; 3 Asp. M. C. 195, relied on. R BIBBY BROTHERS v. CHARLES R. COWIE & CO., 1 R. 146 **916**

C. P. Criminal Circular No. 1-28 para. 6, *meaning of—Second Class Magistrate, whether competent to try adolescent accused.*

The Central Provinces Criminal Circular No. 1-28 para. 6, lays down that adolescents should be tried by a Magistrate not below the rank of a Sub-Divisional Magistrate; it does not say that a Second Class Magistrate may try an adolescent but must refer the case for punishment to the Sub-Divisional Magistrate under section 349 of the Criminal Procedure Code. Such a reference is invalid.

In a case where adults and adolescents are tried jointly, even if the case of the adolescent accused can be validly referred under section 349 of the Criminal Procedure Code, it is doubtful whether the case of the adult accused can be so referred, there being no other reason for referring the case of the latter except that they have been jointly tried with the adolescents. N BABA *v.* EMPEROR, 24 Cr. L. J. 738 **66**

Charitable endowments—*Temple of Sri Thyagarajaswami at Tiruvalur*—Katlais, *nature of—Scheme suit—Matters for consideration—Civil Procedure Code (Act V of 1908), s. 92.*

The *Katlais* attached to the temple of Sri Thyagarajaswami at Tiruvalur in the Tanjore District are independent institutions. The trustees of one *Katlai* are not subject to the control of the trustees of the other *Katlais*, the only common bond between them being that they are supposed to exist for the glorification of the deity in the temple either directly by services rendered within the temple or indirectly by charities carried on outside the temple in the name of the deity. The incomes of the various Katlais do not belong to the idol and cannot be mixed up and utilised for all the purposes of the temple indiscriminately but must be applied and appropriated only for the specific purposes in connection with the temple for which they were endowed.

Any scheme which is framed for a temple with such Katlais as the above, while it must maintain the individuality of the Katlais and not interfere with their essential character, must at the same time provide for some co-ordination of the various Katlais and for some control over them so as to secure the harmonious working of the Katlais when they have to co-operate in the temple service. The scheme must also make provisions for the prevention of the embezzlement of the funds of the Katlais or their diversion by the respective trustees and should contain stringent prohibitions against the borrowing or lending of money from or to the trustees or from one Katlais to another Katlai. M MANICKA VACHAKA DESIKA GYANA SAMBANDA *v.* VAITHILINGA MUDALIAR, 18 L. W. 247 **115**

Cheating—Loss, likelihood of. *See* PENAL CODE, SS. 415, 417 **76**

Chinese Buddhist Law—*Custom—Succession—Widow, position of—Chinese Buddhist widow marrying Burman, death of—Inheritance—Rule applicable—Marriage—Chinese Buddhist widow, whether can re-marry—Cohabitation—Presumption.*

Chinese Buddhist Law—concld.

A Chinese widow can marry again after the period of mourning for her first husband has elapsed.

Cohabitation over a period of years where there is no impediment to marriage raises a presumption of marriage.

Succession to the estate of a Chinese Buddhist widow who subsequently married a Burman is governed by the Chinese Customary Law.

According to the Chinese Customary Law the rule of inheritance is that, when a man dies his property is equally divided among all his sons; daughters succeed only when there are no sons, and the widow succeeds only when there are neither sons nor daughters. If there are sons or daughters the widow has only a right to administer the estate and to be maintained out of it and a claim on the estate for provision for her funeral, but the property vests in the children and not in the widow.

Under the Chinese Customary Law property which a woman brings to the marriage or which she acquires during the marriage belongs to her husband. **R** MAUNG PO MAUNG *v.* MA PYIT YA, 1 R. 161; 2 Bur. L. J. 79; (1923) A. I. R. (R.) 180 **933**

Civil Procedure Code (Act XIV of 1882), s. 396—*Civil Procedure Code (Act V of 1908), O. XX, rr. 12, 18, O. XXVI, rr. 13, 14—Partition suit—Preliminary and final decrees under the old and new Codes—Profits and mesne profits—Interest, whether payable.*

Under the old Civil Procedure Code there was no such thing as a preliminary decree and no such thing as a final decree in a suit for partition. As a matter of practice, the order ascertaining the several parties interested in the properties to be divided and their several rights therein used to be treated as itself a decree subject to appeal, and as such an order does contain the adjudication as to rights and shares and persons interested, the description of such an order as a decree may not be considered inapt. But the description of such an order as a preliminary decree and the description of the decree passed after the report of the Commissioner making the actual division as a final decree are not authorised by the old Civil Procedure Code.

A member of a Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager or the persons in possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him. Such profits cannot be described as mesne profits received by a person in wrongful possession, but profits appurtenant to the plaintiff's right in his share of the lands.

O. XX, r. 12 of the Civil Procedure Code relating to technical mesne profits does not apply to the claim of a plaintiff suing for partition of lands and the profits which are accruing on the lands which ultimately might fall to his share under the decree.

Civil Procedure Code—1882—concld.

Unless a preliminary decree for partition refuses, or is deemed to have refused, to grant profits the Court is not precluded from granting profits in its final decree.

In all adjudications which are not intended to be final but only to be determinations of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation;

In a partition suit the plaintiff is not entitled to claim profits before date of suit. As regards subsequent profits he is entitled to have an account taken of the profits of the properties proved to have been in the possession of the defendant, such profits being treated as appurtenances and accretions to the properties falling to his share.

A co-owner in possession of joint property is, ordinarily, not liable to pay interest on the share of the profits belonging to the other co-owners received by him. **M** RAMASWAMI AIYAR *v.* SUBRAMANIA AIYAR, 16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M.) 147; 46 M. 47 **804**

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XX—*Preliminary decree—Order in supplemental proceedings leading to final decree—O. XX, whether exhaustive—Trusts*—Trustee de son tort, *liability of—Accounts, nature of—Limitation Act (IX of 1908), s. 10, application of—Suit for accounts against* trustee de son tort.

In a suit relating to the administration of a *debutter* estate and for a declaration that an execution purchase of a portion of the trust estate by the trustee in the name of his son was invalid and inoperative, the Judicial Committee affirming the decree of the High Court held the sale to be invalid directed an account to be taken showing what if anything was due from the *shebait* to the estate and on the basis of this order of the Judicial Committee the Subordinate Judge made an order defining the extent and character of liability of the *shebait* to render an account and specifying the mode, the period and the properties:

Held, that this order of the Subordinate Judge was a decree, being an order which was in essence a preliminary decree in the supplementary proceeding leading up to the final decree to be made therein.

It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in O. XX of the Civil Procedure Code in order that it may form the basis of a final decree. Those cases are illustrations of preliminary decrees. Whether an order possesses the qualities of a decree preliminary or final or partly preliminary and partly final clearly depends upon its contents.

It may be that the Legislature contemplated that, ordinarily, there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertaining what is to be done, while the final decree stating the result achieved by

means of the preliminary decree, but there may be exceptions.

If a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a *trustee de son tort*, he may be called to account by the *cestui que trust* for the moneys he received under colour of the trust; such a person cannot be heard to say for his own benefit that he had no right to act as a trustee.

Under the Limitation Act a suit for accounts in respect of trust property falls within the scope of section 10 and a *trustee de son tort* stands in the same position as an express trustee.

There are two forms of account which can be claimed by a *cestui que trust* against the trustee. One is the common account being an account of all the moneys or funds comprised in the trust deed or from time to time subject to the trusts thereof as have been possessed or received by the trustee or by any person by his order. The other is an account, in addition to the former account, of the moneys or fund comprised in the trust-deed or from time to time subject to the trusts thereof which might without the wilful neglect or default of the trustee have been so possessed or received.

In taking the common account the *cestui que trust* cannot charge the trustee with anything beyond his actual receipts and is not permitted to show that there is some part of the trust funds which the trustee should have got in and has failed to get in.

But a trustee, when a common account is being taken, can properly be charged with a breach of trust which arises on the accounts themselves; he stands charged with his receipts and if he seeks to discharge himself by improper payments the discharge is disallowed. On the other hand, in order to obtain an account on the footing of wilful default against a trustee the *cestui que trust* must allege and prove at least one instance of wilful default.

An order on the footing of wilful default is a very strong one to make against an accounting party and is not made unless there has been a loss of assets received or assets which might have been received. **C** PEARY MOHUN MUKHERJEE v. MANOHAR MUKHERJEE, 27 C. W. N. 989; 38 C. L. J. 255 **373**

——— **s. 11**—*Decrees, several, deciding same question between parties—Appeal against one, competency of*—Res judicata.

When it appears to an Appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate Appellate Court, and only one of such decrees is brought before it in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him.

Zaharia v. *Debi*, 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861 (F. B.), distinguished.

Damodar Das v. *Sheoram Das*, 29 A. 730; 4 A. L. J. 587; A. W. N. (1907) 245, approved.

Balhari Pande v. *Shiva Sampat Pande*, 18 A. L. J. 40, *Dakhni Din* v. *Syed Ali Asghar*, 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995, *Anant Das* v. *Udai Bhan Pargas*, 19 Ind. Cas. 76; 35 A. 187; 11 A. L. J. 214, *Abdul Basit* v. *Ashfaq Husain*, A. W. N. (1908) 211; 4 M. L. T. 172 and *Ramcharan* v. *Lachman Pershad*, 9 Ind. Cas. 667, overruled. **A** GHANSHAM SINGH *v.* BHOLA SINGH; 21 A. L. J. 465; (1923) A. I. R. (A.) 490; 45 A. 506 **411**

——— **s. 11**—*Fraud—Decree, setting aside of*—Res judicata.

Plaintiff sued to set aside a decree passed against him on the ground that it had been obtained by fraud. The alleged fraud consisted in a suppression by defendant of a part of the accounts whereby it was alleged the Court was deceived. The existence of any such accounts was denied by the defendant. It was found that in the previous suit, the truth or falsity of the accounts was adjudicated upon:

Held, that the alleged fraud had in fact been already adjudicated upon and the suit was not maintainable.

Kadirvelu Nainar v. *Kuppuswami Naicker*, 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; (1918) M. W. N. 514; 8 L. W. 103 (F. B.), followed. **L B** ARLANDU *v.* SITHAMBARAM, (1923) A. I. R. (R) 82 **278**

——— **s. 11**—*Mortgagee's suit for possession against stranger—Title at issue—Subsequent suit for redemption by mortgagor—Stranger, whether can set up title*—Res judicata.

A mortgagee's suit for possession was resisted by a stranger on the ground that the land belonged to him and that the mortgagor had no title to it. This suit was decreed. Subsequently, a son of the mortgagor brought the present suit for redemption. The contesting defendant in the earlier suit was also a party and raised the same plea of title:

Held, that in the previous suit the mortgagee sued as representing the estate and in the present suit, the plaintiff was really claiming through the mortgagee and the defendant was debarred from raising the same plea of title which had been adjudicated upon in the previous suit. **B** BAPUJIRAO *v.* RAGHUNATHRAO **285**

——— **s. 11**—Res judicata—*Cross-suits—Question directly and substantially in issue in both suits—Appeal from one decree—Decree not appealed from, whether operates as bar.*

One *J.* brought a suit for pre-emption against *D.* and *M.* basing his claim on the ground that he was the owner of the whole of the adjoining *Katra*. *D.* and *M.* resisted the suit and instituted a cross-suit for possession and partition of the *Katra* on the ground that after the institution of the pre-emption suit they had themselves pur-

Civil Procedure Code—1908—contd.

chased a portion of the *Katra* from a third person *C. J.* contested the right of *C.* to make the sale and the suits were, at the instance of the parties, tried together. The Court of first instance held that *C.* had no title in the *Katra* and not only dismissed the suit of *D.* and *M.* but also passed a decree for pre-emption in *J.'s* favour. *D.* and *M.* appealed only against the dismissal of their own suit:

Held, that there being no appeal from the decree in *J.'s* suit, the decree in that suit had become final and as the question of title was directly and substantially in issue in the pre-emption case, it was *res judicata* as between the parties and against *D.* and *M.* L MUHAMMAD JAN *v.* DULI CHAND, 3 L. L. J. 473 **583**

——— s. 11—Res judicata—*Execution proceedings—Issues of fact and law—Landlord and tenant—Non-transferable occupancy holding—Decree obtained by landlord against tenant—Holding, whether can be sold.*

A landlord who has sued his tenant and obtained against him a money-decree can, in execution thereof, sell the non-transferable occupancy holding of his tenant without the latter's consent.

An execution case is not a suit but the principle of law underlying section 11 of the Civil Procedure Code applies to proceedings in execution of decrees.

Section 11, Civil Procedure Code, draws no distinction whatever between an issue of fact and an issue of law; and an issue of law operates as *res judicata* in the same way as an issue of fact.

A landlord obtained a money decree against his tenant and attached a non-transferable occupancy holding belonging to the latter in execution. The execution was dismissed on the ground that the holding could not be sold in execution of a money-decree. It was subsequently decided by a Full Bench that a landlord was entitled to sell the non-transferable occupancy holding of his tenant in execution of a money-decree. The landlord again applied for execution of his decree:

Held, that the question having been tried and decided between the parties in the previous execution proceeding operated as *res judicata* and could not be re-opened.

Gowri Koer v. *Audh Koer*, 10 C. 1087: 5 Ind. Dec. (N. S.) 726, followed.

Alimunnissa Chowdhurani v. *Shama Charan Roy*, 32 C. 749; 1 C. L. J. 176; 9 C. W. N. 466, dissented from. Pat RAM LAL MALIK *v.* DEODHARI RAI, 2 Pat. 771; 5 P. L. T. 7 **781**

——— s. 11—Res judicata—*"Former suit," meaning of—Two suits decided by common judgment—Appeal in one suit—Decision in other suit, whether operates as* res judicata *in appeal.*

If the same question is in controversy between the same parties in two distinct litigations instituted, one after the other, but simultaneously pending, the final decision in the later suit, if given earlier, operates as *res judicata* in the earlier suit whose final stage is reached later.

The rule of *res judicata* is applicable to all the stages of a suit, till it is finally terminated and is not confined to Courts of first instance.

Civil Procedure Code—1908—contd.

The expression "former suit" in section 11 of the Civil Procedure Code means a previously decided suit, and the same rule applies to appeals.

Plaintiffs instituted a suit against defendant for confirmation of possession of land upon establishment of title. A few days later, defendant and his brothers instituted a suit against the plaintiffs for establishment of their title to a portion of the property involved in the first litigation. The two suits were tried jointly at the desire of the parties. The first suit was dismissed, and the second was decreed. Thereupon plaintiffs preferred an appeal to the District Judge. The appeal was directed against the decrees in both the suits, and copies of both decrees were attached to the Memorandum of Appeal, which, however, set out the name of defendant alone as the respondent, and his brothers, who were co-plaintiffs with him in the second suit were not impleaded:

Held, (1) that the appeal must be deemed to have been an effective appeal only in respect of the decree in the first suit and no effective appeal having been preferred so far as the second suit was concerned, the decree made therein became final;

(2) that the decision of the question of title in the suit under appeal was barred by the decision in the subsequent suit between the same parties and others, which had terminated earlier in a victory for the defendant. C ISUP ALI *v.* GOUR CHANDRA DEB, 37 C. L. J. 184; (1923) A. I. R. (C) 496 **591**

——— s. 11—Res judicata—*Question not finally decided—Limitation Act (IX of 1908), Sch. I, Art. 120—Declaration, suit for—Cause of action—Assertion of title—Limitation, commencement of.*

A *taluqdar* brought a suit for resumption of certain *muafi* plots against the plaintiff. In that suit defendant put in an application claiming to be a partner with plaintiff in the under-proprietary right. The suit was decreed as against the plaintiff only, and the question whether the defendant was a partner with th plaintiff was pronounced to be one for a Civil Court and he was discharged from the suit. More than six years after the date of the defendant's application in the resumption suit, plaintiff brought a suit for a declaration that the defendant had no superior or inferior right or co-partnership with plaintiff in the plots which were the subject-matter of the resumption suit:

Held, (1) that the question of the status of the defendant as regards the plaintiff not having been decided in the previous suit by the Revenue Court, it was not *res judicata*;

(2) that the defendant's plea in the resumption suit that he was a partner with the plaintiff furnished the latter with a cause of action and limitation began to run from the date of defendant's application and that the suit was, therefore, barred by time under Art. 120 of Schedule I to the Limitation Act. O KHALIL *v.* MOHAMMAD ISMAIL, 9 O L. J. 540; (1923) A. I. R. (O.) 101 **195**

——— s. 11—Res judicata—*Suit for partition of Hindu joint family property—Mortgage,*

alidity of, decision as to—Subsequent suit on ortgage—Interest and terms of mortgage, validity of, whether res judicata.

A Hindu father executed a mortgage of family property. His son brought a suit for partition to which the mortgagee was also made a party. One of the reliefs claimed in the suit was that the mortgage was not binding on the plaintiff. It was found that the entire amount of the mortgage was borrowed for legal necessity, and the relief in respect of the mortgage was refused. Subsequently, the mortgagee brought a suit for sale on the mortgage to which the mortgagor's son was made a party. He contended that there was no necessity to borrow at the rate of interest and on the terms stipulated for in the mortgage-deed:

Held, that in the previous suit the only question directly and substantially in issue was the validity of the mortgage, and that the question of the amount which the mortgagor or his son may be called upon to pay in the event of a suit for redemption being brought by him or in the event of a suit for sale being brought by the mortgagee on the basis of the mortgage-deed could not be and was not directly and substantially in issue in the previous suit, and that, therefore, the contention of the mortgagor's son in the present suit was not barred by *res judicata*. O BASANT RAI *v.* KESHO RAM, 9 O. L. J. 612; (1923) A. I. R. (O.) 139 **346**

——— **s. 11, O. XXIII, r. 1**—*Dismissal of suit for declaration—Permission given* suo motu *to file fresh suit—Subsequent suit for possession, whether maintainable*—Res judicata—*Relief, how determined—Change of events after institution of suit, effect of.*

In dismissing a suit for a declaration that a certain deed of gift was void, the Court went on to remark *suo motu* that plaintiffs were given liberty to file a fresh suit for possession. Such a suit was subsequently filed wherein the plaintiffs set up a custom contrary to the general law of reversion:

Held, that the remark of the Court did not amount to an order under O. XXIII, r. 1, of the Civil Procedure Code, and did not confer any right on the plaintiffs which they did not otherwise possess, or prevent the application of section 11, Explanation 4, to the question of custom which the plaintiff attempted to raise in the present suit.

The general rule is that relief will be granted according to the state of things at the date of institution. The Court is not precluded from granting the plaintiff a declaration because that relief has ceased to be appropriate owing to events occurring after institution.

Ram Adhar v. *Ram Shankar*, 25 A. 215; A. W. N. (1903) 236, followed. O FATEH SINGH *v.* JAGANNATH BAKHSH SINGH, 10 O. L. J. 132; (1923) A. I. R. (O.) 242 **549**

——— **s. 11, Expl. IV, O. XXII, rr. 3, 4, 12**—Res judicata—*Matter which ought to have been made ground of defence—Appeal, second, question, whether can be raised in—Execution of decree—Death of judgment-debtor—Abatement,*

Civil Procedure Code—1908—contd.

A plea of *res judicata* can be entertained in second appeal though not taken in the memorandum of appeal.

Muhammad Ismail v. *Chattar Singh*, 4 A. 69; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 634 (F. B.), *Chhadami Lal* v. *Shyama Charan*, 24 Ind. Cas. 12, relied on.

M. filed a suit against *P.* and *S.* for recovery of a certain share in a village on the allegation that *P.* had transferred that share to *M.* *S.* was made a party on the ground that *P.* had got a portion of the land in dispute mutated in his favour. The suit was decreed and the decree directed that the land should be taken from *P.* In execution it was discovered that *P* was in possession only of a very small portion of land and the share decreed to *M.* was made up from the share in possession of *S.* The latter filed an objection that there was no decree against him, that the transfer in his favour was prior to that in favour of *M.* and he was not, therefore, liable under the decree;

Held, (1) that the question of the ownership of *S.* over the land in dispute was directly and substantially in issue in the suit and the decision in the suit must be regarded as an implied adjudication to the effect that *S.* was not the owner of the share decreed to *M.*;

(2) that the direction in the decree to the effect that *M*'s share should be taken from *P.* was due to the fact that the Court was unaware that *S* claimed to be the owner of the land to which the decree applied;

(3) that the question of the ownership of *S.* was, therefore, *res judicata* under Explanation IV to section 11 of the Civil Procedure Code.

Gobind Lal v. *Baldeo Singh*, 24 Ind. Cas. 931; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914, followed. L MIR KHAN *v.* SHARFU, 5 L. L. J. 163; (1923) A. I. R. (L.) 560 **577**

——— **ss. 24, 115**—*Transfer of case—Notice to opposite party, absence of—Irregularity—Revision.*

In a matter coming before the High Court under section 115 of the Civil Procedure Code, it is open to the Court to refuse to interfere with any irregularity unless it considers that the irregularity is one of which the applicant in revision has real cause to complain.

A transfer of a case by a District Judge from one Court to another, on the application of a party, without giving notice to the opposite party, is an irregularity, but the irregularity will be treated as material only if it has made a difference to the party affected by it.

Zuboo Qadar Jang Bahadur v. *T. B. W. Bishop, Manager Nanpara Estate*, 58 Ind. Cas. 667; 23 O. C. 210; 7 O. L. J. 523; 2 U. P. L. R. (O.) 162 and *Fatima Begam* v. *Imdad Ali*, 58 Ind. Cas. 500; 18 A. L. J. 551; 2 U. P. L. R. (A.) 83, dissented from.

It is better for a case to be decided by a Judge who has actually heard the evidence or a great part of it, if this is possible without dislocation of work. O KARIM BAKHSH *v.* ABDUL HAQ, 26 O. C. 621; (1923) A. I. R. (O.) 240 **249**

Civil Procedure Code—1908—contd.

——— s. 29—*Suit by trustee against manager of trust property for accounts—Sanction of Advocate-General whether necessary.*

The suit contemplated by section 92 of the Civil Procedure Code must be a representative one, brought by the person interested therein against trustees in respect of the trust mentioned, in cases where there has been a breach of trust or, if there is none, where the directions of the Court or relief of the kind mentioned in the section itself are wanted.

A suit by a trustee against a person appointed by him to manage the trust property for compelling him to render accounts of his stewardship as manager and for possession of books and papers, the property of the trust, does not come under section 92 of the Civil Procedure Code and may be brought without the sanction of the Advocate-General. **N** AYUB KAREEM *v.* JAFFAR AYUB, 6 N. L. J. 209; (1923) A. I. R. (N.) 298 **45**

——— s. 39, O. XXI, r. 6—*Decree transferred for execution to another Court—Decree-holder, duty of, to make application for execution.*

Where there has been no application for the execution of a decree in the Court which passed the decree, the decree-holder is bound to make an application for execution in the Court to which the decree has been transferred, but if he has already made an application in the Court which passed the decree he is not bound to make a second application for the execution of the decree in the Court to which the decree has been transferred. **Pat** K. B. DUTT *v.* TARAPRASANNA ROY CHOWDHURY, (1923) Pat. 280; 2 Pat. 909; 5 P. L. T. 11 **753**

——— s. 41—*Execution of decree—Transfer of decree—Certificate, when to be sent—Jurisdiction to execute decree.*

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution is withdrawn from it, or until it has fully executed the decree, or has executed it so far as it has been able to execute it within its jurisdiction or has failed to execute it and has certified the result to the Court which forwarded the decree. It is only when one of these stages has been reached that the Court to which a decree has been sent is bound to send a certificate under section 41 of the Code of Civil Procedure to the Court which sent the decree, and in the case of a failure to execute, it is intended that there should be a complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure.

Abda Begam v. *Muzaffar Husen Khan*, 20 A. 129; A. W. N. (1897) 218; 9 Ind. Dec. (N. S.) 443, relied on.

It does not follow that because one application for execution fails in a Court to which a decree has been sent for execution, that that Court is bound to send a certificate under section 41 of the Civil Procedure Code to the Court in which the decree was passed. **B** VITHU *v.* GANESH RAMCHANDRA, 25 Bom. L. R. 453; (1923) A. I. R. (B.) 396 **149**

Civil Procedure Code—1908—contd.

——— s. 47—*Execution sale—Objection that property not covered by decree sold, whether maintainable.*

Where at a sale in execution of a decree property other than that covered by the decree is sold, an objection by the judgment-debtor that he has been dispossessed of property not covered by the decree is not maintainable under section 47 of the Civil Procedure Code. **A** MUNNA LAL *v.* THE COLLECTOR OF SHAHJAHANPUR, 44 A. 96; (1923) A. I. R. (A.) 470 **995**

——— s. 47—*One decree-holder agreeing to pay others but failing to do so—Sale in execution by other decree-holder—Fraud—Suit to set aside sale, whether competent.*

In a suit to recover property sold at an auction-sale in execution of a decree it appeared that one of several decree-holders had agreed, in consideration for a conveyance of certain land in his favour, to pay up his co-decree-holder but did not do so, with the result that the property was sold in execution taken out by the other decree-holder:

Held, that the sale could not be set aside by an application under section 47 of the Civil Procedure Code and that the suit was competent.

Prosunno Kumar Sanyal v. *Kali Das Sanyal*, 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 899 (P. C.), distinguished. **A** NARAIN SINGH *v.* ZALIM SINGH, (1923) A. I.R. (A.) 573 **351**

——— ss. 47, 144—*Execution of decree—Sale—Decree set aside—Auction-purchaser, whether can recover purchase-money from decree-holder—Remedy, proper.*

An auction-purchaser under a decree which has after confirmation of the sale, been set aside as the result of a separate suit can recover his purchase money from the decree-holder, and his remedy is by appplication under section 47 of the Civil Procedure Code.

An auction-purchaser is not bound to look beyond the decree; if a decree is in existence he is entitled to assume that it is a valid decree.

Rewa Mahton v. *Ram Kishen Singh*, 13 I. A. 106; 14 C. 18; 4 Sar. P. C. J. 746. 10 Ind. Jur. 428; 7 Ind. Dec. (N. S.) 13 (P. C.), followed.

One of the first and highest duties of all Courts is to take care that the act of the Court does not injury to any of the suitors.

Rodger v. *Comptoir D'Escompte de Paris*, (1871) 3 P. C. 465 at p. 475; 7 Moo. P. C. (N. S.) 314; 40 L. J. P. C. 1; 24 L. T. 111; 19 W. R. 449; 17 E. R. 120, followed. **A** BINDESHRI PRASAD TEWARI *v.* BADAL SINGH, 21 A. L. J. 228; (1923) A. I. R. (A.) 394; 45 A. 369 **873**

——— ss. 47, 148, O. XXXIV, r. 5—*Mortgage—Decree for sale—Compromise—Extension of time—Appeal, whether lies.*

The general provisions of section 148 of the Civil Procedure Code relate only to proceedings antecedent to the passing of a decree.

Where a final decree has been passed, the time fixed by the decree for the payment of money cannot be extended under the general provisions

of section 148; any order passed for extension of time by the Court in such a case must be deemed to be passed under the authority given to an Execution Court under section 47 of the Code and is appealable.

After a decree for sale had been passed in a mortgage suit the parties came to a compromise by which the amount of the decree was reduced on condition that the judgment-debtor paid the remaining sum by a certain date. The judgment-debtor failed to make the payment by the date fixed and applied for extension of time:

Held, (1) that time being of the essence of the agreement between the parties, the Court had no power to grant an extension;

(2) that in any case a Court has no power under O. XXXIV, r. 5 of the Civil Procedure Code to extend the time for payment after a final decree has been passed in a suit for sale.

Narendra Bahadur Singh v. *Ajudhya Prasad*, 5 Ind. Cas. 443; 13 O. C. 28, followed. **O** GANGA RATAN *v.* CHANDIKA PRASAD, 9 O. & A. L. R. 319 **573**

——— **ss. 47, 151**—*Order for payment of costs of commission, nature of—Enforcement of such order—Inherent power—Proceedings to enforce order, nature of—Appeal.*

An order passed by a Court for the payment of the costs connected with the execution of a commission which are recoverable from the parties to the suit, is virtually an order in favour of an officer of the Court, and may be enforced under the inherent powers conferred on the Court by section 151 of the Civil Procedure Code, and any proceeding taken to enforce such order is not a proceeding between the parties to the suit within the meaning of section 47 of the Code, and the order is not open to appeal. **A** GOPAL DAS *v.* GAURI SHANKER PRASAD **186**

——— **s. 47, O. XX, r. 14, O. XXI, r. 19**—*Oudh Laws Act (XVIII of 1876), ss. 14, 15—Pre-emption decree—Pre-emptor, whether bound to deposit costs awarded to vendee along with purchase-money—Pre-emptor, whether entitled to deduct costs from amount of purchase-money—Failure to comply with decree—Appeal, whether lies.*

Sections 14 and 15 of the Oudh Laws Act contain no provisions similar to that contained in r. 14 of O. XX of the Civil Procedure Code, requiring a pre-emptor decree-holder to pay, in addition to the purchase-money, the costs, if any, awarded to the defendant vendee.

In any case, where the decree itself does not so direct, the defendant vendee is not entitled to claim that the costs awarded to him should be paid with the purchase-money within the time allowed by the decree. On the other hand, a pre-emptor decree-holder is not entitled to deduct from the amount of the purchase-money the costs awarded to him and to deposit only the balance in Court.

Ishri v. *Gopal Saran*, 6 A. 351; A. W. N. (1884) 125; 4 Ind. Dec. (N. S.) 51, *Bechai Singh* v. *Shami Nath Tewari*, 10 Ind. Cas. 454, *Parmanand Raot* v. *Gobardhan Sahai*, 28 A. 676; A. W. N. (1906) 198; 3 A. L. J. 604 and *Kapuria Mal* v. *Wali Muhammad*, 65 Ind. Cas. 250; 2 L. 294; 23 P. L. R. 1922; 4 L. L. J. 354; (1922) A. I. R. (L) 142, dissented from.

Baldeo Parshad v. *Baldeo Singh*, 3 O. C. 323, and *Ali Husain* v. *Amin Ullah*, 15 Ind. Cas. 337; 34 A. 596; 10 A. L. J. 153, distinguished.

The effect of sections 14 and 15 of the Oudh Laws Act is that if a pre-emptor seeks to enforce his decree, he can only do so by paying the purchase-money into Court either before or on the day fixed for such payment before the Court rises, and if he does not so pay the sum, the decree becomes void and the right of pre-emption awarded by it is lost.

O. XXI, r. 19, of the Civil Procedure Code only applies to a case where an application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other. It has no application to a decree for pre-emption under which costs are awarded to the vendee.

A vendee against whom a decree for pre-emption is obtained subject to the payment of the purchase-money within a certain time is not a person entitled to recover that purchase-money from the plaintiff. It is open to the latter to pay that money, if he chooses to enforce his pre-emptive right, within the time allowed by the decree, or withhold payment and allow the decree to lapse. If he adopts the latter course, the vendee cannot compel him to make the payment or seek to recover the purchase-money by an application for execution. He may be able to recover the costs, if any, awarded to him against the plaintiff, but he cannot compel the plaintiff to take advantage of his pre-emptive right.

The question whether the terms of a pre-emption decree have been complied with or not is one affecting the satisfaction or the discharge of the decree within the meaning of section 47 of the Civil Procedure Code, and an adjudication of the question is, therefore, appealable.

Bharath Singh v. *Dharam Singh*, 21 Ind. Cas. 193; 17 O. C. 14 and *Jaggar Nath Pande* v. *Jokhu Tewari*, 18 A, 223; A. W. N. (1895) 43; 8 Ind. Dec. (N. S.) 856, relied on.

Janga Singh v. *Lachhmi Narain*, 57 Ind. Cas. 488; 23 O. C. 254; 7 O. L. J. 378; 2 U. P. L. R. (O.) 171, dissented from. **O** NILKANTH *v.* MAHABIR SINGH, 9 O. & A. L. R. 207; 26 O. C. 345 **558**

——— **s. 47, O. XXI, rr. 22, 66**—*Execution of decree—Notice to judgment-debtor, object of—Subsequent applications for execution—Fresh notice, whether necessary—Sale in execution—Objection on ground of illegality in conducting sale—Valuation of property in notice—Judgment-debtor, whether can contest valuation—Order refusing to set aside sale—Second appeal.*

No second appeal lies against an order refusing to set aside a sale in execution of a decree where the sale is attacked on the ground of irregularity in publishing and conducting the sale.

Civil Procedure Code—1908—contd.

The object of r. 22, O. XXI of the Civil Procedure Code is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree-holder's delay in executing his decree, but once the original decree has been put into execution and a notice has been served under the rule indicating his intention to proceed to execution, the rule does not contemplate that a first notice must be served for every execution application made more than one year after the last order against the judgment-debtor.

In a previous execution petition notice was duly served on the surviving judgment-debtor himself and the legal representatives of the deceased judgment-debtor. A sale took place but was eventually set aside on the 20th January 1919. The last application for execution was made on the 22nd December 1920 and the property was re-sold on the 16th March 1921. An application to set aside the sale was dismissed by the Munsif and the order was confirmed on appeal. A second appeal was preferred to the High Court:

Held, (1) that the order of the Court could not be regarded as one made under section 47 of the Civil Procedure Code and, therefore, no second appeal lay:

(2) that the notice under O. XXI, r. 66, having been duly served the judgment-debtor was estopped from contending that the notice gave an inadequate valuation of the property.

Macnaghten v. *Mahabir Pershad Singh*, 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N.S.) 1086 (P.C.) and *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, 21 Ind. Cas. 389; 38 M. 387; 14 M. L. T. 320; 25 M. L. J. 198, followed. **Pat** MAHADEO SINGH *v.* DHOBI SINGH, (1923) Pat. 283; 4 P. L. T. 721; 2 Pat. 916 **838**

——— **s. 48, O. XXXIV, r. 6**—*Transfer of Property Act (IV of 1882), ss. 89, 90—Mortgage-decree—Preliminary and final decrees—Execution—Limitation—Properties, whether can be included in application for execution after expiry of limitation.*

A preliminary decree upon a mortgage was passed on the 22nd November 1907 allowing six months' grace to the mortgagor. On the application of the decree-holder a final decree was made on the 4th July 1908; but the reliefs granted were not embodied in a formal decree, the order simply stating that the decree was made absolute as applied for:

Held, (1) that the preliminary decree was incapable of execution and that limitation for execution began to run from the date of the final decree, however, informally it was expressed;

(2) that no fresh decree was necessary to entitle the decree-holder to enforce his decree against properties other than those mentioned in the decree.

A decree-holder cannot, after the expiry of the period of limitation for execution of his decree; be allowed to amend a pending application for execution by adding to it a fresh list of properties against which he wanted to proceed.

Gnanendra Kumar Rai Chowdhury v. *Shayama Sunder Jen*, 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398, distinguished.

Asgar Ali v. *Troilokya Nath Ghose*, 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.). followed. **C** HAYATUNNESSA CHOWDHURANI *v.* ACHIA KHATUN, 50 C. 743; **1017**

——— **s. 73**, *scope of—Execution of decree—Rateable distribution—Some judgment-debtors common to all decrees—Enquiry—Court, duty of.*

When execution is sought of several decrees and some of the judgment-debtors are common to all the decrees, rateable distribution among the several decree-holders ought to be allowed of the assets realised from the sale of properties belonging to the judgment-debtors who are common to all the decrees.

Gonesh Das v. *Shiva Lakshmin*, 30 C. 583; 7 C. W. N. 414 (F. B.), *Nilmoni Dey* v. *Hira Lal Das*, 43 Ind. Cas. 452; 27 C. L. J. 100, *Bijoy Kumar Addya* v. *Rama Nath Barman*, 43 Ind. Cas. 715. *Ram Chandra Nath Kalia* v. *Raghunath Saran Singh Deo*, 46 Ind. Cas. 101; 16 A. L. J. 530, relied on.

Balmer Lawrie & Co. v. *Jadu Nath Banerjee*, 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N 1202, *Toola Ram* v. *Abdul Gafur*, 2; Ind. Cas. 476; 7 Bur. L. T. 67, distinguished.

The provision contained in section 73 of the Civil Procedure Code intends to give a substantial relief to the holders of decrees passed against the same judgment-debtor, and, therefore, even if the procedure is summary the consequences thereof are very material to the decree-holders and any enquiry that may be needed to give relief to the decree-holders should not be grudged by a Court. **Pat** INDERBASI KUER *v.* SATNARAIN SINGH, 4 P. L. T. 373; (1923) Pat. 216; (1923) A. I. R. (Pat.) 521 **626**

——— **s. 92**—Scheme suit—Matters for consideration. *See* CHARITABLE ENDOWMENTS **115**

——— **ss. 96, 100**—*Appeal—Order for re-trial—Decree.*

An order made by an Appellate Court directing a re-trial of a case with reference to an entry in the Record of Rights which was published after the decree of the First Court is a decree reversing the decree of that Court and as such, is appealable under section 96 of the Civil Procedure Code read with section 100. **C** BHAIRAB CHANDRA DUTT *v.* KALI KUMAR DUTT, 37 C. L. J. 491; (1923) A. I. R. (C.) 606 **1038**

——— **s. 99, O. III, r. 4**—*Rules as to* vakalatnamahs, *interpretation of*—Vakalatnamah *signed by person other than litigant, when proper.*

The rules as to *Vakalatnamahs* are more or less strict and they are made, no doubt, with a view to prevent fraud. But at the same time when it is clearly proved that no fraud has been committed and that what has been done has been done with

full knowledge and acquiescence of the party himself, it was never intended by these rules where some mere formal matter has not been complied with or where there has been some irregularity in presenting the case before the Court and where such formality or irregularity in no way affects the merits of the case that that should be taken as a matter of vital importance and it was for this very reason that section 99 of the Civil Procedure Code was passed.

Where an application by one *B.* to set aside a sale in execution on the ground of fraud and material irregualrity in conducting the sale was filed by a Pleader who was engaged not by *B.* himself but by one *T.* whom he had instructed to do so and who had signed the *Vakalatnamah* on behalf of *B*:

Held, (1) that the authority given to *T.* to file the petition must be taken to include the authority to instruct a Pleader;

(2) that the irregularity in this case was a trivial one and was covered by section 99 of the Civil Procedure Code. **Pat** BANWARI RAI *v.* CHETHRU LAL RAI **1033**

——— **s. 99, O. VI, r. 14**—*Omission to sign plaint—Irregularity.*

A decree passed in favour of a plaintiff cannot be disturbed in appeal on the ground that he omitted to sign the plaint as required by O. VI, r. 14 of the Civil Procedure Code, section 99 of the Code applies to such a case. **R** MA NGWE KIN *v.* MA HWE, 1 R. 42; (1923) A. I. R. (R.) 205 **100**

——— **ss. 109, 110**—*Subject-matter of suit, value of—Method of determination—Certificate, when can be granted—Landlord and tenant*—Pattah *—Terms, fair and equitable, how fixed—Construction—Rent, rate of—Madras Estates Land (Act I of* 1908), *ss.* 27, 28.

The High Court may with propriety grant a certificate for leave to appeal to His Majesty in Council where the proceeding in question raises the entire question of the contract relations between the parties and that question, settled one way or the other, affects a much greater value, and its determination governs rights and liabilities of a value beyond the limit.

Past practice is one of the elements to be taken into consideration in fixing, under the Madras Estates Land Act, 1908, what are the fair and equitable conditions of a particular *pattah*.

Under sections 27 and 28 of the Madras Estates Land Act the old rent continues until reduced or enhanced by special applications under the Statute.

Even in regard to penal provisions with a strict construction, no construction is open to a Court of Law which is in violation of what that Court considers to be the true meaning of the provision.

Plaintiff sued for recovery of rent said to have accrued and to be due by the defendants in respect of their holdings in accordance with the terms of a *pattah* which provided that the defendants shall cultivate the specified area of land, harvest the crops and apportion the plaintiff's dues. A further clause added that if the yield be carried away without acting in accordance with the above provisions then the defendants will pay at an average rate of 170 *kalams* 4 *marakals* per *veli* of *nanja*:

Held, that the rent of 170 *kalams* was not a penal rent but was a substituted rent and the plaintiff was entitled to recover at that rate. **P C** RADHAKRISHNA AYYAR *v.* SUNDARASWAMIER, 36 C. L. J. 450; 16 L. W. 18; 31 M. L. T. 31; 45 M. 475; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 257; 20 A. L. J. 937; 49 I. A. 211 **584**

——— **s. 110**—*Appeal to Privy Council—Subject-matter of suit—Interest between date of institution and date of decree, whether to be included.*

Although interest between the date of the institution of a suit and the date of the decree is not ascertained in the plaint and the total amount claimable on account of it cannot be ascertained until the decree is passed, it is a part of the amount claimed in the suit and must be taken into account for the purpose of determining the value of the subject-matter of the suit under section 110 of the Civil Procedure Code.

Radhakrishna Ayyar v. *Sundaraswamier*, 74 Ind. Cas. 584; 16 L. W. 18; 31 M. L. T. 31; 45 M. 475; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 207; 20 A. L. J. 937; 36 C. L. J 450 (P. C.), *Mathura Prasad Singh* v. *Ram Prasad Tewary*, 60 Ind. Cas. 523 at p. 524; 2 P. L. T. 340, relied upon. **M** RAGHUNATHSWAMI IYENGAR *v.* S. GOPAUL RAO, (1922) M. W. N, 652; 16 L. W. 682; 43 M. L. J. 622; (1923) A. I. R. (M.) 135; 32 M. L. T. **596**

——— **s. 110, O. XLV, r. 2, O. XLVII, rr. 4, 8,** *scope of—Limitation Act (IX of* 1908), *s.* 5—*Leave to appeal to His Majesty in Council—Extension of time—Sufficient cause—Estoppel—Failure to object to value of suit, effect of.*

The provisions contained in rules 4 and 8 of O. XLVII of the Civil Procedure Code make it clear that the granting of an application for review merely amounts to a decision to re-hear the case in which the decree or order in respect of which a review is claimed was passed. The Judge hearing the review is not entitled to do anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted, the Judge who has allowed the review becomes vested with jurisdiction to pass any order which the original Judge could have passed. It may be sufficient for him merely to alter the order of the original Judge, or it may be necessary for him to take some intermediate step such as an order in remand, or referring an issue.

Once an application for review is granted it cannot subsequently be dismissed.

The provisions of section 5 of the Limitation Act are applicable to an application for leave to appeal to His Majesty in Council.

A review application was granted by a Judge and an issue was referred to the lower Court. On receipt of the finding the Judge came to the conclusion that the judgment of which review had

Civil Procedure Code—1908—contd.

been granted was correct, but instead of passing an order in the same terms himself he dismissed the application for review. The unsuccessful party applied for leave to appeal to His Majesty in Council but meanwhile the time for making the application had elapsed:

Held, (1) that the original judgment of which review had been obtained had not been affected by anything which had subsequently taken place;

(2) that, therefore, the application for leave to appeal must be considered with reference to that order;

(3) that although the application was barred by time, yet having regard to the fact that this was due to the erroneous procedure adopted by the Judge granting the review who had wrongly dismissed the application for review after granting it, the applicant was entitled to the benefit of section 5 of the Limitation Act.

The value of property which is the subject-matter of a suit is a question of fact which may be concluded against a party by his admission.

A party cannot by admitting a lower valuation of a suit suffer an appeal to be heard by a Single Judge of a supreme Court and then claim a higher valuation for the purpose of obtaining leave to appeal to His Majesty in Council. O BHAGWATI PRASAD *v.* ACHHAIBAR SINGH, 9 O. L. J. 531; (1923) A. I. R. (O.) 93; 26 O. C. 24 **214**

——— s. 115—*Another remedy open—Revision, whether competent—Land Registration Act (VII B.C. 1876), s. 55—Reference by Collector to Civil Court—Civil Court, whether has jurisdiction to decide question of title.*

Where the party to whose prejudice an order has been made has another remedy, the High Court will not interfere with the order in the exercise of its revisional jurisdiction under section 115 of the Civil Procedure Code.

Where the dispute between two parties contesting each others' right to possession of certain lands was referred by the Collector to the Civil Court under section 55 of the Land Registration Act and the District Judge having tried the case came to the conclusion that a particular party's right prevailed; on an application for revision of the order to the High Court:

Held, that the District Judge had jurisdiction to decide the matter, and as there was no irregular or illegal exercise of the jurisdiction, the High Court could not interfere in revision. Pat KAPLESHWAR JHA *v.* RAGHUNANDAN PRASAD, 1 P. L. R. 370; 4 P. L. T. 718 **474**

——— s. 115—*Application for leave to sue as a pauper rejected—Revision, whether lies.*

An application in revision against an order dismissing an application for permission to sue as a pauper is permissible inasmuch as such an application is in itself a case within the meaning of that term as used in section 115 of the Civil Procedure Code.

Shamim-ud-din v. *Amir Hussain*, 4 Ind. Cas. 777; 12 O. C. 381, followed.

Buddhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 and *Mahadeo Sahai* v. *Secretary of State for India in Council*, 65 Ind. Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1, dissented from. O SHEO NARAYAN LAL *v.* MUNAQQA, 9 O. L. J. 610; (1923) A. I. R. (O.) 118 **344**

——— s. 115—*Revision—Appeal—Unappealable order—Appeal, memorandum of, whether can be treated as revision.*

Where an appeal is preferred to the High Court against an order from which no appeal is permitted, it is open to the Court to treat the memorandum of appeal as a petition under section 115 of the Civil Procedure Code, if the case is such that it would amount to a denial of justice if the order which is challenged were not interfered with. C HABIBULLAH *v.* GOLA ASMOTER KHATUN, 37 C. L. J. 395; 27 C. W. N. 720; (1923) A. I. R. (C.) 612 **575**

——— s. 115—Suit wrongly brought against President, District Board—Interference in revision. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, Art. 1 **223**

——— ss 115, 151, O. XXXIX, O. XL—*Security for mesne profits—Order not provided in Code—Inherent power of Court—Appeal—Revision—Possession—Mutation.*

No Court ought to allow itself to be prevented from doing substantial justice merely because it cannot find a section of the Civil Procedure Code under which its order will fall.

Abdul Karim Abu Ahmed Khan Chaznavi v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49, relied upon.

The Civil Procedure Code does not provide for an order for the taking of security for mesne profits. But if such an order is passed by a Court in exercise of its inherent power under section 151 of the Code, the order is not appealable.

The position of a trustee in possession of the trust property is wholly different from the position of the full owner. Therefore, while it is always reasonable to take security from a person who holds property in trust, it is a different thing to call a man to account for his expenditure of his own income.

If in a suit for possession and mesne profits a Court, acting under section 151, Civil Procedure Code, directs security for mesne profits to be taken yearly during the pendency of the suit and in fact takes security for one year's mesne profits from the defendant, who is in possession of the property in dispute, and whose possession has been recognised by a mutation order, it does not act without jurisdiction, but if its order is not essential for the ends of justice, it acts with material irregularity in inventing a form of relief not expressly mentioned in the Code.

Section 115 of the Civil Procedure Code ought to receive rather a liberal than a narrow interpretation.

Bai Atrani v. *Deepsing Barla*, 33 Ind. Cas. 358; 40 B. 86; 17 Bom. L. R. 1097, relied upon.

Therefore, where a Subordinate Court has an express jurisdiction to pass an appealable order, but goes out of its way to invent a novel form of proce-

dure, and consequently makes an order for which no appeal is provided in the Code, the High Court should consider whether the course adopted by the Subordinate Court was really necessary, and ought not to hold itself precluded from setting aside the order by taking a strict and narow view of the provisions of section 115, Civil Procedure Code.

If an order passed by a Subordinate Court under section 151, Civil Procedure Code, in exercise of its inherent power, is not open to revision under section 115, Civil Procedure Code, the High Court in dealing with such an order may exercise its own inherent power under section 151 of the Code.

Obiter.—Possession is *prima facie* evidence of ownership, and an order of mutation is a determination of the question which of the parties is entitled to possession. **O** BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH, 10 O. L. J. 209; (1924) A. I. R. (O.) 11 **835**

——— **s. 115, O. XXI, r. 89**—*Refusal to accept deposit—Refusal to exercise jurisdiction—Revision.*

A refusal to accept a deposit under O. XXI, r. 89, of the Civil Procedure Code tendered for the purpose of setting aside a sale is a refusal to exercise jurisdiction and a revision from such an order lies under section 115 of the Code. **Pat** AULAD ALI *v.* ABDUL HAMID, (1923) A. I. R. (Pat.) 490; 2 Pat. 715 **102**

——— **s. 115, O. XXI, r. 89, O. XLVI r. 1**—*Application to set aside sale—Appeal—Revision—Reference to High Court—Subordinate Courts, duty of.*

Per *Curiam*:—(*Walsh, J.*, dissenting)—No revision lies against an order of the lower Appellate Court passed in appeal from an order of the Trial Court disposing of an application to set aside an execution sale under O. XXI, r. 89 of the Civil Procedure Code.

A Subordinate Court is bound to follow a reported decision of the High Court to which it is subordinate in preference to the decisions of the other High Courts.

Per *Walsh, J.*—Subordinate Judges must not be too timorous in stating their doubts to the High Court in references under O. XLVI r. 1 of the Civil Procedure Code, in order to have them either removed or confirmed by final decisions of the High Court. **A** YAD RAM *v.* SUNDER SINGH, 21 A. L. J. 313; (1923) A. I. R. (A.) 392; 45 A. 425 **778**

——— **s. 115, O. XXIII, r. 1**—*Order on application to withdraw from suit—Discretion of Court—Revision.*

From an order on an application to withdraw a suit with leave to bring a fresh one, if the lower Court has applied its mind to the question whether sufficient cause under O. XXIII, r. 1, of the Civil Procedure Code is established, no revision to the High Court lies, whether the decision is right or wrong.

Ratan Lal v. *Muhammad Hamidullah Khan*, 60 Ind. Cas. 899; 19 A. L. J. 47; 2 U. P. L. R. (A.) 403 and *Jhunku Lal* v. *Bisheshar Das*, 46 Ind. Cas. 71; 16 A. L. J. 495; 40 A. 612, followed.

The High Court has power to revise an order such as the above if the lower Court has failed to exercise a judicial discretion in passing it. **A** NANNHU *v.* ROSHAN SINGH **112**

——— **s. 115, O XXXIII, r. 2**—*Application for leave to sue as pauper—Schedule of immoveable property omitted—Rejection of application—Revision, whether lies.*

Order XXXIII, r. 2, of the Civil Procedure Code specifically requires that the schedule attached to an application for leave to sue as a pauper shall be both of moveable and immoveable property. Therefore, where an applicant not merely omits to mention an item of immoveable property in the schedule but entirely fails to submit a list of such property, the application cannot be regarded as properly framed.

Kuppusawmy Aiyar v. *Muthusamy Aiyar*, 27 Ind. Cas. 891; (1915) M. W. N. 31; 1 L. W. 1068 considered. **O** SHEO NARAYAN LAL *v.* MUNAQQA, 9 O. L. J. 610; (1923) A. I. R. (O.) 118 **344**

——— **s. 115, O. XLVII, r. 7**—*Review, refusal to grant—Revision, whether lies.*

The granting of a review is a matter peculiarly within the discretion of the Judge who passed the decree; no other Judge can hear an application for review and if the Judge who tried the case refuses to grant a review, his order is by r. 7 of O. XLVII of the Civil Procedure Code expressly declared not to be appealable; nor is an application for revision against such order competent. **O** JAG MOHAN SINGH *v.* MATA BADAL, 9 O. L. J. 623; (1923) A. I. R. (O.) 153 **351**

——— **s. 115, Sch. II, para. 16**—*Arbitration—Award—Decree on award—Revision.*

It cannot be laid down that in no possible case can a revision be entertained against a decree passed in accordance with an award, even if the procedure of the lower Court has been altogether irregular and illegal.

Ghulam Khan v. *Muhammad Hassan*, 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.), *Merali Visram* v. *Sheriff Devji*, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017 and *Betana* v. *Kedar Nath*, 37 Ind. Cas. 400; 3 O. L. J. 583, relied on.

Where, however, the Court has considered the objections to the award on the merits and has come to, what the applicant contends is, a wrong decision as to whether there has been any irregularity on the part of the arbitrator, the case does come within the provisions of section 115 of the Civil Procedure Code and no revision lies.

Lalawan v. *Lachiya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 and *Ajodhya Prasad* v. *Badarul Husain*, 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427, relied on.

It is the clear intention of the Legislature that objections to an award on the ground of invalidity from any cause whatever should be

decided by the Court which had made the order of reference and by no other Court. O SHEO PALTAN v. SUKHDEO SINGH, 26 O. C. 107; (1923) A. I. R. (O.) 235 401

——— ss. 122, 123, O. XLI, r. 1—*Patna High Court Rules, Chapter V I I, r. 6—Appeal, second—Copy of judgment of Trial Court not filed within limitation—Appeal, whether barred.*

Section 122 of the Civil Procedure Code gives power to the High Courts to make rules regulating their own procedure and the procedure of the Civil Courts subordinate to their superintendence, and by such rules to annul, alter or add to all or any of the rules of the First Schedule to the Code. But in order to have the effect of varying the rules contained in the First Schedule, the rules made under section 122 must first have been considered and submitted by a Rule Committee appointed under section 123 of the Code.

Rule 6 of Chapter VII of the Patna High Court Rules requiring a copy of the judgment of the Trial Court to be filed along with the Memorandum of Appeal in a second appeal has not been made under section 122 of the Civil Procedure Code and has not, therefore, the effect of adding to r. 1 of O. XLI of the Code.

A second appeal filed within limitation cannot be rejected as barred by limitation merely because a copy of the judgment of the Trial Court was not filed within limitation, as required by r. 6 of Chapter VII of the Patna High Court Rules.

Narsingh Sahai v *Sheo Prasad*, 42 Ind. Cas. 855; 40 A. 1; 15 A. L. J. 835 (F. B.), distinguished.

Chunilal Jethabhai v. *Barot Dahyabhai Amulakh*, 32 B. 14; 9 Bom. L. R. 1138, relied on. Pat RAMDEO SINGH v. MUKHAN SINGH, (1923) Pat. 19 330

——— s. 141, O. IX, r. 9—*Application to set aside* ex parte *decree—Dismissal in default—Application for restoration, whether maintainable.*

Where an application to set aside an *ex parte* decree is dismissed for default, an application to set aside such dismissal lies under O. IX, r. 9, read with section 141, of the Civil Procedure Code.

Bhubaneswar Prasad Singh v. *Tilakdhari Lal*, 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.), *Ramgulam Singh* v. *Sheo Deonarain Singh*, 51 Ind. Cas. 152; 4 P. L. J. 287, dissented from.

Bepin Behari Saha v. *Abdul Barik*, 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446, *Gauri* v. *Hinga*, 59 Ind. Cas. 575; 23 O. C. 349, *Abdul Rahman Shah* v. *Shahana*, 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188, relied on. O JAMNA v. RAMRAJI, 9 O. L. J. 627; 9 O. & A. L. R. 32; (1923) A. I. R. (O.) 146 380

——— s. 145, *object of—"Personally," meaning of—Liability of surety, whether limited—Security, how enforced.*

The object of section 145, Civil Procedure Code, is to provide that where a person has become liable as a surety for the performance of a decree or for the restitution of any property taken in execution of a decree or for the payment of any money or for the fulfilment of any condition imposed in any suit or proceeding the party for whose benefit the security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety has been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him.

The word "personally" in section 145 of the Civil Procedure Code does not limit the enforcement of the security to a personal liability of the surety.

A security bond executed in favour of a Court for the performance of a decree can be enforced by the Court in the same way as a decree. A BETI MAHALAKASHMI BAI v. BADAN SINGH, 21 A. L. J. 604; 45 A. 649 927

——— s. 149—*Extension of time for payment of Court-fees—Application for leave to sue* in forma pauperis, *withdrawal of—Court-fees paid after limitation—Discretion of Court.*

Plaintiff applied for leave to sue *in forma pauperis*. A similar application made by him in another suit had already been rejected. He subsequently applied to withdraw his application and paid in the requisite Court-fee on the plaint after the expiry of the period of limitation for the suit and prayed that time may be extended under section 149 of the Civil Procedure Code:

Held, (1) that the application made by the plaintiff for leave to sue *in forma pauperis* after the rejection of a similar application in another suit was fraudulent;

(2) that, therefore, this was not a fit case for the exercise of the discretion vested in the Court under section 149 of the Civil Procedure Code.

Stuart Skinner v. *Orde*, 2 A. 241 at p. 249; 4 C. L. R. 331; 6 I. A. 126; 4 Sar. P. C. J. 31, 3 Suth. P. C. J. 627, 1 Ind. Dec. (N. S.) 685 (P. C.), distinguished. R SOOK LAL v. DAL CHAND, 1 R. 196; (1923) A. I. R. (R.) 256 835

——— s. 149, O. VII, r. 11—*Plaint filed on insufficient Court-fee—Balance made good after expiry of limitation, but within time fixed by Court—Suit, whether time-barred.*

A suit filed within limitation but on an insufficiently stamped paper, is not barred by time if the deficiency is made good within the time allowed by the Court even though limitation has in the meantime expired.

Jainti Prasad v. *Bechu Singh*, 15 A. 65; A. W. N. (1893) 29; 7 Ind. Dec. (N. S.) 758, dissented from.

Gaya Loan Office Limited v. *Awadh Behari Lal*, 37 Ind. Cas. 507; 1 P. L. J. 420; 3 P. L. W. 51, followed. A RAM DIAL v. SHER SINGH, 21 A. L. J. 387; 45 A. 518; (1923) A. I. R. (A.) 538 358

——— s. 149, O. XLI, r. 3—*Appeal—Court-fee, deficiency in—Rejection of appeal—Procedure—Extension of time—Discretion, exercise of—Interference by Appellate Court.*

The powers of an Appellate Court to reject a Memorandum of Appeal are set out in O. XLI,

r. 3 of the Civil Procedure Code. It has no power to reject an appeal on the ground that it is insufficiently stamped.

Under section 149 of the Civil Procedure Code a power is reserved to a Court in the matter of granting time for the making up of deficiencies in Court-fees, and where such discretion has been exercised, it will not be interfered with on appeal.

Where, however, the Court has not exercised any discretion in the matter at all, the Appellate Court will be justified in making an order of remand for the purpose. **A** JAI SINGH GIR *v.* SITA RAM SINGH, 21 A. L. J. 333; (1923) A. I. R. (A.) 349 **757**

——— **ss. 151, 152**—*Mortgage suit—Accidental omission of item of mortgaged property from plaint and decree—Amendment of decree—Power of Court.*

In a mortgage-deed drawn up under the direction of the mortgagor there was an accidental omission in describing one item of the mortgaged property. The omission was perpetuated in the plaint in a suit brought by the mortgagee on the mortgage-deed and was continued in the decree. Subsequently, at the instance of the decree-holder, the Court amended the decree so as to include the item which had been omitted:

Held, that the case was one of "an error arising in the decree from an accidental omission" within the meaning of section 152 of the Civil Procedure Code, and the Court had inherent power to make the amendment.

Mahboob Begum Sahiba v. *Lal Begum Sahiba*, 62 Ind. Cas. 652; 4 L. W. 445, *Somasundaram Chettyar* v. *Rama Krishna Kadir Velasami Naicker*, 22 Ind. Cas. 774; (1914) M. W. N. 107; 15 M. L. T. 102, relied on.

Jivan Sahai v. *Kalyan Mal*, A. W. N. (1906) 220, *Ahmed* v. *Shaik Essa*, 17 B. 657; 9 Ind. Dec. (N. S.) 431 and *Lakho Bibi* v. *Salamat Ali*, 20 A. 337; A. W. N. (1898) 59; 9 Ind. Dec. (N. S.) 576, distinguished. **R** MAUNG CHIT HAING *v.* N. A. R. M. CHETTY **1020**

——— **ss. 151, 152, O. XX, r. 3**—*Inherent power of Court—Power to re-call order passed by predecessor—Judgments, sanctity of.*

Section 151 of the Civil Procedure Code gives no power whatever, to a Judge to re-call an order passed by his predecessor-in-office. He is entitled to correct clerical or arithmetical mistakes in the judgment or errors arsising from any accidental slip or omission and he is also entitled to review a judgment if there are grounds for review, but otherwise he is not entitled to touch that judgment in any way. **Pat** BISHESHWAR PRATAP NARAYAN SAHI *v.* ASARFI SINGH **110**

——— **s. 151, O. XLI, r. 23**—*Remand, when can be made.*

Although under r. 23 of O. XLI of the Civil Procedure Code a remand can only be made on the grounds set forth therein, an Appellate Court is not confined to those grounds, and has inherent power to remand a case for a fresh trial on any other ground, if in the interests of justice, it considers it necessary to do so. Various circumstances may arise under which an Appellate Court may not be able to decide a case completely and a remand may become necessary in the interests of justice.

Abdul Karim Abu Ahmed Khan Ghaznavi v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598; 44 C. 929 (F.B.); 21 C.W.N. 877; 26 C.L.J. 49, relied on. **L** UMRI *v.* SHAH MUHAMMAD, 5 L. L. J. 269 **497**

——— **s. 151, O. XLVII, r. 1**—Review of judgment before decree signed—Inherent power of Court: *See* CONTRACT ACT, s. 69 **416**

——— **s. 152**—*Amendment of decree—Court, power of.*

A Court has no power to amend a decree passed by itself, apart from the rectification of a clerical error, etc., and if a Court directs an amendment which varies the operative part of the decree it exercises a jurisdiction which is not vested in it by law and its action is open to revision under section 115 of the Civil Procedure Code. **C** HABIBULLAH *v.* GOLAASMOTER KHATUN, 37 C L. J. 395; 27 C. W. N. 720; (1923) A.I. R. (C.) 612 **575**

——— **s. 152**—*Redemption suit—Memorandum about surplus profits—Failure to calculate profits up to date of possession—Decree—Appeal—Mistake, whether can be rectified.*

A decree was passed giving the right of redemption to the mortgagor and stating that Rs. 3,812 were the surplus profits in the hands of the mortgagee. For arriving at this figure calculation had only been made up to the 25th June 1920. Possession was given on the 2nd February 1922. When the preliminary decree was passed on the 18th November 1921 the Judge noted in the order sheet that when the decree is prepared the account will be made up to date. This note was however, overlooked and the profits were fixed at Rs. 3,812 only:

Held, that the failure to calculate surplus profits from the 25th June 1920 to 2nd February 1922 was a mistake, error or omission within the meaning of section 152, Civil Procedure Code, and could be rectified even during the pendency of an appeal against the decree. **A** BISHUN NARAYAN *v.* BIBI RAMJI **842**

——— **s. 153, O. VI, r. 17**—*Limitation Act (IX of 1908), s. 14—Amendment of plaint—Discretion of Court—Amendment, effect of—Exclusion of time spent in previous suit—Same cause of action—Good faith.*

An amendment of a plaint relates back to the date of the original institution of the suit provided there was nothing illegal about it.

Section 153 and O. VI, r. 17 of the Civil Procedure Code do not put any express restriction on the discretion of the Court to allow an amendment altering the entire character of the suit.

The plaintiff brought a suit in Court A on an account alleged to have been taken respecting a dissolved partnership between himself and the defendant. After inquiry the Court held that no such account had ever been taken. Instead of dismissing the suit, however, it returned the plaint, to enable the plaintiff, after amending the suit into one for taking an account of the dissolved partnership, to present the plaint in Court B,

Civil Procedure Code—1908—contd.

which alone was competent to try a suit of that description. The plaintiff, however, presented the plaint in Court B without any amendment, with the result that it was again returned, the Court holding that on the face of it, the suit was triable by Court A. The plaint was now presented back in Court A, which again returned it for proper presentation, after allowing it to be amended into a suit for an account and a share of the dissolved partnership. The plaint as amended was now finaly presented in Court B, but by this time the suit was time-barred, and the Court dismissed it after holding that the delay could not be condoned under section 14 of the Limitation Act. On appeal:

Held, (1) that in granting the amendment the Court A exercised its discretion in a judicial manner and that, as an amendment relates back to the time of the institution of the suit, the suit ultimately instituted in Court B was, for the purpose of section 14 of the Limitation Act, not only to be considered to be founded on the same cause of action as the suit at first instituted in Court A, but was in fact the same suit;

(2) that, however, as the plaintiff deliberately left the plaint unamended for a long time after the decision in Court A as to no account having been taken of the dissolved partnership, it could not be said that he was prosecuting the suit in "good faith" to enable him to take advantage of that section, and that the suit was rightly dismissed. N SHEONARAYAN *v.* RAMPRASAD, (1923) A. I. R. (N.) 241; (1924) A. I. R (A.) 17 **317**

——— **O. V, rr. 17. 19, 21**—*Service of summons —Summons affixed to door of defendant's house —Presumption—Temporary absence—Summons sent for service to another Court—Certificate of service.*

Where service of summons is effected on a defendant the very first time by affixing a copy of the summons to the door of his house, there can be no presumption that he had notice of the case or of the date fixed for the hearing.

Where a person is merely temporarily absent from his house when the process-server calls it cannot be said that he cannot be found within the meaning of r. 17 of O. V of the Civil Procedure Code.

Where a summons is sent for service to a Court under O. V, r. 21 of the Civil Procedure Code, it is the duty of such Court, after proper enquiry, to certify whether service has been sufficient or not. A certificate of the sufficiency of service recorded by the *munsarim* of the Court is neither legal nor of value. O MATHURA SINGH *v.* SHEO MOHAN PRASAD, 9 O & A. L. R. 437; 10 O. L. J. 337 **792**

——— **O. VI**—*Pleadings—Particulars—Courts, duty of—Procedure—Fraud, proof of.*

Courts should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met. This rule is of general application.

A defendant is entitled, before delivering his written statement, to have an order that the plaintiff shall deliver to him a pleading in compliance with the provisions of O. VI of Civil Procedure Code. Equally, a paintiff is entitled, before being called to take any further step in the action, to have proper particulars of the defendants' written statement. If the Judge is of opinion that a groundless application is made to him, the party putting in the application should be ordered to pay costs.

A Court should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application, such payment to be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff is in default, he should have his action stayed; and if the defendant is in default his defence should be struck out.

Particulars having been furnished, the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original pleading and the particulars.

To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true, that they were made for purpose of being acted upon and believed, that they were believed and acted upon and caused the actual damage for which the relief is claimed. A GAURI SHANKAR *v.* MANKI KUNWAR, 21 A. L. J. 571; 45 A. 624; (1924) A. I. R. (A.) 17 **466**

——— **O. VI. r. 4**—*Fraud—Suit by minor to set aside compromise—Pleadings—Particulars—Burden of proof.*

If it is sought to set aside a decree on the ground of fraud, the allegation of fraud must be clear, definite and specific.

Nanda Kumar Howladar v. *Ram Jiban Howladar*, 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457, relied on.

There is no warrant for the proposition that if a minor on coming of age comes forward to challenge a decree passed against him on the basis of a compromise, even though he does not allege in what way the compromise was invalid, the burden is immediately thrown upon the opposite party of establishing that sanction to the compromise was duly given and that all the proceedings in the suit in which the decree was passed were regular.

Partab Singh v. *Bhabuti Singh*, 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 40 I. A. 182 (P. C.), *Ganesha Row* v. *Tulja Ram Row*, 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.) and *Badr Prashad* v. *Gopal Behari Lal*, 50 Ind. Cas. 752; 41 A. 553; 17 A. L. J. 789, distinguished. A RADHA KRISHUN SHUKUL *v.* NOKH LAL SHUKUL, 21 A. L. J. 488; (1923) A. I. R. (A.) 566 **964**

——— O. VII, r. 1 (e)—*Pleadings—Plaint—Ownership relied upon in plaint—Particulars.*

Ownership is a mixed question of law and fact and a plaintiff who relies on ownership should set forth in the plaint facts justifying the assertion of ownership, as required by clause (*e*) of r. 1 of O. VII of the Civil Procedure Code. O KHALILULLAH SHAH *v.* EWAZ ALI, 26 O. C. 128; (1923) A. I. R. (O.) 214 **390**

——— O. VII, r. 11, O. IX, r. 9—*Dismissal of suit for default—Restoration—Illness of brother, whether sufficient cause.*

Plaintiff's suit was dismissed for default of appearance under O. IX, r. 8, Civil Procedure Code. In an application under r. 9 of that Order he asked for restoration of the case alleging the illness of his brother as the reason for his non-appearance on the day fixed for the hearing of the suit:

Held, that there was no sufficient cause for the plaintiff's non-appearance when the suit was called on for hearing, or for the restoration of the case. Pat RAMBHANJAN SINGH *v.* PASHUPAT RAI, 2 Pat. 784 **847**

——— O. IX, r. 6—*Defendant, absence of—Application for adjournment by Pleader, refusal of—Pleader retiring from case—Proceedings, whether* ex parte—*Medical certificate not believed by Court—Procedure.*

On the date fixed for the hearing of a suit defendant was absent and his Counsel applied for an adjournment which was refused. Counsel thereupon retired from the case. Plaintiff's evidence was then recorded and the suit was decreed but the decree stated that the suit had been heard in the presence of Counsel for both parties:

Held, (1) that the decree actually passed was not an *ex parte* decree;

(2) that from the moment when the application for adjournment was refused the defendant should have been treated as both absent and unrepresented and the subsequent proceedings should have been *ex parte*.

If a Court sees good reason to distrust a medical certificate tendered on behalf of a party, its proper course is to summon the Doctor, or Medical Officer who gave the certificate, and to insist upon his attendance. But it is not fair to penalise a party on mere suspicion engendered in the mind of the Court by the fact that a number of certificates have been tendered in support of successive applications for adjournment. A KRISHNA DASS *v.* RAM UGRAH SINGH, 21 A. L. J. 500; (1923) A. I. R. (A.) 549 **845**

——— O. IX, r. 9, *scope of—Cause of action—Suit to eject defendant as tenant—Subsequent suit for possession, whether barred.*

Order IX, r. 9 of the Civil Procedure Code does not preclude a plaintiff, after his suit has been dismissed on one cause of action, from bringing another suit on another cause of action. The rule is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit, which was dismissed. Thus, on the failure of a suit for ejectment in which the cause of action was the refusal of the defendant to vacate after he had been served with notice of ejectment, a subsequent suit for possession of the same property based on a denial of title would not be barred.

Haji Khan v. *Baldeo Das*, 24 A. 90; A. W. N. (1901) 188, distinguished. A BALKISHAN *v.* RAGHUBAR DAYAL, 45 A. 81; (1923) A. I. R. (A.) 409 **991**

——— O. IX, r. 9, O. XVII, rr. 2, 3—*Pleader instructed only to apply for adjournment—Dismissal of suit, nature of—Restoration, application for, whether maintainable.*

On the date of hearing of a suit the Pleader for the plaintiff put in an application for adjournment which was rejected. The Pleader had no further instructions. The Court thereupon dismissed the suit under O. XVII, r. 3 of the Civil Procedure Code, "for want of evidence":

Held, (1) that the Pleader for the plaintiff having no instructions beyond applying for an adjournment there was no appearance on behalf of the plaintiff at the hearing and the dismissal of the suit was, therefore, under O. XVII, r. 2 of the Civil Procedure Code;

(2) that an application under O. IX, r. 9 of the Civil Procedure Code for restoration of the suit was, therefore, maintainable. Pat SHAH MUHAMMAD MAUDOOD *v.* RAMESHWAR SINGH BAHADUR, 1 P. L. R. 281; (1923) A. I. R. (Pat.) 530 **693**

——— O. IX, r. 13, O. XLIII, rr. 1 (c), 2—Ex parte *decree, setting aside of—Order demanding deposit of large decretal amount, whether equitable.*

An order granting a re-hearing of a suit decreed *ex parte* on condition of the applicant's depositing security to the large amount of Rs. 7,000, the sum decreed, is hard and cannot be upheld in equity. O INDAR SINGH *v.* GURDAYAL SINGH **86**

——— O. XI, r. 9, *scope of—Bengal Tenancy Act (VIII of 1885), s. 158—Application for assessment of rent dismissed in default—Subsequent suit for compensation for occupation of land and for determination of annual rental, whether barred.*

Order IX, r. 9, of the Civil Procedure Code applies only to the case of suits.

An application under section 158 of the Bengal Tenancy Act, for assessment of rent having been dismissed for default under O. IX, r. 9, Civil Procedure Code, the landlord instituted a suit for compensation for occupation of the same land by the same tenants, and for determination of the amount of annual rent payable by the tenants:

Held, that, in so far as the matters under appeal concerned merely an application under section 158 of the Bengal Tenancy Act, they could not be regarded as a suit within the meaning of O. IX, r. 9, Civil Procedure Code, and that the claim for determination of the amount of the annual rent payable by the tenants was not barred. Pat JANKI RAY *v.* KALANAND SINGH, 2 Pat. 192; (1923) A. I. R. (Pat.) 381; 4 P. L. T. 705 **464**

Civil Procedure Code—1908—contd.

——— **O. XVI, r. 1**—*Witnesses served, failure of, to attend—Adjournment.*

Where the witnesses of a party have been duly served but fail to appear an adjournment should be granted for re-summoning the witnesses. A CHATURBHUJ *v.* GOBIND RAM, 21 A. L. J. 348; 45 A 407 **571**

——— **O. XXI, r. 15**—*Execution of decree—Decree for costs in favour of several plaintiffs—Satisfaction by some decree-holders, validity of—Execution—Procedure—Court, discretion of.*

A decree for costs in favour of several plaintiffs operates as a simple money-decree jointly in favour of all the plaintiffs, and can only be executed by all the decree-holders jointly, or by some only of the decree-holders subject to the provisions of O. XXI, r. 15 of the Civil Procedure Code. No one of the decree-holders is entitled to grant full discharge of the decree out of Court, or to certify to the Court complete satisfaction of the decree, without the concurrence of all the decree-holders.

A wide discretion is conferred upon the Execution Court by O. XXI, r. 15 of the Civil Procedure Code and so long as it insists upon payment of the entire amount of the decree by the judgment-debtor, it has authority to make such adjustment of the rights of the decree-holders *inter se* as it may think equitable and proper; and for this purpose, without going behind the decree, or entering into any question, which if it was to be litigated at all between the plaintiffs should have been adjudicated upon prior to the passing of the decree and not after, it is entitled to examine the pleading and to inform itself as to the precise position of the plaintiffs as they came into Court. A UMRAO BEG *v.* MUKHTAR BEG, 21 A. L. J. 308; 45 A 401; (1923) A. I. R. (A.) 494 **687**

——— **O. XXI, r. 17, O. XXXIV, r. 14**, *scope of—Mortgage suit—Compromise decree—Decree directing execution against properties of judgment-debtor in certain order—Decree-holder whether can bring mortgaged properties to sale—Execution petition—Prayer for sale of immoveable property in case of moveable property proving insufficient—Alternative prayer, whether constitutes amendment of petition.*

The class of case contemplated in O. XXXIV, r. 14, of the Civil Procedure Code appears to be that class of case in which a suit is brought upon the covenant to re-pay contained in a mortgage deed or upon the debt arising out of that covenant or in respect of some other obligation arising out of the mortgage and not to a suit which is brought in order to enforce a sale of the mortgaged properties.

Where a mortgagee has obtained a decree against the mortgagor not in the form of a mortgage-decree but merely in the form of a personal decree, the mortgaged properties cannot be allowed to be sold in execution of such a decree until there is another decree directing the enforcement of the charge against the mortgaged properties.

Civil Procedure Code—1908—contd.

In a mortgage suit a compromise decree was passed directing that the judgment-debtor should pay the decretal amount by certain instalments and in case of failure to pay three consecutive instalments, execution for the amount due should issue against the other properties of the judgment-debtor and in the event of the amount not being realised in that manner against the mortgaged properties. Default having taken place, the decree-holder applied for execution against the properties referred to in the compromise decree in the order in which they became liable. There being no moveable properties of the judgment-debtor, the decree-holder applied for attachment and sale of the mortgaged properties:

Held, (1) that the decree was nothing more than a decree for the payment of money in satisfaction of a claim arising under the mortgage;

(2) that inasmuch as the decree itself provided; in the event of default and in the event of the other property of the judgment-debtor proving insufficient, for a sale of the mortgaged property itself, it was not necessary for the decree-holder to bring another suit asking again for the sale of the property merely because the other remedy given under the decree had proved infructuous;

(3) that the application to be allowed to proceed against the mortgage properties came directly within the execution petition itself, and it required no amendment of the execution petition to enable the Court to proceed against those properties. **Pat** CHAURASI MAHSARICK *v.* BHAGAN SAHU, (1923) Pat. 209; 2 Pat. 787; (1924) A. I. R. (Pat.) 20 **144**

——— **O. XXI, r. 22**—*Notice to judgment-debtor, when necessary.*

The notice mentioned in O. XXI, r. 22 of the Civil Procedure Code is only required to be issued where the application for execution is more than one year after the date of the decree. **Pat** BALDEO SINGH *v.* MEGHU SINGH, (1919) Pat. 386 **202**

——— **O. XXI, r. 35 (2)**—*Execution of decree—Symbolical possession—Warrant, copy of, not affixed on property, effect of.*

The failure to affix a copy of the warrant on property of which formal possession is to be delivered as required by r. 35 (2) of O. XXI of the Civil Procedure Code is a material defect and renders the delivery of formal possession ineffectual.

Where the law lays down a definite procedure for the delivery of possession which is purely symbolical, that procedure must be strictly followed and any omission therein must be regarded as material.

Khub Ram v. *Surat*, 39 Ind. Cas. 753; 20 P R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917, followed. **L** NIDHI RAM *v.* PARSA RAM, (1923) A. I. R. (L.) 693 **1**

——— **O. XXI, r. 58**—*Objection to attachment by previous transferee from judgment-debtor—Auction-sale—Jurisdiction, determination of.*

A Court has no jurisdiction to try a claim under O. XXI, r. 58, of the Civil Procedure Code to property attached in execution of a decree, after the sale of that property, even though the claim was registered before the sale was held, as the sale *ipso facto* determines the attachment, and thereafter the Court is *functus officio*.

Gopal Chandra Mukerji v. *Notobar Kundu*, 15 Ind. Cas. 53; 16 C. W. N. 1029, followed. **Pat** PUHUP DEO KUER *v.* RAMCHARITAR BARHI, 4 P. L. T. 544 **87**

——— **O. XXI, r. 58**—*Objection to attachment on ground of alleged sale—Sale found to be not genuine—Objection disallowed—Revision, whether competent.*

Certain house property having been attached in execution of a decree, an objection was filed that the property had been purchased by the objector long before the passing of the decree in execution of which it was attached. The Court having found that the *bona fides* of the alleged sale were doubtful and that the judgment-debtor was still in possession disallowed the objection. The objector put in an application for revision of the order:

Held, that there was no reason for interferring in revision with the order. **O** SHYAM LAL *v.* RADHE SHYAM, 10 O. L. J. 139; (1923) A. I. R. (O.) 208 **546**

——— **O. XXI, rr. 66, 89**—*Execution of decree—Sale proclamation—Objection—Sale held before objection disposed of—Application to set aside sale on payment of decretal amount.*

An execution sale was held while an objection to the amount stated in the sale proclamation was on the file of the Execution Court and undisposed of and the judgment-debtors were allowed to use the provisions of O. XXI, r. 89 of the Civil Procedure Code; under protest subject to an adjudication after the sale had been held as to the amount for the recovery of which the sale ought really to have been ordered:

Held, that the procedure adopted by the Execution Court was irregular. **A** DUTT PRASAD SINGH *v.* SRI NARAIN, 21 A. L. J. 340; (1923) A. I. R. (A.) 503 **557**

——— **O. XXI, r. 90**, *scope of—Interests affected by the sale, meaning of—Auction-purchaser, whether can take benefit of rule.*

The expression "interests affected by the sale" in r. 90 of O. XXI, Civil Procedure Code, means interests in the property existing before the sale and which have been adversely affected thereby.

Rule 90 does not cover an interest which has been created by the sale itself.

Bhaviriseti Gopala Krishnayya v. *Pakanati Pedda Sanjeeva Reddy*, 55 Ind. Cas. 333; 11 L. W. 184; (1920) M. W. N. 152; 38 M. L. J. 228, dissented from.

O. XXI, r. 90, Civil Procedure Code, is designed for the relief of the decree-holder and judgment-debtor so far as material irregularity and fraud are concerned. The auction-purchaser cannot, by pleading fraud, take the benefit of that rule. He must apply under rule 91.

Sheo Gobind Singh v. *Dhanukdhari Singh*, 21 Ind. Cas. 774; 19 C. W. N. 1291 and *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry*, 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.) followed. **Pat** KARTIK CHANDRA CHATTERJI *v.* NAGENDRA NATH ROY, 5 P. L. T. 41 **760**

——— **O. XXI, r. 93**—*Auction sale set aside—Refund of purchase-money—Sale confirmed on appeal—Purchaser, whether bound to re-deposit purchase-money.*

In execution of a money-decree against one *S*, who claimed to be the *Mahant* of an *Asthal*, the decree-holder had the properties appertaining to the *Asthal* sold. *S*. applied to have the sale set aside and the application was allowed. The auction-purchasers thereupon applied for a refund of the purchase-money and were allowed to withdraw it on the condition that they would re-deposit the amount in case the order was set aside on appeal. The High Court allowed the appeal and confirmed the sale. The auction-purchasers having then been ordered to re-deposit the purchase-money filed a suit for a declaration that they were not liable to do so:

Held, (1) that *S*. had a good title to convey the properties and, therefore, the properties could be seized in execution of a decree which was properly obtained against *S*.;

(2) that the plaintiffs had acquired a good and valid title to the properties by the purchase made by them and were not entitled to have a declaration that they were not liable to deposit the purchase-money in Court.

Quaere.—It is very doubtful whether a suit lies for a declaration that the auction-purchasers are not liable to deposit purchase-money in Court. **Pat** KEDAR NATH *v.* JAGAR NATH DAS, 1 P. L. R. 73 **134**

——— **O XXII, rr. 3, 12**—*Execution of decree—Death of judgment-debtor—Abatement.*

Rules 3 and 4 of O. XXII of the Civil Procedure Code have no application to execution proceeding by virtue of the provisions of rule 12 of the Order. **L** MIR KHAN *v.* SHARFU, 5 L. L. J. 163; (1923) A. I. R. (L.) 560 **577**

——— **O. XXII, rr. 3, 4, 12, O. XXXIV, rr. 4, 5**—*Mortgage suit—Compromise decree—Preliminary and final decree—Death of plaintiff and defendant—Abatement—Execution proceedings.*

During the pendency of an appeal preferred against a mortgage-decree the parties agreed that the plaintiff should get a decree for a sum very much less than that payable under the decree of the Trial Court, that the said sum should be paid by the defendant within two years, and that in default of payment within two years, the amount would be realised by sale of the properties mentioned in the plaint. A decree was passed in accordance with this agreement. No payment was made by the defendant within the period of two years specified in the decree. After the expiry of this period the plaintiffs applied for execution of the decree. In the meantime,

the defendant and one of the plaintiffs had died and no application had been made, within limitation, to bring their legal representatives on the record. On the objection of the legal representatives of the defendant that the suit had abated:

Held, (1) that the intention of the parties, so far as it could be gathered from the compromise decree, was that in consideration of the decretal amount having been reduced and a longer period than six months allowed for payment, the defendant had waived the advantage of the rule of law requiring a preliminary decree to be made final before execution could be levied, and that immediately on the expiration of two years from the date of the decree, the plaintiffs would be competent to realise the moneys due to them by the sale of the properties mentioned in the plaint;

(2) that the compromise decree was not, therefore, a preliminary decree which required to be made final, but had put an end to the suit;

(3) that there being no suit pending after the compromise decree there could be no abatement by reason of the death of the defendant and of one of the plaintiffs;

(4) that the provisions of O. XXII, rr. 3 and 4 of the Civil Procedure Code were not applicable to execution proceedings and no question of abatement could, therefore, arise with respect to the plaintiffs' application for execution. C HEMENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DATTA, 50 C. 650; 27 C. W. N. 621; (1923) A. I. R. (C.) 626 **929**

——— **O. XXII, rr. 3, 9, (2), O. XLIII, r. 1 (k)**—*Abatement of suit—Application for substitution made after expiry of limitation, nature of—Order on application—Appeal, whether lies.*

Where no application is made within time to bring upon the record the representatives of a deceased plaintiff, the suit abates automatically and an application for substitution made thereafter must necessarily be considered as an application under O. XXII, r. 9 (2) of the Civil Procedure Code, to set aside the abatement.

Lachmi Narain v. *Muhammad Yusuf*, 59 Ind. Cas. 903; 42 A. 540; 18 A. L. J. 688, *Arur Singh* v. *Todar Mal*, 49 Ind. Cas. 501; 22 P. W. R. 1919 and *Chunt Lal* v. *Kala Khan*, 67 Ind. Cas. 596; 4 L. L. J. 171; (1922) A. I. R. (L.) 61; 34 P. W. R. 1922, relied on.

An order passed on such application is, therefore, appealable under O. XLIII, r. 1 (*k*) of the Civil Procedure Code. L BADLU *v.* NARAINI **17**

——— **O. XXII, r. 4**—*Appeal—Death of respondent—Case remanded in ignorance—Procedure.*

A suit was decreed by the Trial Court but was dismissed on appeal by the District Judge. During the pendency of a second appeal preferred by the plaintiff, one of the defendants-respondents died and no application was made to bring his legal representatives on the record. The High Court heard the appeal in ignorance of this fact and, accepting the appeal, remanded the case to the District Judge for re-decision. When the latter proceeded to decide the case he was informed that one of the defendants had died. He, consequently, declined to hear the appeal and decided that the decree passed by him on the previous occasion stood in its entirety:

Held, (1) that the fact of the death of one of the respondents had not destroyed the jurisdiction of the High Court;

(2) that the District Judge should not have regarded the order of the High Court as if it were null and void and should have reported the matter to that Court for proper action under the circumstances;

(3) that the order of the District Judge must be set aside and the case must be re-called to the High Court and placed before the Bench which disposed of it on the previous occasion for orders. C ABDUL AZIZ *v.* LAKHMI CHANDRA, 37 C. L. J. 494; (1923) A. I. R. (C.) 676 **545**

——— **O. XXII, r. 4**—*Death of defendant during pendency of suit—Legal representatives not substituted—Decree against deceased defendant, legality of.*

It is illegal for a Court to continue to hear a suit against a dead person whose death has been brought to its notice and to pass a decree against such person in the absence of his legal representative being brought on the record. L DEBI PARSHAD *v.* BHAGO, 5 L. L. J. 187 **682**

——— **O. XXII, r. 4**—*Partition suit—Appeal—Death of one of several respondents—Abatement, extent of.*

During the pendency of an appeal by the plaintiffs in a suit for partition of land which was alleged to be in the joint possession of the parties, one of the defendants-respondents died and his legal representatives were not brought on the record:

Held, that the legal representatives of the deceased respondent were necessary parties to the appeal and as the appeal could not be heard in their absence it had abated *in toto*.

Jamna v. *Sarjit*, 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919, relied on.

Lakhmichand Rewachand v. *Kachubhai Gulabchand*, 11 Ind. Cas. 559; 35 B. 339; 13 Bom. L. R. 517, *Chandarsang Versabhai* v. *Khimabhai Raghabhai*, 22 B. 718; 11 Ind. Dec. (N. S.) 1061, *Joy Gobind Laha* v. *Monmotha Nath Banerjee*, 33 C. 580, *Hem Kunwar* v. *Amba Prasad*, 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. S.) 1324, *Bai Full* v. *Adesang Pahadsang*, 26 B. 203; 3 Bom. L. R. 736, *Alla Bakhsh* v. *Madho Ram*, 23 A. 22; A. W. N. (1900) 183, *Ranga Srinivasa Chari* v. *Gnanaprakasa Mudaliar*, 30 M. 67; 2 M. L. T. 36, and *Mehdi Husain* v. *Sughra Begam*, 25 A. 206; A. W. N. (1903) 15, distinguished. R. MAZAN NYEIN *v.* MAUNG KYAW ZAN, 1 R. 186; (1923) A. I. R. (R.) 258 **102**

——— **O. XXII, rr. 4, 11**—*Joint decree, appeal against—Some decree-holders not made party, effect of.*

Where a joint decree has been given in favour of certain persons and the appellant fails to make

some of them respondents, the appeal will fail not only against the persons not impleded, but as against all the decree-holders.

Tej Narain Sahu v. *Dal Ram Sahu*, 69 Ind. Cas. 624; 1 Pat. 699; (1922) A. I. R. (Pat.) 606; 4 P. L. T. 170; (1923) Pat. 207; *Basir Sheikh* v. *Fazle Karim Biswas*, 28 Ind. Cas. 703; 19 C. W. N. 290, *Monmohan Panday* v. *Bidhu Bhusan Ray Chowdhury*, 48 Ind. Cas. 309; 28 C. L. J. 268, *Jamna* v. *Sarjit*, 52 Ind. Cas. 510; 67 P. R. 1919; 90 P. L. R. 1919, *Sardari Lal* v. *Ram Lal*, 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920 and *Kali Dayal Bhattacharjee* v. *Nagendra Nath*, 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44, relied on. A GAJRAJ TEWARI *v.* BHAGIRATHI PANDE **14**

——— **O. XXIII, r. 1**—*Appellate Court, whether can allow withdrawal of suit—Decision of First Court set aside on appeal*—Res judicata.

It is open to an Appellate Court to pass an order under O. XXIII, r. 1 of the Civil Procedure Code permitting a plaintiff whose suit has been dismissed to withdraw his suit with leave to institute a fresh suit.

Afzal Begam v. *Akbari Khanam*, 28 Ind. Cas. 857; 37 A 326; 13 A. L. J. 444, followed.

The decision of a Trial Court which is set aside in appeal is wholly inoperative and cannot operate as *res judicata*.

Abdul Rahman v. *Lal Behari*, A. W. N. (1885) 151 and *Chhajju* v. *Khyali Ram*, 14 Ind. Cas. 175; 9 A. L. J. 378, relied on. A GAJRAJ SINGH *v.* SRI THAKURJI MAHARAJ RADHA RAWANJI **894**

——— **O. XXIII, r. 1**—*Withdrawal of suit against some of several appellants—Prejudice.*

Order XXIII, r. 1 of the Civil Procedure Code gives a right to a plaintiff to withdraw a suit or abandon any part of his claim and a similar previlege is inherent in an appellant. But a plaintiff-respondent cannot, when the litigation has reached the stage of an appeal, as of right, be allowed to defeat the appeal and prevent its being heard by withdrawing the suit as against the appellant.

Plaintiff brought a suit to establish his right to a certain channel feeding a Government Tank and to prevent interference by Government and by other *patladars* holding lands irrigated by the tank. The Government and the *patladars* were impleaded as defendants. The plaintiff got a decree in the Court of First instance. The Government did not appeal but the other defendants did so. In appeal the plaintiff applied and was allowed to withdraw the suit as against the appellants-defendants. The decree against the Government was confirmed.

Held, that the *patladars*-defendants were materially prejudiced by the decree against the Government since it prevented the Government from using the plaint channel as a supply channel and thereby exercising its permanent right of distributing the water supply and that, therefore, the order allowing the suit to be withdrawn as against them was illegal.

Sivasailam Iyer v. *Ramakrishna Aiyar*, 26 Ind. Cas. 18; (1914) M. W. N. 788, followed. M DHARMA RAJA *v.* PETHU RAJA, 45 M. L. J. 212; 18 L. W. 243; (1923) M. W. N. 677; 46 M. 811 **4**

——— **O. XXIII, r. 1 (3)**—*"Subject-matter", meaning of—Suit on different cause of action, whether barred.*

The expression "subject-matter" in O. XXIII, r. 1, sub-rule (3), of the Code of the Civil Procedure, are not to be identified with the "property" in suit. They obviously include the right and also the infringement of it, which is equivalent to saying that the words "subject-matter" mean the cause of action for a claim.

Therefore a person who withdraws from a suit without permission is not debarred from bringing a fresh suit in respect of the same property based on a different cause of action. O PUTTO KHAN *v.* AHMAD ZAMAN KHAN, 9 O. & A. L. R. 978 **56**

——— **O. XXIII, r. 3**—Award whether can be recorded as adjustment. *See* ARBITRATION **609**

——— **O. XXXII, rr. 2, 4**—*Specific Relief Act (I of 1877), s. 42—Minor—Suit brought without next friend—Procedure—Guardian* ad litem—*Certificated guardian not appointed—Failure to record reasons—Irregularity—Appointment of guardian* ad litem *procured by fraud, effect of—Guardian, whether can bind minor by onerous covenants—Mortgage by guardian held valid in part—Declaration, suit for, whether lies — Redemption—Construction of document.*

Order XXXII, r. 2 of the Code of Civil Procedure is applicable only where, on the face of a plaint, the plaintiff appears to be a minor.

Beni Ram v. *Ram Lal*, 13 C. 189; 6 Ind. Dec. (N. S.) 625, followed.

If on an issue raised and tried in a case the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint.

But if before the Court decides the point, the plaintiff becomes a major, he may elect to drop the suit as not properly instituted or affirm the previous proceedings and continue the suit.

Where in a suit the defendant raised the objection that on the date of suit, the plaintiff was a minor and the suit was brought without a next friend was unsustainable but before the Court decided the point, the plaintiff admittedly became a major;

Held, that the objection that the suit was originally by a minor could no longer be urged and the suit was not liable to be dismissed.

The mere failure by a Court to record reasons under O. XXXII, r. 4 (2) of the Civil Procedure Code for appointing a guardian of a minor defendant in supersession of the legal guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court.

Civil Procedure Code—1908—contd.

Sridhar Rao v. *Ram Lal*, 1 Ind. Cas. 555; 31 A. 7; A. W. N. (1908) 251; 5 A. L. J. 633, relied on.

Bhimaji v. *Rajabhai Hussain Sahib*, 59 Ind. Cas. 842; 43 M. 808; 12 L. W. 114; 39 M. L. J. 239; 28 M. L. T. 295, distinguished.

Where the appointment of a Court Officer as guardian for a minor defendant was procured by means of an affidavit which falsely stated that there was no other next of kin for the minor except his father who was unwilling to act and whose interests in the suit were adverse to those of the minor:

Held, that the appointment was vitiated by fraud and was of no legal effect and the case must be treated as having been proceeded with without a legally appointed guardian, and that the decree in the case and a subsequent Court-sale in execution of the decree were not valid and binding on the minor.

Bhagwan Dayal v. *Param Sukh Dass*, 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179, followed.

A guardian has no power to enter into engagements on behalf of his minor ward making him liable under onerous covenants.

Indur Chunder Singh v. *Radhakishore Ghose*, 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N. S.) 782 (P.C.), *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, 13 Ind. Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 39 I. A. 1 (P. C.), *Waghela Rajsanji* v. *Sheikh Masludin*, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.) and *Chodavarapu Narayana Row* v. *Chennuru Venkatasubba Row*, 55 Ind. Cas. 377; 38 M. L. J. 77; (1920) M. W. N. 129; 27 M. L. T. 264, relied on.

The action of a *de facto* guardian can be binding on a minor's property only if it is for the minor's benefit or necessity.

Where a guardian executed a usufructuary mortgage of certain properties of a minor, and took them back on lease on onerous conditions, the mortgage and lease together forming parts of one and the same transaction, and the lease was held to be not binding on the minor, but the mortgage was held to be valid in part:

Held, (1) that the minor was not entitled to bring a suit for a mere declaration as to the invalidity of the lease and mortgage since it was open to him to claim further relief by way of redemption of the mortgage to the extent it was valid;

(2) that the plaintiff may be permitted even in appeal to amend the plaint by adding a prayer as to redemption on paying the necessary Court-fees on the plaint and memorandum of appeal.

Navunni v. *Ramasawmy Patter*, 52 Ind. Cas. 738; 10 L. W. 169, relied on.

Where a deed of mortgage provided that if the mortgagee wanted payment he must give notice to be paid on the day after "*Ucharal*" or the beginning of the cultivation season in any year and not at other times:

Civil Procedure Code—1908—contd.

Held, that the covenant was not mutual and the mortgagor's right to redeem at any time was not affected by the covenant.

Navunni v. *Ramasawmy Patter*, 52 Ind. Cas 738; 10 L. W. 169, distinguished. **M** PUPPOOTH *v.* VAYISRAVANATH MANAKKAL RAMAN SOMAYAJIPAD, 44 M. L. J. 515; 17 L. W. 558; 32 M. L. T. 107; (1923) M. W. N. 301; (1923) A. I. R. (M.) 553 **309**

——— **O. XXXII, r. 3**—*Minor defendant—Guardian* ad litem, *failure to appoint—Suit defended by person named in plaint as guardian—Decree, whether binding on minor.*

A Court ought to appoint a proper person to act as guardian *ad litem* of a minor defendant in the conduct of a suit, but where it has by its action given its implicit sanction to the appearance of a person as such a guardian the absence of a formal order of appointment is not necessarily fatal to the proceedings.

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), followed.

In a suit in which one of the defendants was a minor, the latter's father was described as his guardian in the plaint. The minor's father appeared on the date fixed for the hearing of the suit and filed a written statement on behalf of the minor denying the minor's liability and stating that he was not the guardian of the minor, and that the actual guardian of the minor was one of the other defendants. The Court made no order appointing a guardian *ad litem* of the minor. It proceeded to record evidence in the case and decreed the claim. In a suit by the minor to avoid the decree:

Held, that the proceeding of the Court was not regular but in the absence of any proof that the minor was prejudiced thereby the decree could not be set aside. **O** DARSHAN SINGH *v.* RATAN LAL, 9 O. & A. L. R. 463 **821**

——— **O. XXXII, r. 3**—*Minor—Guardian* ad litem, *appointment of—Presumption—Irregularity in appointment of guardian, effect of.*

Where the Court by its action has given its sanction to the appearance of a person as the guardian *ad litem* of a minor defendant, the absence of a formal order of appointment is not necessarily fatal to the proceedings.

Where a lawful guardian *ad litem* has been appointed for a minor defendant, any defect or irregularity in the procedure leading up to the appointment, cannot operate to render a decree passed in the suit in which the minor was represented by such a guardian invalid, unless the defect or irregularity has had the effect of prejudicing the interest of the minor or affecting the merits of the case.

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar P. C. J. 512 (P. C.), *Munnu Lal* v. *Ghulam Abbas*, 6 Ind. Cas. 788; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.), *Ram Brichh*,

Civil Procedure Code—1908—contd.

Ram v. *Tarak Tewari*, 33 Ind. Cas. 805; 14 A. L. J. 589 and *Sripal Singh* v. *Jagdish Narayan (Radhe Lal)*, 56 Ind. Cas. 313; 23 O. C. 396; 7 O. L. J. 219; 2 U. P. L. R. (O.) 77, relied on.

Hanuman Prasad v. *Muhammad Ishaq*, 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229 and *Shivnath Singh* v. *Manohar Lal*, 22 Ind. Cas. 245; 16 O. C. 961, distinguished.

Where it was found that an application accompanied by the necessary affidavit had been made for the appointment of a person as guardian *ad litem* of a minor defendant and the person named in the application as the guardian had subsequently appeared in Court and filed a compromise on behalf of the minor to which the Court had accorded its sanction, but the order of the Court appointing the guardan *ad litem* could not be traced on the record owing to the weeding out of papers:

Held, that the presumption was that the proceeding of the Court had been carried out regularly and in accordance with law, and the decree passed in the case was, therefore, binding on the minor. **O** MATA GHULAM SINGH *v.* SITAL PRASAD, 26 O. C. 113; (1923) A. I. R. (O.) 206 **409**

——— **O. XXXIV**—*Decree for sale in favour of puisne mortgagee—Prior mortgagee not party to suit—Prior mortgagee, rights of.*

When a prior mortgagee, who has obtained a decree under O. XXXIV of the Civil Procedure Code, is sued by a puisne mortgagee, whom he did not join in his suit, he, the prior mortgagee, is entitled to use his prior mortgage as a shield and to have the discharge of his decree made a condition precedent to the grant of a sale decree in favour of the puisne mortgagee. **L B** N. N. V. CHETTY FIRM *v.* K. A. P. L. CHETTY FIRM, (1923) A. I. R. (R.) 107 **151**

——— **O. XXXIV, r. 1**, *object of—Suit by prior mortgagee—Subsequent mortgagee not impleaded—Suit whether liable to be dismissed—Procedure.*

The object of O. XXXIV, r. 1 is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party not impleaded. The provision is expressly made subject to other provisions of the Code which include O. I, r. 9. Wherever, therefore, it is possible for the Court to do justice as between the parties before it, it should do so, and should not make O. XXXIV, r. 1 a ground for dismissing the entire suit.

Shivubai Rajaram Shete v. *Shiddheswar Martand Hedge*, 61 Ind. Cas. 590; 25 B. 1009; 23 Bom. L. R. 405, *Sital Prasad* v. *Asho Singh*, 69 Ind. Cas. 677; 2 Pat. 175; (1922) Pat. 326; (1922) A. I. R. (Pat) 651, followed.

Where, therefore, in a suit for sale of mortgaged property on the basis of mortgage the plaintiff omits to implead a subsequent mortgagee the suit ought not to be dismissed entirely; the plaintiff is entitled to any relief that can be given to him without prejudicing the right of the subsequent mortgagee. **A** PARSHADI LAL *v.* LAIQ SINGH, 21 A. L. J. 701 **943**

Civil Procedure Code—1908—contd.

——— **O. XXXIV, rr. 5, 6**, *object of—Mortgage-decree—Mortgaged property, portion of, not available for sale—Personal decree, whether can be passed—Contract Act (IX of 1872), ss. 43, 44—Joint judgment-debtors—Release of one judgment-debtor, effect of.*

The object of rr. 5 and 6 of O. XXXIV of the Civil Procedure Code is, that the remedy of the mortgagee should, in the first instance, be against the property mortgaged and that such property should be exhausted before a personal liability is imposed upon the mortgagor. But the rules do not mean that if a portion of the property, however small, which is included in the mortgage-decree as a portion of what is to be sold, is destroyed or has ceased to be available for sale after the date of the decree, through no fault of the mortgagee, there can be no decree for personal liability against the mortgagor.

Satish Ranjan Das v. *Mercantile Bank of India*, 48 Ind. Cas. 322; 45 C. 702, followed.

Where some of the mortgaged properties directed to be sold under a mortgage-decree were sold at the instance of the superior landlord under the Patni Regulation and in execution of a decree for arrears of rent, which constituted a prior charge on the properties, and they could, therefore, not be sold under the mortgage-decree:

Held, that the mortgagee could not be deprived of his right to apply for a personal decree under r. 6 of O. XXXIV of the Civil Procedure Code merely because some of the mortgaged properties directed to be sold under the decree had ceased to be available for sale owing to no default of the decree-holder.

The release from liability of one of several joint judgment-debtors by the decree-holder does not affect the latter's right to proceed against the other judgment-debtors.

Bhawani Koer v. *Darsan Singh*, 11 Ind. Cas. 450; 14 C. L. J. 354, *Krishna Charan Barman* v. *Sanat Kumar Das*, 34 Ind. Cas. 609; 44 C. 162; 25 C. L. J. 24; 21 C. W. N. 740 and *Moolchand* v. *Alwar Chetty*, 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449, relied on.

Badri Das v. *Inayat Khan*, 22 A. 404; A. W. N. (1900) 132; 9 Ind. Dec. (N. S.) 1305, *Kamta Prasad* v. *Syed Ahmad*, 1 Ind. Cas. 799; 6 A. L. J. 451; 31 A. 373 and *Darbari Mal* v. *Moola Singh*, 56 Ind. Cas. 139; 42 A. 519; 18 A. L. J. 628; 2 U. P. L. R. (A.) 160, not followed. **C** CHAND MALL BABU *v.* BAN BEHARI BOSE, 50 C. 718 **1021**

——— **O. XLI, r. 2**—*Appeal—Issue disposed of on two grounds—Decision on one ground attached—Appellate Court, power of, to deal with issue generally.*

Where an issue is disposed of by the Trial Court on two grounds and the decision on one of them is attacked in appeal, it may be taken that the appellant desires to impugn the decision on the issue generally, and the Appellate Court has power, under O XLI, r. 2, of the Civil Procedure Code, to deal with the whole matter. **O** JAMNA PRASAD *v.* BALBHADDAR, 9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O.) 147 **353**

Civil Procedure Code—1908—contd.

——— **O. XLI, r. 17**—*Absence of appellant and his Counsel on date of hearing—Court, whether can dismiss appeal on merits—Second appeal, right of.*

An Appellate Court has no jurisdiction to dismiss an appeal on the merits when neither the appellant nor his Counsel is present on the date fixed for hearing.

Muhammad v. *Manavikrama*, 69 Ind. Cas. 513; 45 M. 882; 43 M. L. J. 317; 16 L. W. 434; (1922) M. W. N. 604; (1923) A. I. R. (M.) 13, followed.

The right of appeal does not depend on what the Court ought to have done but on what it actually did.

Therefore, an order dismissing an appeal on the merits when neither the appellant nor his Pleader was present in Court amounts to a decree and a second appeal lies against such decree. **A** NASIR KHAN v. ITWARI, 21 A. L. J. 667; 9 O. & A. L. R. (A.) 645 **905**

——— **O. XLI, r. 17**—*Appeal—Appearance, what amounts to—Pleader unable to argue—Dismissal for default, legality of.*

In order to constitute an appearance by a Pleader within the meaning of r. 17 of O. XLI, of the Civil Procedure Code, it is necessary to show that the Pleader was ready to place materials before the Court upon which the Court could apply its judicial mind.

Satish Chandra Mukerjee v. *Ahara Prasad Mukerjee*, 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329 (F. B.), *Muhammad Bakar Ali* v. *Chulhai Mahton*, 52 Ind. Cas. 290; 4 P. L. J. 712, relied on.

The hearing of an appeal was adjourned at the request of the appellant's Pleader. One day before the adjourned date of hearing an application by the appellant's Pleader for a further adjournment was refused. On the date of hearing a junior Pleader appeared for the appellant and filed an application for time; the application was refused and he was called upon to argue the appeal, but this, he said, he was unable to do, whereupon the Court passed an order dismissing the appeal for default:

Held, that in the eye of the law there was no appearance on behalf of the appellant, and the order dismissing the appeal for default was, therefore, perfectly correct. **Pat** JAINARAIN RAMJASH v. SITARAM MARWARI, (1923) Pat. 175; (1923) A. I. R. (Pat.) 520 **941**

——— **O. XLI, rr. 17, 19, O. XLVII, r. 1**—*Appeal dismissed for default—Remedy—Review, whether permissible.*

The ordinary remedy provided by law to meet the case of an appellant who has been prevented by some sufficient cause from appearing when his appeal is called upon and whose appeal is dismissed in default, is by way of an application under O. XLI, r. 19 of the Civil Procedure Code, and an appellant who allows this remedy to become barred cannot avail himself of the provisions of r. 1 of O. XLVII of the Civil Procedure Code. **A** MANPHUL SINGH v. HAMID ALI KHAN, 21 A. L. J. 416; (1923) A. I. R. (A.) 576 **528**

Civil Procedure Code—1908—contd.

——— **O. XLI, rr. 23, 25, 33**—*Suit for possession and damages, dismissal of—Appeal—Decision on question of possession and title in favour of plaintiff—Procedure—Remand—Appeal, second—High Court, power of, to pass proper order.*

A suit for possession of a house and damages was dismissed by the Trial Court. On appeal, the Appellate Court decided the questions of title and possession in favour of the plaintiff and instead of deciding the question of damages itself or of remitting an issue on the point to the lower Court, it remanded the whole case to the Trial Court under O. XLI, r. 23 of the Code. On appeal to the High Court:

Held, (1) that the order of the lower Appellate Court was illegal;

(2) that the High Court had power, under O. XLI, r. 33 of the Civil Procedure Code to pass the order which the lower Appellate Court should have passed and to determine the question of damages. **A** ABDULLAH KHAN v. MUHAMMAD MAQBUL HUSSAIN, 21 A. L. J. 538; (1923) A. I. R (A.) 603; 45 A. 565 **822**

——— **O. XLI, rr. 25, 26**—*Appeal—Order remitting issue, whether open to question on final hearing—Execution of decree—Mortgage—Decree for sale conditional on mortgagee paying off prior mortgage—Prior mortgage paid off by mortgagor, effect of—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Application for execution relating to different property, whether operates to save limitation.*

Where an Appellate Court at the first hearing does not decide the case but merely remits certain specific issues, it is open to the Court before which the case ultimately comes for disposal to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order.

Masthunnissa v. *Kaniz Sughra*, 60 Ind. Cas. 975; 43 A. 377; 19 A. L. J. 139; 3 U. P. L. R. (A) 30, *Mubarak Husain* v. *Bihari*, 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199, *Lachman Prasad* v. *Jamna Prasad*, 10 A. 162; A. W. N. (1887) 295; 6 Ind. Dec. (N. S.) 109, *Ganendra Nath Roy Chowdhury* v. *Surja Kanta Roy Chowdhury*, 15 Ind. Cas. 39; 17 C. W. N. 462 and *Bara Estate Limited* v. *Anup Chandra*, 41 Ind. Cas 337; 2 P. L. J. 663; 2 P. L. W. 71; (1917) Pat. 342, relied on.

It is not necessary that an execution application in order to save limitation should be directed against the same property which is applied for in the subsequent application.

A decree for sale on a mortgage provided that the decree holder would not be entitled to bring a certain portion of the mortgaged property to sale unless he paid off the amount due on a prior mortgage. The amount was paid off by the mortgagor, and the mortgagee-decree-holder applied for execution of his decree against the mortgaged property including the portion which was subject to the prior mortgage;

Civil Procedure Code—1908—contd.

Held, (1) that the decree did not lay down any limit of time within which the amount due on the prior mortgage must be paid; that the order had been made for the protection of the prior mortgagee and that it was open to the decree-holder to make the payment so long as the right to execute his decree had not become time-barred;

(2) that the mere fact that the mortgagor had stepped in and made the payment did not deprive the decree-holder of his right to execute the decree against that portion of the property which was the subject of the prior mortgage. A GOPI NATH SHUKUL *v.* SAT NARAIN SHUKUL, (1923) A. I. R. (A.) 384 **1014**

——— **O. XLI, rr. 25, 26** —*Order remitting issue, whether can be re-considered—Procedure—Appeal, second—Remand order, form of—Possession and title, questions of, whether can be decided piecemeal.*

It cannot be affirmed broadly that when an order has been made under O. XLI, r. 25 of the Code of Civil Procedure, the Court called upon to determine the appeal finally under O. XLI, r. 26, is competent to treat the order as erroneously made.

When an order has been made under O. XLI, r. 25, of the Civil Procedure Code, the appeal remains pending and undisposed of on the file of the Court and the order, whether rightly or wrongly made, is an order made with jurisdiction. Its validity may be attacked and reviewed, but till it has been set aside in an appropriate proceeding, it must be treated as an interlocutory order which is operative in law.

The evidence and findings on remand become part of the record in the suit, and when the Court proceeds to determine the appeal, such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under O. XLI, r. 25, was made, as also what has been added in the Court of Appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon. No portion of the record can be disregarded, and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority.

In a second appeal, involving several points difficult to disentangle, the appropriate course to follow is to make, not an order under O. XLI, r. 25, but an order of remand in the exercise of the inherent power of the Court.

The principle that a stranger to a deed, which is intended to be real and operative between the parties thereto, cannot dispute the payment or non-payment of consideration, its adequacy or inadequacy, has no bearing in a case where a deed is challenged as fictitious, never designed to operate as a real deed or to effect a transfer of the title.

Questions of title and possession cannot always be properly considered piecemeal as disconnected fragments. C KAMINI KUMAR DEB *v.* DURGA CHARAN NAG, 37 C. L. J. 122; (1923) A. I. R. (C.) 521 **392**

Civil Procedure Code—1908—contd.

——— **O. XLI, r. 27** —*Appeal—Additional evidence—Other substantial cause—Privy Council—Practice.*

Under r. 27 of O. XLI of the Civil Procedure Code, an Appellate Court has power to allow, at the instance of any of the parties, additional evidence or documents to be produced or witnesses to be examined, for any cause other than those particularly specified in the rule. The rule does not limit the admission of additional evidence to cases, when the Appellate Court has itself discovered some inherent *lacuna* or defect, and requires evidence to fill up the gap, or remedy the defect.

Kessowji Issur v. *Great Indian Peninsula Railway, Co.*, 34 I. A. 115; 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435 (P. C.), *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty*, 11 M. I. A. 28; 7 W. R. P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11, distinguished.

Rules of procedure are not made for the purpose of hindering justice. There is no restriction on the powers of the Privy Council to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. P C INDRAJIT PARTAP BAHADUR SAHI *v.* AMAR SINGH, 21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277 **747**

——— **O. XLI, r. 31**, *scope of—Appellate Court—Contents of judgment—Court, duty of.*

The provisions of O. XLI, r. 31 are mandatory. A Judge of the lower Appellate Court is bound to give the points for decision and the reasons for the decision thereon in order to enable the Court of second appeal to see that the Judge whose findings on facts are binding on it has put properly before him the points at issue and has decided them.

Sohawan v. *Babu Nand*, 9 A. 26 at p. 27; A. W. N. (1886) 284; 5 Ind. Dec. (N. S.) 446 and *Babban Singh* v. *Jaimangal Singh*, A. W. N. (1906) 86, followed. A GUPTA NAND *v.* BEHARI LAL, 21 A. L. J. 567 **827**

——— **Sch. II, paras. 15, 16**—*Arbitration—Reference through Court—Award, decree on—Appeal, whether lies.*

Objections, if any, to the validity of an award made on a reference to arbitration through Court, must be taken by the parties in the Court in which the award is filed; and in case the objections taken are disallowed or any objections are omitted or none are taken, no appeal can lie against the decree passed on the award on the ground that the award was invalid. The only ground upon which an appeal would lie against the decree in such a case, would be a case where the decree is either not in accordance with the award or is in excess of the award.

Civil Procedure Code—1908—concld.

Lutawan v. *Lachiya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 (F. B.), followed. A HARI SHANKAR v. RAM PYARI, 21 A. L. J. 326; (1923) A. I. R. (A.) 502; 45 A. 441 **884**

——— **Sch. II, para. 21**—*Arbitration, private—Award, partly invalid, whether can be remitted—Award containing provisional, uncertain and contingent condition, validity of—Invalid award, whether can be set up as defence.*

Where an arbitration is made without the intervention of a Court and an application is made to file the award, if the award is good in part and bad in part, the Court cannot remit it to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part.

Dinabandhu Jana v. *Chintamoni Jana*, 26 Ind. Cas. 697; 19 C. W. N. 476, *Kunj Lal* v *Banwari Lal*, 48 Ind. Cas. 711; 4 P. L. J. 394, relied on.

An award which contains a decision on a point which was not referred to the arbitrator is in excess of jurisdiction and is bad.

An award which cannot be enforced in Court cannot be set up as a defence to a suit.

An award containing a provisional, uncertain and contingent direction is bad.

An award directed that one of the parties shall execute a mortgage if legally necessary:

Held, that the direction being uncertain and contingent, the award was bad. Pat JALDHARI RAI v MUHAMMAD ABDUL KABIR, 1 P. L. R. 244; 1923) A. I. R (Pat.) 470; 4 P. L. T. 669 **649**

Companies Act (VII of 1913), ss. 10, 12—*Memorandum of Association — Appointment of person as Agent, Secretary and Director, whether "object" or "condition"—Resolution of Company deleting clause—Application to Court for confirmation, maintainability of—Discretion of Court.*

The object of a Company under the Companies Act was stated in one of the clauses of the Memorandum of Association to be to carry on a banking business and things ancilliary thereto, and by another clause a gentleman was appointed "Agent, Principal, Secretary and Director to the Bank" with wide powers of transacting business. Subsequently, the Company, by a resolution deleted the clause relating to the said appointment and applied to the Court under section 12 of the Companies Act for confirmation of the resolution treating it as an alteration of the Memorandum of Association "with respect to one of the objects of the Company":

Held, (1) that the appointment could not be regarded as one of the objects of the Company but that, on the other hand, the clause amounted to a "condition" within the meaning of section 10 of the Act which could not be altered either by the Company or by the Court;

(2) that even if the clause was not a condition, it was at least a statement of a fact solemnly made in the Memorandum which neither the Court nor the Company could delete;

(3) that in the matter of confirmation of the resolution of a Company under section 12 of the Companies Act, the Court was bound to exercise a discretion having regard to the interests of the various persons, share-holders, creditors and others, and that the Court ought, in any case, to refuse to exercise its discretion in the present case, since the Company had made a contract in the most solemn manner with a third person, and there was no justification for the Court or the Company to unmake that contract.

Ashbury v. *Watson*, (1885) 30 Ch. D. 376; 54 L. J. Ch. 985; 54 L. T. 27; 33 W. R. 882, *In re Welsback Incandescent Gas Light Co., Ltd.*, (1904) 1 Ch. 87; 73 L. J. Ch. 104; 89 L. T. 645; 52 W. R. 327; 11 Manson 47; 29 T. L. R. 122, relied on. M VENKATARAMANA AIYAR v. COIMBATORE MERCANTILE BANK, LTD., (1923) M. W. N. 568; 18 L. W. 304 **966**

——— **s. 186 (1)**—*Order directing contributory to pay barred debt, legality of.*

Section 186 (1) of the Indian Companies Act does nothing more than create a new machinery for bringing in debts due by a contributory to the Company. It does not create new liabilities or confer new rights; it merely provides a summary procedure for enforcing existing legal liabilities.

The words "at any time" in section 186 (1) of the Indian Companies Act do not authorise the Court to order the payment of a Statute-barred debt, they can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding up order. L SRI NARAIN v. LIQUIDATOR, UNION BANK OF INDIA, 4 L. 109 **600**

Company in liquidation—*Secured creditor, rights of—Winding up order, effect of.*

The rules relating to insolvency proceedings are, as far as possible, applicable to liquidation matters.

When a Company goes into liquidation, a secured creditor may realise his security and recover therefrom the whole of his principal as well as the interest up to the date of his realisation, and not merely the amount due on the date of the winding-up order. But if he realises his security and has to prove for a balance, the remaining assets of the Company would only be liable for such principal and interest as was due on the date of the winding-up order. The hypothecated property is liable for the whole claim and it is only the liability of the remaining of assets that is affected by the winding-up order.

A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. He may, if he choose, disregard the liquidation proceedings and proceed against his security. L RAM CHAND v. BANK OF UPPER INDIA, LD., DELHI, 3 L. 59; 24 P. W. R. 1922; (1922) A. I. R. (L.) 281 **187**

Consent decree—*Appeal, whether lies—Suit to set aside decree—Grounds on which decree can be set aside—Mistake, effect of—Consent-decree, whether can be set aside in part.*

No appeal lies against a consent decree. Consequently, the decree can be set aside only on a ground which would justify a cancellation of the

Consent decree—concld.

agreement; for the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded to it the command of a Judge.

A consent decree cannot have greater validity than the compromise itself, and the Court has jurisdiction to set aside the order founded upon the agreement when it is established that the agreement was invalid by reason of fraud, mistake or any other similar circumstance.

A consent order is a mere creature of the agreement and if greater sanctity were attributed to it than to the original agreement itself it would be to give the branch an existence which is independent of the tree.

Though a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake, yet as an agreement may be rectified for an appropriate mistake, so may also a consent decree based upon such agreement.

A mistake on the part of one party only, not caused or actively assisted by the act of the other party, cannot invalidate an agreement.

The law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment; and not to close their eyes to the means of information which are accessible to them. When two parties are at arm's length, either of them may *prima facie* remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence.

A duty to speak arises wherever and only where silence can be construed as having an active property, namely, that of misleading.

When a consent decree is set aside, the effect is to revive the original suit which was terminated by the compromise decree.

A party litigant cannot be permitted to retain the benefit of a compromise in part and repudiate it as to the remainder.

A plaintiff cannot be permitted to retain the benefit of a compromise decree to the extent of his success and to re-open matters in controversy in respect of his defeat. C A. Y. REILY, *v.* RAJKUMARI, 36 C. L. J. 245; (1922) A. I. R. (C.) 493 770

Construction of decree—*Redemption decree—Amount decreed payable with interest within fixed time—Future interest payable on 'entire decretal amount', on default, meaning of—Contract Act (IX of 1872), s. 38—Tender of mortgage amount—Partial tender, validity of.*

When under a decree the contractual rate of interest ceases to be payable at a given date and the Court rate is substituted for it therefrom up to the date of realisation, the Court rate is chargeable on the whole amount due with interes at the contractual rate up to the given date. *Venkatachalapathi Aiyar* v. *Thavasi Servai*, 51 Ind. Cas. 67; 42 M. 465; 36 M. L. J. 288, *Maharaja of Bhartpur* v. *Rani Kanno Dei*, 23 A. 181; 3 Bom. L. R. 51; 5 C W. N. 137; 28 I. A. 35; 7 Sar. P. C. J. 792 (P. C.); and *Sundar Koer* v. *Rai Sham Krishen*, 34 C. 150; 4 A L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304. 11 C. W N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.), relied on.

A compromise decree was passed in a redemption suit under which the plaintiff was to pay the defendant a certain sum within a fixed time with interest at a certain rate from the date of the compromise. In case of failure of plaintiff to pay the entire decretal amount within the time fixed, the defendant was to realise the 'entire decretal amount' by sale of the mortgaged property with future interest at a different rate from the date of default to the date of realisation. There was a default and the defendant applied for a decree for sale:

Held, that the defendant was entitled to future interest on the entire amount due on the date of default, comprising the amount decreed under the compromise, as well as the interest on it up to that date, and not simply on the amount due under the decree.

A tender to be valid must be of the whole amount due and not of a part only.

Section 38 of the Contract Act requires an offer to be of the whole of what the promisor is bound by his promise to do, and the same rule applies as to the tender of a sum decreed in respect of a mortgage.

Chunder Caunt Mookerjee v. *Jodoonath Khan*, 3 C. 468; 1 C. L. R. 470; 1 Ind. Dec. (N. S.) 883, relied on.

Haji Abdul Rahman v. *Haji Noor Mahomed*, 16 B. 141; 8 Ind. Dec. (N. S.) 570, dissented from.

Digambar Das v. *Harendra Narain Pandey*, 5 Ind. Cas. 165; 14 C. W. N. 617; 11 C. L. J. 226, distinguished O FAGHFUR MIRZA *v.* KHUSHAL CHAND, 26 O. C. 59; (1923) A. I. R. (O.) 241 246

Construction of document—*Gift—Transfer by limited owner—Estate conveyed—Presumption—Burden of proof.*

Where a transferor has merely a limited interest in the property transferred and purports to dispose of the property itself, the presumption is that he intends to dispose of only his limited interest, and if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than that interest. But for this purpose a positive declaration is not necessary. Regard may be had to the context of the deed of transfer, and to the inaptitude of the words of transfer if applied to the transferor's actual interest.

Where a deed of gift executed by a Hindu widow began by stating the fact of an oral Will made by her husband, which gave her nothing more than a life-interest, but further stated that the donees would have all the proprietary powers of transfer in respect of the gifted property and would, generation after generation, remain in possession and occupation of the same, because the Will gave them a remainder:

Construction of document—contd.

Held, that the deed of gift meant that the absolute title arose from the addition of the life-interest gifted under the deed to the remainder devised by the Will, and was not of itself intended to transfer an absolute interest in the property gifted. **O** MAHESHA *v.* RAMESHAR, 10 O. L. J. 24; (1923) A. I. R. (O.) 173; 26 O. C. 329 **295**

——— Kabuliyat—*Tenancy, commencement of—Evidence Act (I of 1872), s. 114, ills. (e), (f)—Accounts kept in Collector's Office—Presumption—Appeal to Privy Council—Findings on all points—Duty of Courts in India.*

The purchaser of an estate appointed a *Mukhtar* on 15th September 1862 to apply on his behalf to the Revenue Authorities for mutation of names in his favour. On 10th November 1862 he gave to the Deputy Collector an acknowledgment of having received a *pattah* and on the same date he gave a *kabuliyat* which concluded with the following words:—

"I shall pay the rent year by year. Accordingly on receiving a *pattah* I execute this *kabuliyat*, 10th November 1862." It appeared from the accounts kept in the Collector's Office that the tenancy was for the Bengali year, and that on a certain date there was an arrear of Government revenue due from the estate for recovery of which the estate was sold:

Held, (1) that the date, 10th November 1862, entered in the *kabuliyat* was merely the date on which the *kabuliyat* was signed and did not determine the commencement of the tenancy;

(2) that the tenancy was for the Bengali year and the Government revenue became due at the end of the Bengali year;

(3) that under section 114, illustrations (*e*) and (*f*), of the Evidence Act, the Court was entitled to presume that the accounts in the Collector's Office were correctly kept;

(4) that, therefore, the sale for arrears of revenue was valid and could not be questioned.

In cases in which an appeal lies to the Privy Council the Courts in India should, as far as may be practicable, pronounce their opinions on all the important points involved.

Tarakant Bannerjee v. *Puddomoney Dossee*, 10 M. I. A. 477 at p. 488; 5 W. R. P. C. 63; 1 Suth. P. C. J. 631; 2 Sar. P. C. J. 184; 19 E. R. 1052, followed. **P C** MAHOMED SOLAIMAN *v.* KUMAR BIRENDRA CHANDRA SINGH, 50 C. 243; (1922) A. I. R. (P. C.) 405; 44 M. L. J. 388; 32 M. L. T. 115; 27 C. W. N. 749; 37 C. L. J. 561 **906**

——— *Mortgage-deed—Personal covenant to pay interest—Suit for redemption—Property, whether can be made liable for interest.*

Plaintiffs mortgaged a house for Rs. 399 carrying interest at 12 annas per cent. per mensem, and executed a mortgage-deed, which provided that the defendants would be put in possession of a shop from the rent of which they would set off Rs. 2 per month against a portion of the interest on the mortgage-money, the balance being paid by plaintiffs, and that on the plaintiffs paying the principal sum of Rs. 399 they would be entitled to redeem the mortgage. In a suit for redemption:

Construction of document—concld.

Held, (1) that the conditions relating to redemption were clearly stated in the mortgage-deed and that there was nothing to indicate that the property was charged for payment of the interest as well;

(2) that consequently the plaintiffs were entitled to redeem the mortgage on payment of the principal sum alone. **Pat** KISHUN PRASAD SAHU *v.* HAKIM CHAUDHARI **973**

——— *Muhammadan Law—Gift in favour of private individual—Gift, description of, as waqf, effect of.*

Where in a deed of gift in favour of a private individual, the donor, in the course of the document, describes it as *waqf*, the mere use of the word *waqf* would not, in the absence of a consecration, necessarily involve a transfer of ownership in favour of the deity such as is required to constitute a valid dedication under Muhammadan Law. **A** MUHAMMAD AFZAL *v.* MUHAMMAD MAHMOOD, 21 A. L. J. 595; (1924) A. I. R. (A) 28 **343**

——— *Municipal Octroi Schedule, prescribing value of goods—Octroi, whether can be charged on actual value.*

Where the Octroi Schedule of a Municipality provided for the charging of Octroi on certain articles at a certain rate per cent. per cart-load and the value of a cart-load of each article was prescribed in the Schedule:

Held, that it was not open to the Municipality to charge Octroi at an *ad valorem* rate on the actual value of the articles. **B** LAXMICHAND JAVERMAL *v.* MUNICIPAL COMMITTEE OF NANDURBAR, (1923) A. I. R. (B) 413 **205**

Contract— *Breach— Damages—Impossibility of performance—Contract Act (IX of 1872), s. 56.*

The defendants entered into a contract with the plaintiffs to supply them a certain amount of coal from stock within a certain time, and placed an order with a Colliery firm presumably to secure the coal required. At the time, however, the supply of Railway wagons for transport of coal was restricted by Government only to the wants of actual consumers by whom the indents had to be signed. The plaintiffs, who were merchants and not consumers, supplied the defendants with a special indent in favour of a consumer to evade the Government, but in fact did not enter into any contract with that consumer to supply him the coal to be received from defendants. The defendants failed to deliver the full quantity of coal to the plaintiffs and the latter sued them for damages, claiming the difference between the contract price and the market price of the balance. It was urged in defence that the contract had become impossible of performance, as owing to Government restrictions the defendants could not get a supply of wagons for delivery of coal to plaintiffs who were not consumers and that at any rate as the plaintiffs could not sell that coal in the open market, no damages had been suffered by them. It was admitted that coal was available and could be purchased in the local market:

Contract—concld.

Held, (1) that as the defendants had agreed to supply the plaintiffs with coal from their stock the latter could sell it in the open market, and that as coal could be had in the local market, the contract had not become impossible of performance;

(2) that, therefore, the plaintiffs were entitled to recover the damages they claimed. **P C** KESHAVLAL BROS. & CO. *v.* DIWAN CHAND & CO., (1923) A. I. R. (P. C.) 105; 25 Bom. L. R. 854; (1923) M. W. N. 583; 27 C. W. N. 974; 47 B. 563; 45 M. L. J. 630; 33 M. L. T. 342; 1 P. L. R. 434 Cr. **396**

——— *Breach of promise to marry—Implied promise—Damages, whether recoverable.*

In a suit for damages for a breach of promise to marry, the promise need not be an express promise, but can be implied from the circumstances of the case. **R** MG. SHWE THE *v.* MA E BON. (1923) A. I. R. (R.) 128 **128**

Contract Act (IX of 1872), s. 23—*Money paid for settlement of marriage—Suit for recovery, whether lies.*

A person who gives to another, who is to procure a girl for his marriage, money for payment to the guardian of the girl selected, should money be demanded, can, on failure of the marriage negotiations, sue for its recovery.

Srinivasa Aiyar v. *Sesha Iyer*, 41 Ind Cas. 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282 and *Gulabchand Paramchand* v. *Fulbai Harichand*, 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649, followed.

Vaithyanatham v. *Gangarazu*, 17 M. 9; 3 M. L. J. 132; 6 Ind. Dec. (N. S.) 6, *Pitamber Ratansi* v. *Jagjivan Hansraj*, 13 B. 131*n.*; 13 Ind. Jur. 267*n.*; 7 Ind. Dec. (N. S.) 88, *Dholidas Ishvar* v. *Fulchand Chhagan*, 22 B. 658; 11 Ind. Dec. (N. S.) 1021, distinguished. **N** GANGADHAR DAJI *v.* GOVIND NARAYAN, (1923) A. I. R. (N.) 296 **107**

——— **s. 23**—*Public policy—Bond executed in lieu of compromise of non-compoundable case.*

A bond the consideration for which is the withdrawal of a non-compoundable case is void under the provisions of section 23 of the Contract Act and is unenforceable. **Fat** R. S. BION *v.* SHEO-GULAM LAL **843**

——— **s. 38**—Tender of mortgage amount—Partial tender, validity of. *See* CONSTRUCTION OF DECREE **246**

——— **s. 62**—*Novation of contract—Similarity of terms.*

The essence of the innovation of a contract lie not in the dissimilarity of the terms between the old and the new contract but in the intention of the parties to supersede the old by the new. **O** BALDEO *v.* SHER BAHADUR SINGH, 6 O. & A. L. R. 761 **42**

——— **ss. 69, 70**, *scope of—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 132—"Interested," meaning of—Sale—Vendee having notice of vendor's defective title—Payment of encumbrances—Vendee whether entitled to be reimbursed—Suit for recovery of money paid—Starting point of limitation—Civil Procedure Code (Act V of 1908), s 151, O. XLVII, r. 1—Review of decision before decree signed—Inherent power of Court.*

Sections 69 and 70 of the Contract Act are not designed for the benefit of persons who intermeddle with the affairs of others.

The word "interested" in section 69 of the Contract Act should be interpreted liberally.

Radha Madhub Samonta v. *Sasti Ram Sen*, 26 C. 826; 13 Ind. Dec. (N. S.) 1129, followed.

A man who gets a genuine sale-deed, and on the strength of that sale-deed obtains a valid decree for possession from a competent Court in a contested suit, cannot fairly be accused of an endeavour to manufacture evidence of title if he pays off charges upon the property in order to preserve it from sale.

Where an appeal to a superior Court only results in the decree appealed against being confirmed there is no interruption in the running of time calculated from the date of the original decree.

Hukum Chand Boid v. *Pirthichand Lal Chowdhury* [*Juscurn Boid*], 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.), followed.

Sarvothama Row v. *Chiannsami Pillai*, 49 Ind. Cas. 729; 42 M. 507; 36 M. L. J. 157; 9 L. W. 379; 25 M. L. T. 291; (1919) M. W. N. 432, not followed.

When a person pays off a debt which another is bound to pay the ordinary relief that the Courts can give is a personal decree against the defendant for money had and received, as section 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plantiff's delay he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property.

Where a vendee's suit for possession is dismissed on the ground that his vendor's title was nominal and that he took the sale with notice of the defect of title, a suit brought by him for recovery of certain sums alleged to have been paid by him in discharge of encumbrances on the property more than three years both from the date when his title was found against by the Court and from the date of the payment of encumbrances, is barred by limitation, whether Art. 62, or 97 of the Limitation Act is the more appropriate Article. Article 132 is inapplicable since the plaintiff can at best obtain only a personal decree against the defendant fo money had and received under section 69 of the Indian Contract Act.

Rajah of Vizianagram v *Rajah Setrucherla Somasekhararaz*, 26 M. 686 (F. B.) and *Narayana Kutty Goundan* v. *Pechiammal*, 15 Ind Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 354; 22 M. L. J. 364, distinguished.

A covenant for quiet enjoyment between the vendor and the vendee can in law be implied only

Contract Act—contd.

upon valid sales and not where the sale-deed, to vendee's knowledge, conveys no title whatever.

Article 116 of the Limitation Act is applicable to a suit on failure of consideration for return of any purchase-money paid under a registered sale and must be instituted within six years from the date of sale.

Subbaraya Reddiar v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240; (1914) M. W. N. 376, *Arunachala Aiyar* v. *Ramasami Aiyar*, 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J. 517; 16 M. L. T. 397 and *Secretary of State* v. *Pemaraju Venkayya*, 35 Ind. Cas. 254; 40 M. 910 at p. 915; 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575, followed.

Per *Spencer, J.*—Though a purchaser may have had notice of the defective title of his vendor, if he makes payments to creditors of the vedor *bona fide* after a decree for possession is passed in his favour, to preserve the property and stave off attachments and sales, the vendee is not a mere volunteer and would be entitled as to such payments to equitable relief under section 69 of the Contract Act.

Per *Devadoss, J.*—A vendee who knows that his vendor has no title and the sale is a sham, is only in the position of a volunteer and is not entitled to any amount for relieving the burden on the properties sold. A Civil Court does not confer a right to property which a person does not possess but only declares or enforces a right he has.

Per *Spencer and Devadas, JJ.*—Before a decree is signed it is competent to a Court to review its own decision under O. XLVII, r. 1 of the Civil Procedure Code.

Seyud Tuffuzzool Hossein v. *Rughoonath Pershad*, 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656, 20 E R. 701 and *Debi Bakhsh Singh* v. *Habib Shah*, 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 19; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 151 (P. C.), followed.

A Court has also inherent powers to correct an error obvious on the face of the record before an order has been completed.

In re St. Nazaire Co., (1879) 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854 and *In re Suffield and Watts, Ex parte Brown*, (1888) 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 514; 5 Morrell 83, relied on. **M** GOPALASAMY IYENGAR *v.* NUMMACHI REDDIAR, 17 L. W. 254; (1923) A. I. R. (M.) 392 **416**

——— s. **119**—*Order for specified goods—Portion of goods delivered to defendant—Second consignment containing more than remaining portion—Defendant, whether justified in refusing to take delivery.*

Plaintiff sued for recovery of money due on a balance of account in respect of the price of oil-cake supplied to defendant. It was pleaded that the agreement was for the sale of 500 bags that 250 had already been received; that the second consignment was of 290 bags, and that th

Contract Act—contd.

defendant had the legal right to refuse this consignment:

Held, (1) that the contract was governed by section 119 of the Contract Act and the defendant was justified in refusing a consignment which contained more than the ordered goods;

(2) that a second offer made by the plaintiff's agent could not alter the rights and liabilities of the parties. **Pat** JUGAL KESHWAR-BHOLANATH *v.* KISHORI LAL BEHARI LAL **923**

——— s. **149**—*Railway Company—Delivery of goods.*

Plaintiff brought a package to a Railway Station for despatch to another place. The Loading Clerk filled up a number in the forwarding note presented by the plaintiff and returned the same back to him with a request to call the next day and have the package marked with the number assigned and obtain a Railway Receipt. The plaintiff without waiting for the next day got the number assigned put on the package and left it in a shed within the premises of the Railway Station meant for the deposit of goods prior to their acceptance by the Railway. During the night the package was stolen. The plaintiff sued the Railway Company for damages:

Held, that the suit of the plaintiff must fail as there had been no delivery of the package to the Railway Company within the meaning of s. 149 of the Contract Act. The mere filling up of the forwarding note could not amount to such delivery. **A** LACHMI NARAIN *v.* BOMBAY, BARODA AND CENTRAL INDIA RAILWAY CO., 45 A. 235; (1923) A. I. R. (A.) 449 **243**

——— s. **151**—*Bailor and bailee—Goods lost by bailee—Want of care—Burden of proof.*

In order to escape liability for the payment of damages for the loss of goods entrusted to a bailee, the burden of proving that he took as much care of the goods as a man of ordinary prudence would, lies on the bailee. **L B** MAUNG PO THAIK *v.* MAUNG THA BYAW, (1923) A. I. R. (L. B.) 74 **18**

——— s. **230**—*"Principal contract"—Principal disclosed—Broker, liability of—Special custom—Arbitration.*

"Principal contracts" as distinguished from "direct contracts" are a very well known feature in the Calcutta Hessian Market and to them is attached a custom, under which whether or not the names of the principals are disclosed, the brokers are liable to the buyers and the sellers for the due fulfilment of those contracts and are entitled likewise to enforce them as against the said buyers and sellers. Section 230 of the Contract Act does not in any way affect the position of these brokers.

The whole point of a "principal contract" is that the credit of the brokers is the main thing in the mind of the contracting parties.

Where there is a custom entitling the brokers to enforce a "principal contract" against the parties to it, an arbitration clause providing for settlement of disputes "between both parties" to such a contract, should be taken to include the brokers.

Contract Act—concld.

Joy Lal & Co. v. *Monmotha Nath Mullik*, 35 Ind. Cas. 3; 20 C. W. N. 365, followed.

Obiter.—Wherever the "principal contract" form is employed, a custom obtains making the brokers and the contracting parties mutually liable to one another. **C** JITMULL-GIRDHARI LAL *v.* RAM GOPAL BOHITRAM, 50 C. 12; (1923) A. I. R. (C.) 419 **273**

——— **s. 264**—*Partnership, dissolution of, notified in public press—Retiring partner, liability of.*

The mere publication of a notice of dissolution of a partnership in the public press is not sufficient to relieve a retiring partner from liability for good supplied to the firm by persons having old dealings with the same. **R** EZEKIEL MOSES *v.* RUSSA ENGINEERING WORKS, 1 R. 47; 2 Bur. L. J. 46 **16**

Court-fees—*Mortgage-decree—Application for personal decree—Appeal—Court-fees payable—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.*

A mortgage-decree contained no provision for the recovery of the balance of the decretal amount after the sale of the mortgaged properties, from the debtor. After the sale of the properties the decree-holder made an application under O. *XXXIV*, r. 6 of the Civil Procedure Code, for a personal decree against the mortgagor for the balance of the decretal amount which had been ascertained as a result of the realisation by the sale, and the application was granted. The judgment-debtor appealed.

Held, that the Memo. of Appeal required an *ad valorem* Court-fee stamp on the amount in respect of which a personal decree had been made against the appellant. **A** BINDHIACHAL RAI *v.* SITA RAM **21**

Court-fee—*Redemption of mortgage, decree for, appeal against—Amount claimed larger than allowed by decree—Court-fee payable.*

When a mortgagee in appeal claims a larger amount than that awarded by the decree of the lower Court allowing redemption, his Memorandum of Appeal is chargeable with an *ad valorem* Court-fee calculated on the difference between the amount found due by the lower Court and that claimed by him in appeal.

Sangar Bakhsh Singh v. *Rawat Digdeo Bakhsh Singh*, 67 Ind. Cas. 968; 25 O. C. 30; (1922) A. I. R. (O.) 82, followed. **O** SANT BAKHSH *v.* DILDAR HUSAIN **88**

Court Fees Act (VII of 1870), s. 7 (v) (e) and Sch. II, Art. 17 (vi)—*Temple, if has market value.*

A temple which is inalienable and absolutely devoted in perpetuity to religious purposes has no market-value at all as such within the meaning of section 7 (*v*) (*e*) of the Court Fees Act and must be dealt with for the purposes of the Act as a matter "not otherwise provided for" under Schedule II, Art. 17 (*vi*) of the Act.

Quaere.—Whether a temple is a "house" within the meaning of section 7 (*v*) (*e*) of the Court-Fees Act. **M** RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR, (1923) M. W. N. 5 0; 45 M. L. J. 274; 18 L. W. 326; 33 M. L. T. 21; 46 M. 782; (1924) A. I. R. (M.) 19 **198**

Court Fees Act—contd.

——— **s. 7, v, xi (cc)**—*Tenant staying over after notice to quit—Suit for possession—Court-fees.*

A suit for possession against a person who continues to be in possession after his tenancy has come to an end and who was given a notice to quit according to law, is not far recovery of immoveable property from a person who is a tenant holding over but is a suit to recover it from a trespasser and as such falls not under section 7, xi (*cc*) of the Court-Fees Act but under clause v of that section. **N** NARAIN *v.* TUKARAM, (1923) A. I. R. (N.) 310 **93**

——— **s. 7 xi (cc)**—"*Tenant,*" *meaning of—Suit to eject*—Thikadar *after expiry of lease position of—Court-fee.*

Section 7 (*xi*) (*cc*) of the Court Fees Act relates to suits for the recovery of immoveable property from a person who has been a tenant but whose tenancy has expired and who is holding over even against the will of his lanlord.

The clause refers to all cases where the landlord seeks to recover the property from a person who has been his tenant and whose tenancy has come to an end or where the landlord by reason of some breach of covenant is entitled to re-enter.

The word "tenant" in section 7 (*xi*) (*cc*) of the Court Fees Act, includes a person to whom the description would apply immediately before the commencement of an ejectment suit but whose tenancy has terminated entitling the landlord to eject him.

A suit by a landlord to eject a tenant who was a *thikadar* but whose *thikadari* interest has expired and who refuses to quit, whatever the reason may be, comes within clause (*cc*) of paragraph (*xi*) of section 7 of the Court-Fees Act. **Pat** RAMCHARAN SINGH *v.* SHEO DUTTA SINGH, 2 Pat. 260; (1923) A. I. R. (Pat.) 380; 4 P. L. T. 666 **619**

——— **Sch. I, Art. 5**—*Review, application of—Court-fee payable.*

The words "leviable on the plaint or Memorandum of Appeal" in Art. 5 of Schedule I of the Court-Fees Act, mean "leviable on the plaint or Memorandum of Appeal in which the judgment, review of which is asked for, was passed" and cannot be construed as meaning "leviable on a plaint or Memorandum of Appeal asking for the same relief as that asked for in the application for review."

In re Manohar Tambekar, 4 B 26; 2 Ind. Dec. (N. S.) 528, *Proceedings, 6th January* 1872, 7 M. H. C. R. App. 1, *In the matter of Sheikh Ali Ahmad*, 1 Ind. Cas. 209; 31 A. 294; 6 A. L. J. 215 *Nobin Chundra Chuckerbutty* v. *Mohamed Uzir Ali*, 3 C. W. N. 292 and *Fakhur Ali* v. *Sahib Nur*, 20 Ind. Cas. 3; 254 P. L. R. 1913; 159 P. W. R. 1913, relied on.

An application for review must, therefore, if presented before the ninetieth day from the date of the decree, bear one-half the fee levied or leviable on the plaint or Memorandum of Appeal, out of which the application has arisen, without

Court Fees Act—concld.

reference to the relief asked for in the application for review. **O** NAGESHAR SAHAI *v.* SHIAM BAHADUR, 26 O. C. 33 **255**

Creditor and debtor—*Promissory-note, suit on —Independent cause of action, value of.*

Where a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory-note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence.

Ram Sarup v. *Jasodha Kunwar*, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72, followed. **A** KASHI PRASAD *v.* PANNA LAL, (1923) A. I. R. (A.) 529 **359**

Criminal Procedure Code (Act V of 1898), ss 4 (1) (h) 199—*Penal Code (Act XLV of 1860, s. 498—Complaint and statement of complainant, nature of—Enticing away married woman—Complaint, contents of.*

The sworn statement and the complaint of a complainant may be read together for the purpose of ascertaining what the nature of the complaint in any particular case is, as oral allegations are also included in the definition of "complaint" contained in section 4 (1) (*h*) of the Criminal Procedure Code.

In re Pedda Anjinigadu, 64 Ind. Cas. 282; (1921) M. W. N. 514; 22 Cr. L. J. 762; (1922) A. I. R. (M.) 353; 13 L. W. 695, followed.

Where in a complaint of an offence of enticing away a married woman there is no allegation either in the complaint or in the sworn statement of the complainant, that the accused's purpose was to have illicit intercourse with her, there is no "complaint" of an offence under section 498 of the Penal Code so as to give a Magistrate jurisdiction to take cognizance of that offence as provided by section 199 of the Criminal Procedure Code. **M** ARUNACHALAM CHETTY *v.* EMPEROR, 45 M. L. J. 543; (1923) M. W. N. 876; 24 Cr. L. J. 837 **949**

——— **s. 39**—*Opium Act (I of 1878), s. 3—"Special empowering," what amounts to*

A Notification of the Local Government empowering Second Class Magistrates of certain places in the Presidency mentioned in a list appended to the Notification, by virtue of their office to try cases under the Opium Act, amounts to a "special empowering" within the meaning of section 3 of the Opium Act. **M** ALAGA PILLAI *v.* EMPEROR 24 Cr. L. J. 846 **958**

——— **s. 107**—*Magistrate, when can detain person in custody—Proper procedure.*

Where proceedings have been instituted against a person under section 107 of the Criminal Procedure Code it is only in the special circumstances referred to in sub-sections (3) and (4) of that section that the law empowers a Magistrate to detain a person in custody till the completion of the enquiry.

The sub-section can only be put into operation when a Magistrate, who has no powers to proceed under sub-section (1) of section 107 is led to believe

Criminal Procedure Code—contd.

that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance, and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest a person and he must send him then to another Magistrate who has got adequate powers for dealing with the case.

Raghunandan Pershad v. *Emperor*, 32 C. 80; 8 C. W. N. 779; 1 Cr. L. J. 775, followed. **Pat** WAHARI MANDER *v.* EMPEROR, (1923) A. I. R. (Pat.) 527; 24 Cr. L. J. 825 **857**

——— **s. 110**—*Security for good behaviour—Evidence of vague character, order, whether can be based on—Prosecution evidence, value of.*

An order requiring security for good behaviour cannot be based on the vague evidence of a large number of persons to the effect that the accused is a thief and a dacoit and that the neighbourhood is of that opinion. There is no rule of law or of good sense that every person who appears as a witness on behalf of the prosecution must be believed. **O** RAGHUDATT *v* EMPEROR, 9 O. & A. L. R. 517; 24 Cr. L. J. 791 **535**

——— **s. 114**—*Consideration justifying arrest —Magistrate, duty of—Substance of report not recorded—Order, legality of.*

In order to take action under section 114 of the Criminal Procedure Code, the Magistrate must be of opinion that the only way of preventing an imminent breach of the peace is to commit the persons concerned to custody and must put on record the substance of the Police or other report by which he is influenced.

Where a Magistrate's order commiting certain persons to custody did not state who had made the report, or what in particular was stated in the report:

Held, that the Magistrate could not be said to have proceeded on any information to the effect that the arrest of those persons was the only way to preserve a breach of the peace and the order was, therefore, illegal. **Pat** MANIRUDDIN *v.* EMPEROR, 24 Cr. L. J. 829 **861**

——— **s. 122**—*Sureties living at distance from person bound over, whether can be accepted.*

Section 122 of the Code of Criminal Procedure gives a discretion to a Magistrate to refuse or accept the sureties according as he considers them unfit or otherwise for the purpose for which the security is required. The elements necessary for determining the fitness of the sureties have not been laid down, but in each case the Magistrate must consider whether the surety is in a position to exercise considerable control and supervision over the accused. The mere solvency of a surety may not invariably be sufficient to ensure the good conduct of the accused any more than the mere fact of his residing at a distant place may be a sufficient ground for rejecting him as such, because there might be circumstances suggesting that, in spite of the solvency of the surety or his residence at a distant place, the exercise of due

supervision and control over the conduct and movements of the accused may not or may yet be practically possible. The object of requiring security is not to obtain money for the Crown by the forfeiture of recognisances but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is, therefore, reasonable to expect and require that the sureties to be tendered, should not be sureties from such a distance as to make it unlikely that they would exercise any control over the man for whom they are willing to stand surety. If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour there can be no inherent objection to their being accepted as sufficient.

Queen-Empress v. *Rahim Bakhsh*, 20 A. 206; A. W. N. (1898) 21; 9 Ind. Dec. (N. S.) 494, *In re Jesa Bhatha*, 55 Ind. Cas. 857; 22 Bom. L. R. 190; 21 Cr. L. J. 377; 44 B. 385 and *King-Emperor* v. *Mangal*, 6 O. C. 199, relied on. **O** EMPEROR *v.* RAMESHWAR TEWARI. 9 O. & A. L. R. (O.) 526; (1923) A. I. R. (O.) 165; 10 O. L. J. 299; 24 Cr. L. J. 795 **539**

——— **ss. 133, 135, 137, 439**—*Obstruction to right of way*—Bona fide *dispute—Procedure—Jurisdiction—Revision—Interference by High Court—Public way—Dedication.*

Per *Lindsay, J.*—The discretion vested in the High Court to interfere in revision ought to be exercised in all cases where an attempt is made to abuse the process of the Court so as to prevent parties from resorting to the Criminal Courts to compel a decision regarding matters which properly lie within the cognisance of the Civil Courts.

Disputes relating to a private right of way should not be decided in the Criminal Courts.

In order to show that a way is a public way it must be proved that it has been dedicated to the public generally. A dedication to a limited section of the public is void and of no avail. A general dedication has to be inferred from the conduct of the owners of the soil and from uninterrupted user of the way by the general public.

Per *Daniels, J.*—It is not correct to say that a Magistrate has no jurisdiction to proceed under Chapter X of the Criminal Procedure Code in a case where a *bona fide* dispute as to title is raised. On objection being taken by the defendant to the proceeding, under section 135 (*b*) of the Code, all that the Magistrate has to decide is whether his conditional order is reasonable and proper or not.

Emperor v. *Dost Muhammad*, 28 A. 98; A. W. N. (1905) 202; 2 A. L. J. 599; 2 Cr. L. J. 517, dissented from.

Ram Sagar Mondal v. *Alek Naskar*, 67 Ind. Cas. 177; 49 C. 682; 26 C. W. N. 442; 35 C. L. J. 247; 23 Cr. L. J. 353, relied on.

The High Court will only entertain a revision acts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced.

Ahsanullah Khan v. *Mansukh Ram*, 25 Ind. Cas. 350; 36 A. 403 at p. 405; 12 A. L. J. 511; 15 Cr. L. J. 598, followed.

Per *Walsh, J.*—One co-sharer of an undivided share cannot dedicate to the public a way over the common estate without the consent of his co-owners. The act must be the concerted act, at one given moment, of all the joint owners.

A Magistrate must deal with an alleged public way under section 133 of the Criminal Procedure Code, even though the public character of the way is disputed.

The summary powers conferred upon Magistrates under Chapter X of the Criminal Procedure Code are primarily intended to be exercised in cases where there is no question that the way is one vested in the public, and when that question is seriously disputed and its decision becomes a difficult matter of mixed fact and law, a Magistrate has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. **A** ABDUL WAHID KHAN *v.* ABDULLAH KHAN, 21 A. L. J. 529; 45 A. 656; 24 Cr. L. J. 817; (1924) A. I. R. (A.) 1 **849**

——— **ss. 133, 137**—*Obstruction to public way or place—Railway land, whether public place*—Bona fide *claim—Procedure.*

The obstruction to which section 133 of the Criminal Procedure Code is applicable must be an unlawful obstruction in any way which is or may be lawfully used by the public or in any public place. There is no warrant for the view that Railway land is necessarily a public place, especially Railway land which is outside the Railway fencing at a Railway Station.

In taking evidence under section 137 of the Criminal Procedure Code, in a case where the public nature of the way is disputed, it is incumbent on the Magistrate, even where he finds that the claim of title to the land in question on the part of the person showing cause is not justified, to determine further whether the claim is nevertheless a *bona fide* claim, and if he finds in the affirmative, to stop proceedings and give such person time to establish his claim in the Civil Court.

Luckhee Narain Banerjee v. *Ram Kumar*, 15 C. 564; 7 Ind. Dec. (N. S.) 960, *Imrat Ali* v. *Sheikh Amjad Ali* 39 Ind. Cas. 292; 2 P. L. J. 67; 3 P. L. W. 404; 18 Cr. L. J. 452, relied on. **Pat** RANGI SAH *v.* B. N. W. RAILWAY CO., 4 P. L. T. 402; 1 P. L. R. 154 Cr.; (1923) A. I. R. (Pat.) 540; 24 Cr. L. J. 855 **1047**

——— **s. 144**, *proceeding under—Record, contents of.*

In taking action under section 144, Criminal Procedure Code, the record of the Magistrate should show in clear and unmistakeable terms the authority under which he professes to act. R THUDAMAWARA *v.* EMPEROR, 1 P. 49; 2 Bur. L. J. 22; (1923) A. I. R. (R.) 146; 24 Cr. L. J. 737 **65**

Criminal Procedure Code—contd.

——— **s. 145**—*Attachment and sale of crops—Proceedings dropped—Order disposing of sale-proceeds.*

Where a Magistrate declines to continue proceedings under section 145 of the Criminal Procedure Code in respect of a dispute relating to certain crops on the ground that there is no likelihood of a breach of the peace, he has no jurisdiction to direct that the sale-proceeds of the crops attached under the preliminary order should be deposited in Court till one of the parties establishes his right to them in the Civil Court. The proceeds must be restored to the person from whose possession the crops were taken.

Subbarama Aiyar v. *Mariya Pillai*, 24 Ind. Cas. 967; 16 M. L. T. 52; 1 L. W. 493; 15 Cr. L. J. 559; (1914) M. W. N. 798, followed. **M** MAHALAKSHMI *v.* SUBBARAYADU, 17 L. W. 429; (1923) A. I. R. (M.) 472; 24 Cr. L. J. 783 **447**

——— **ss. 145, 146**—*Magistrate, duty of—Attachment of property, when permissible.*

In cases under section 145 of the Criminal Procedure Code a reasonable effort must be made to decide the question as to possession before there is jurisdiction to attack the subject-matter under section 146.

Sheobalak Rai v. *Bhagwat Panday*, 15 Ind. Cas. 486; 40 C. 105; 13 Cr. L. J. 486; 16 C. W. N. 1052, followed.

It is not a Magistrate's business to speculate whether his order under section 145 of the Criminal Procedure Code will prejudice a future decision in a revenue proceeding. It is also not sound to check his hand because his decision is not final. **Pat** WAYEZUL HUQ *v.* SHOBRATI JOLAHA, 4 P. L. T. 441; 1 P. L. R. 161 Cr.; 24 Cr. L. J. 754 **258**

——— **ss. 145, 435 (3)**—*Initial order, failure to make, effect of—Revision.*

Where in a proceeding under section 145 of the Criminal Procedure Code the Magistrate fails to make the initial order prescribed by sub-section (1) of that section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section the proceedings are without jurisdiction and cannot be regarded as proceedings under section 145.

In circumstances such as the foregoing, the High Court is not precluded by section 435 (3) of the Criminal Procedure Code from interfering in revision. **L** HAKAM *v.* RALIA RAM, 4 L. 66; 24 Cr. L. J. 751 **79**

——— **ss. 145, 439**—*Proceedings under s. 145—Preliminary finding, necessity of—Finding as to possession—Order without jurisdiction—Revision.*

In the absence of a preliminary finding as to the existence of a dispute concerning land likely to cause a breach of the peace, a Magistrate is not justified in taking any action under section 145 of the Criminal Procedure Code.

In a proceeding under section 145, Criminal Procedure Code, the scope of a Magistrate's inquiry is limited to a finding as to possession, and on that finding the only order which he legally can pass is one declaring which of the disputing parties is entitled to possession and forbidding all disturbances of his possession until evicted in due course of law. A finding with respect to the merits of the claims of the respective parties to a right of possession of the subject of dispute is a finding wholly without jurisdiction.

Although the High Court has no revisional jurisdiction with respect to proceedings under section 145, it will nevertheless interfere with an order which is without jurisdiction. **R** NGA PO TIN *v.* NGA PO SAUNG, 1 R. 53; 2 Bur L. J. 32; (1923) A. I. R. (R.) 211; 24 Cr. L. J. 740 **68**

——— **s. 172**—*Calcutta Suburban Police Act (III of 1888), s. 47 (A)—Evidence Act (I of 1872), s. 145—Police diary of case in suburban area, whether privileged—Right of accused to inspect diary.*

In the suburban area covered by the Calcutta Suburban Police Act the Investigating Police Officer keeps his diary under section 47 A of that Act and not under section 172 of the Criminal Procedure Code and no privilege attaches to such diary and the accused is entitled to see the statements of the witnesses recorded by the Investigating Police Officer who have been examined in Court and to use them to contradict the statements made by those witnesses under section 145 of the Evidence Act. **C** SURESH CHANDRA GHOSE *v.* EMPEROR, 24 Cr. L. J. 757 **161**

——— **ss. 190, 476**—*Presentation of forged document for registration—Order by District Registrar for prosecution—District Registrar also District Magistrate—Order, whether legal.*

An application for the compulsory registration of a sale-deed was rejected, whereupon the applicant appealed to the District Registrar, who dismissed the appeal, but a few days later directed the prosecution of the applicant for an offence under section 471, Penal Code, and referred the case under the provisions of section 476, Criminal Procedure Code, to the District Magistrate. After the usual enquiry the accused was committed to the Court of Session and eventually convicted. On appeal it was objected that the District Registrar not being a Civil, Criminal or Revenue Court within the meaning of section 476 had no jurisdiction to proceed under that section:

Held, that as the District Registrar was also the District Magistrate, it was competent for him to take cognizance under section 190, clause (1), sub-section (*c*), of the Criminal Procedure Code and to transfer the case to a Subordinate Magistrate in order that a commitment enquiry might be held. **Pat** CHETA MAHTO *v.* EMPEROR, 2 Pat. 459; 4 P. L. T. 727; 24 Cr. L. J. 792 **536**

——— **s. 195**, *applicability of—Perjury before District Judge as Registrar—Sanction for prosecution—District Judge, jurisdiction of.*

A District Judge has no jurisdiction to sanction a prosecution for perjury in respsect of an affidavit sworn before him as District Registrar. To such a case section 195, Criminal Pro

cedure Code, has no application. A DINA NATH v. NEK RAM, 21 A. L. J 88; (1923) A. I. R (A.) 175; 24 Cr. L. J. 747 **75**

——— **s. 195**—*Sanction for perjury—Deposition by witness*—Locus penitentiae.

A witness is entitled to *locus penitentiae* and an opportunity to correct himself and if, when he gets that opportunity, he re-calls to his mind any fact about which he had made a statement which was not quite accurate a prosecution for perjury in respect of the former statement is not desirable.

Lachhmi Narain v. *Emperor*, 19 Ind. Cas. 712; 16 O. C. 81; 14 Cr. L. J. 280, followed.

No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected if necessary; till then it is open to the witness to qualify or correct any statement. A MAHARAJ PRASAD v EMPEROR, 21 A. L. J. 673; 9 O. & A. L. R. 094; 24 Cr. L. J. 779 **443**

——— **ss. 195, 439**—*Penal Code (Act XLV of 1860), ss. 468, 471—Bihar and Orissa Public Demands Recovery Act (IV of 1914), sale under—Application to withdraw surplus money—Forgery—Sanction, whether necessary—Revision—High Court, whether can restrain subordinate Court from trying accused person.*

A certain *mahal* was sold by a Collector for arrears of Road Cess under the Bihar and Orissa Public Demands Recovery Act, and after paying the Government demand a surplus was lying in the Collectorate to the credit of the certificate debtors. A *mukhtar* subsequently filed a *mukhatarnama* purporting to have been executed in his favour by all the co-sharers in the *mahal* and withdrew the amount in deposit. Complainant, one of the co-sharers, lodged a complaint before a Magistrate that the accused, the other co-sharers in the *mahal*, had forged his name on the *mukhtarnama* and praying that process should issue against them for offences under sections 468 and 471 of the Penal Code. The Magistrate issued process against the accused and the latter moved the High Court in revision to quash the proceedings on the ground that the sanction of the Certificate Officer under section 195 of the Criminal Procedure Code had not been obtained for the prosecution of the accused:

Held, (1) that the certificate proceedings had terminated after the sale of the property and the deposit of the money and that thereafter it was open to any ministerial officer of the Court to return the surplus money to the persons entitled under proper safeguards;

(2) that the application to withdraw the money was not made to the officer entrusted with the custody of the surplus sale-proceeds in his capacity as a Court;

(3) that, therefore, no sancton under section 195 of the Criminal Procedure Code was necessary for the prosecution of the accused.

Semble:—Section 439 of the Criminal Procedure Code does not authorize the High Court to direct a subordinate Court to refrain from trying an accused person against whom it has issued process. Pat JHARU LAL v. MADAN DAS, 2 Pat. 257; (1923) A. I. R. (Pat.) 410; 24 Cr. L. J. 809 **713**

——— **ss. 195, 537**—*Penal Code (Act XLV of 1860), s. 182, offence under—Sanction to prosecute, absence of—Irregularity.*

Although sanction to prosecute for an offence under section 182, Penal Code, is necessary, the absence of such sanction, unless a failure of justice is occasioned thereby, is a mere iregularity under section 537 of the Criminal Procedure Code, and would not vitiate the prosecution. L B NAGAPPAN MADALIAR v. EMPEROR, (1923) A. I. R. (R.) 135; 24 Cr. L. J. 755 **259**

——— **ss. 199, 345, 403**—*Penal Code (Act XLV of 1860), s. 498—Abduction of married woman—Complaint by person having care of woman—Complainant, whether can compound offence—Acquittal on charge of abduction, whether bars trial on charge of detention.*

Although by virtue of section 199 of the Criminal Procedure Code a person having the care of a married woman on behalf of the husband during his absence can prefer a complaint in respect of an offence under section 498 of the Penal Code, the only person who is authorised under section 345 of the Code of Criminal Procedure to compound this offence is the injured husband.

An order of acquittal, therefore, in respect of an offence under section 498 of the Penal Code, which is the result of the offence having been compounded by a complainant other than the husband, is illegal.

An acquittal on a charge of abduction under section 498 of the Penal Code is no bar to the trial of a charge of detention. L MAHBUB ALI KHAN v. EMPEROR, 4 L. L. J. 488; 24 Cr. L. J. 780 **444**

——— **s. 202**—*Magistrate holding preliminary inquiry, whether debarred from trying case.*

The mere fact that a Magistrate holds a preliminary inquiry into the truth of a complaint, does not incapacitate him from trying the case.

Queen-Empress v. *Maganla* Rat. Un. Cr. C 530, Cr. Rg. No. 63 of 1890, followed. L B MRS MAY BOUDVILLE v. EMPEROR, (1923) A. I. R. (R) 65; 24 Cr. L. J. 744 **72**

——— **ss. 202, 476**—*Prosecution on evidence recorded under s. 202, legality of—Penal Code (Act XLV of 1860), s. 211—Complainant not given opportunity to produce all evidence—Prosecution, legality of.*

Section 476 of the Criminal Procedure Code is wide enough to cover the consideration of other than legal evidence and a prosecution can legally be directed upon evidence recorded under section 202 of the Code.

In re Kachi Madar Labhai, 10 Ind. Cas. 619; 10 M. L. T. 47; 21 M. L. J. 795; (1911) 2 M. W. N. 9; 12 Cr. L. J. 323, dissented from.

A prosecution for an offence under section 211 of the Penal Code is not necessarily illegal merely because the complainant was not given an

Criminal Procedure Code—contd.

opportunity to adduce all his evidence in support of his case. **Pat** BANSIDHAR MARWARI *v.* EMPEROR, 24 Cr. L. J. 862 **1054**

——— s. 203—*Complaint against Police Officer —Enquiry—Procedure.*

Where a complaint is made against a Police Officer it should be enquired into with care and every opportunity given to the complainant to prove his complaint. If the complaint is false the Magistrate has considerable powers of granting compensation by inflicting a fine on the complainant and of prosecuting him for perjury. **O** BALDA PASI *v.* NASIR ALI KHAN, 9 O. & A. L. R. 457; 24 Cr. L. J. 814 **718**

——— ss. 203, 437—*Complaint dismissed without notice to accused—Further enquiry—Order of dismissal, whether can be set aside without notice.*

Where a complaint has been dismissed under section 203, Criminal Procedure Code, without notice to the accused, the order of dismissal may also be set aside without notice to him

Angan v. *Ram Purbhar*, 18 Ind. Cas. 146; 10 A. L. J. 531; 14 Cr. L. J. 2; 35 A. 78, followed. **A** MATA PALAT *v.* EMPEROR, (1923) A. I. R. (A.) 479; 24 Cr. L. J. 811 **715**

——— s. 239—*Joint trial—Allegations against two accused mutually exclusive—Misjoinder of charges.*

Where the allegation against two accused persons are mutually exclusive, *i. e.*, where the allegation is that either one or the other committed the offence, they can ot be tried together.

Azi z-ud-din v. *Emperor*, 21 Ind. Cas. 163; Bur. L. T. 191; 14 Cr. L. J. 562; 7 L. B. R. 68, followed. **L B** KYAW DWE *v.* EMPEROR, (1923) A. I. R. (R.) 67; 24 Cr. L. J. 750 **78**

——— ss. 247, 403—*Acquittal under s. 247 bars subsequent proceedings.*

An order of acquittal under section 247 of the Criminal Procedure Code operates as a bar under section 403 to the entertainment of a complaint charging the same accused with having committed the same offence, on the same allegations of fact. **A** EMPEROR *v.* DULLA, 45 A. 58; (1923) A. I. R. (A.) 260; 24 Cr. L. J 862 **1054**

——— ss. 248, 403—*Complainant, absence of —Acquittal, effect of—Presence of accused, whether necessary.*

The important matter for an order under section 247 of the Criminal Procedure Code is the presence or absence of the complainant. It cannot be said that the accused must either be present or must have been summoned to Court.

An order under section 247 is a final order of acquittal which operates as a bar under section 403 of the Code to the trial of the accused for the same offence.

In re Guggilapu Peddaya, 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 12 Cr. L. J. 41, followed.

In re Muthia Moopan, 21 Ind. Cas. 159; 36 M. 315; 14 Cr. L. J. 559, distinguished. **Pat** KIRAN SARKAR *v.* EMPEROR, 24 Cr. L. J. 815; 5 P. L. T. 15; 2 P. L. R. 83 Cr. **719**

Criminal Procedure Code—contd.

——— s. 257—*Duty of Magistrate to summon defence witnesses—Warrant-case—Costs, failure to pay, effect of.*

The provision contained in section 257 of the Criminal Procedure Code that a Magistrate shall, save in exceptional circumstances, issue process on the defence witnesses is mandatory. The exception arises when the Magistrate considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice, and such ground must be recorded in writing.

In the matter of the petition of Sat Narain Singh, 3 A. 392; 5 Ind. Jur. 602; 2 Ind. Dec. (N. S.) 204, *Emperor* v. *Purshottam Kara*, 26 B. 418; 4 Bom. L. R. 38, *Narayana Mudaly* v. *Emperor*, 31 M. 131; 7 Cr. L. J. 425, relied on.

Nilkanta Singh v. *Queen-Empress*, 20 C. 469; 10 Ind. Dec. (N. S.) 317, distinguished.

The inability or even the refusal of an accused person to pay the costs of the witnesses would not, in a warrant-case, be an adequate ground for refusing to summon the witnesses. **Pat** DEBI SINGH *v.* EMPEROR, 24 Cr. L. J. 831 **833**

——— s. 257—*Witnesses, attendance of—Accused, right of—Duty of Court.*

There is no reason why, within all reasonable limits, an accused person should not be entitled to obtain the assistance of the Court in bringing be ore it all such persons as he may think are necessary in order to protect himself against the accusation and charge which has been brought against him in connection with any criminal offence. Mere technicalities as to whether he applies to the Court for enforcing the attendance of his witnesses at one moment or a little later should not deprive him of his right. It does not matter in the least to the Tribunal or to the administration of justice, whether there is or is not a trifling delay in the operation and conduct of proceedings. The only important thing from a fundamental point of view is that the Tribunal should ascertain what is the truth of the accusation which has been brought against the accused. **Pat** BENI *v.* EMPEROR, 1 P. L. R. 117 Cr; (1923) A. I. R. (Pat.) 536; 24 Cr. L. J. 835; 5 P. L. T. 46 **947**

——— ss. 301, 303, 307—*Trial by Jury—Verdict, incomplete—Judge, power of, to put questions to Jury—Several charges—Procedure —Judge, disagreeing with verdict—Reference to High Court—Discretion.*

In a case in which the accused were being tried on several charges, the Judge directed the Jury to return a verdict in respect of each charge with reference to each accused. The Jury returned a unanimous verdict which made no reference to some of the charges. The Judge then put some questions to the foreman of the Jury in order to ascertain precisely what the verdict of the Jury was as regards those charges:

Held, that the course adopted by the Judge was quite legitimate and in accordance with the provisions of section 303 of the Criminal Procedure Code.

Where a Sessions Judge disagrees with the verdict of a Jury, section 307 of

the Criminal Procedure Code gives him a discretion to submit the case to the High Court; it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, that he is bound to do so, if he is not clearly of that opinion, his failure to submit the case to the High Court is not a subject for interference by the High Court on appeal.

Per *Sanderson, C. J.*—In a case in which there are more than one accused and there are several charges it is a convenient course for the Judge to take the verdict of the Jury upon each charge separately. **C** ERAN KHAN *v.* EMPEROR, 50 C. 658; 24 Cr. L. J. 838; (1924) A. I. R. (C.) 47 **950**

——— **s. 342,** *applicability of—Summons-cases—Procedure.*

The provisions of section 342 of the Criminal Procedure Code are inapplicable to summons-cases, but there is no objection to a Magistrate questioning the accused generally for the purpose of enabling him to explain the circumstances appearing in the evidence against him, and in complicated cases, especially where the accused is not represented by Counsel, it is a desirable course, notwithstanding that it is not obligatory. **M** PONNUSAMI ODAYAR *v.* RAMASAMI THATHAN, 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 46 M. 758; 24 Cr. L. J. 833; (1924) A. I. R. (M.) 15 **945**

——— **s. 342 (1), Chap. XXII**—*Summons-case tried summarily—S. 342, applicability of.*

The provision contained in section 342 of the Criminal Procedure Code is inapplicable to summons-cases whether tried summarily or in the ordinary manner. **M** DHARMA SINGH *v.* EMPEROR, 45 M. L. J. 230; 18 L. W. 612; 46 M. 766, (1923) M. W. N. 893; 24 Cr. L. J. 847; (1924) A. I. R. (M.) 30 **959**

——— **s. 345**—*Penal Code (Act XLV of 1860), ss. 323, 504—Compounding offence—Document of compromise.*

S., a Railway passenger, complained to the Police that he had been assaulted and abused by *J.*, the Guard of the train in which he had travelled. Upon this *J.* was charged with the commission of offences under sections 323 and 504 of the Penal Code. At the trial, he produced a document alleged to have been written by *S.*, which said: "Mr. *J.* has come to me and offered an unconditional apology. I beg to withdraw the case against him." *S.* admitted the agreement but said that it was 'given for office and not for Court' and that he wished the accused to be tried. The Magistrate held that the agreement was not a compromise but a withdrawal which could only be made by intimation to the Magistrate and finding the accused guilty sentenced him to a fine. On a reference of the case to the High Court:

Held, that the case had been compounded by *S.* and the conviction of *J.* was illegal. **A** EMPEROR *v.* J. JOHN, 45 A. 145; (1923) A. I. R. (A.) 474; 24 Cr. L. J 758 **262**

——— **s. 349**—*Trial by Second Class Magistrate—Reference to Joint Magistrate—Joint Magistrate, powers of.*

A Second Class Magistrate trying an accused person under sections 352 and 506 of the Penal Code being of the opinion that the accused should be bound over under section 106 of the Criminal Procedure Code referred the case to the Joint Magistrate. The latter passed an order under section 106. On the record going back the Second Class Magistrate convicted the accused on the substantive charge. On a reference by the Sessions Judge:

Held, that the Joint Magistrate acted without jurisdiction and the order passed by him was liable to be set aside. **A** DUKHI *v.* EMPEROR, 24 Cr. L. J. 784 **448**

——— **ss. 349, 562**—*Penal Code (Act XLV of 1860), s. 53—S. 349, construction of—Order under section 562, whether punishment.*

It is a general rule of criminal jurisdprudence that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty, and an exception to this rule must be strictly construed

Emperor v *Ram Prasad*, 36 Ind. Cas. 867; 12 N. L. R. 146; 18 Cr. L. J. 35, followed.

Section 349 of the Criminal Procedure Code creates one of such exceptions.

An order under section 562 of the Criminal Procedure Code directing release upon probation of good conduct cannot be said to be a "punishment" in the sense in which that word is used in section 349 of the Code, for it is not one of the various kinds of punishment described in section 53 of the Penal Code. **N** BABA *v.* EMPEROR 24 Cr. L. J. 738 **66**

——— **s. 369**—*Review—Revision—Order passed by one Judge, whether can be revised by another Judge.*

A High Court Judge has no jurisdiction to revise an order passed by himself or by another Judge of the Court **A** EMPEROR *v.* KALE, 45 A. 143; (1923) A. I. R. (A.) 473; 24 Cr. L. J. 766 **270**

——— **s. 439**—*High Court, power of, to grant leave to compound offence.*

A High Court has power in revision to allow the composition of an offence in a case in which a Court of Appeal can allow a composition, as section 439 of the Criminal Procedure Code authorizes the High Court to exercise any of the powers conferred on a Court of Appeal.

Husain Khan v. *Emperor*, 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J 136; 18 Cr. L. J. 546, followed. **A** SHIBOO *v.* EMPEROR, 45 A. 17; (1922) A. I. R. (A.) 468; 24 Cr. L. J. 854 **1046**

——— **s. 439**—*Revision—Alteration of charge—High Court, power of.*

A High Court has, when sitting as a Revision Court, power to alter a charge from that under a minor offence to one under a more serious one and enhance the sentence. **A** EMPEROR *v.* UMRAO, 21 A. L. J. 316; (1923) A. I. R. (A.) 355; 24 Cr. L. J. 753 **267**

Criminal Procedure Code—contd.

——— **ss. 451, 454**—*European British subject—Trial by Jury—Claim, when to be made—Waiver, effect of.*

Section 451 of the Criminal Procedure Code gives an accused European British subject the right to claim trial by Jury any time before he is called on to enter upon his defence. Therefore, where an European British subject waives this right at an earlier stage, he can re-consider and cancel his waiver before he is called on to make his defence.

Emperor v. *Sullivan*, 24 A. 511; A.W.N. (1902) 142, relied on.

Section 454 of the Criminal Procedure Code does not in express terms deal with a case where the right to claim trial by Jury has been asserted but subsequently withdrawn. It applies only to a case where no claim has been made which would be valid under section 451 of the Code.

Per *Suhrawardy, J.*—Section 454 of the Criminal Procedure Code is an explanatory corollary to section 451 of the Code. Their joint import is that an European British subject may claim to be tried by a Jury at any time before he enters on his defence, but if he does not do so, he must be considered to have relinquished such right and shall not be allowed to assert it again.

There is no express provision in the Criminal Procedure Code that the right to claim trial by Jury once waived cannot be asserted at any time before the accused is called upon to enter on his defence. What the Code lays down is that once he has allowed the opportunity to pass he cannot avail himself of the privilege again. C MAKBUL AHMAD v. A. J. L. ALLEN, 50 C. 689; 27 C. W. N. 649; (1923) A. I. R. (C.) 657; 24 Cr. L. J. 849 **1041**

——— **s. 476**—*Order for prosecution—Reasonable probability of conviction.*

An order under section 476 of the Criminal Procedure Code should not be passed unless there is a reasonable probability of conviction.

Jadunandan Singh v. *Emperor*, 4 Ind. Cas. 710; 37 C 250; 14 C. W. N. 330; 10 C. L. J. 504; 11 Cr. L. J. 37, followed. Pat MANDAR v. EMPEROR, 24 Cr. L. J. 823 **855**

——— **s. 476**—*Sanction for prosecution—Essential particulars—Private non-judicial enquiry—Magistrate, whether can give sanction.*

Sanction must not be given to prosecute a person merely because an officer without proper judicial investigation or inquiry, is of opinion that such person ought to be prosecuted for some offence.

Where a private or a personal enquiry was conducted by a Magistrate on non-judicial lines without the recording of any evidence, without cross-examination and based on unrecorded and irregular methods of taking testimony and as a result of such enquiry the Magistrate passed an order under section 476 of the Criminal Procedure Code for the prosecution of the accused;

Held, that the Magistrate had no jurisdiction to make the order. Pat CHOTE LAL MODI v. EMPEROR, 1 P. L. R 137 Cr.; (1923) A. I. R. (Pat.) 542; 24 Cr. L. J. 806 **710**

Criminal Procedure Code—contd.

——— **s. 481**—*Penal Code (Act XLV of 1860), s. 228—Contempt of Court—Statement of accused, failure to record—Illegality—"If any" in s. 481, meaning of.*

No person can be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him is specifically stated and an opportunity is given him of answering it.

In re Edward Hutchinson Pollard, (1868) 2 P. C. 106; 5 Moo. P. C. (N. S.) 111; 16 E. R. 457, *Chan Hang Kiu* v. *Supreme Court of Hong Kong*, 4 Ind. Cas. 539; 13 C. W. N. 685; 6 M. L. T. 9; 19 M. L. J. 324; 11 Cr. L. J. 277 (P. C.), followed.

All that the expression "statement (if any) of the offenders" in section 481 of the Criminal Procedure Code indicates is, that the Court cannot compel the accused to make a statement; but it does not mean that the Court should not give him an opportunity of making the statement.

A conviction under section 228 of the Penal Code without giving the accused person an opportunity of making a statement as required by section 481 of the Criminal Procedure Code, is illegal. C KRISHNA CHANDRA BHOWMIK v. EMPEROR, 37 C. L. J. 535; (1923) A. I. R. (C.) 562; 24 Cr. L. J. 798 **542**

——— **s. 517**—*Court, jurisdiction of—Order for restoration when can be made—Bona fide purchaser in possession—Remedy.*

Where stolen property has passed into the hands of a third person, and a question of *bona fides* and of title by purchase or otherwise clearly arises, the duty of the Criminal Court, so far as restoration of the property is concerned, is to leave the complainant to his remedy in the Civil Court if he thinks he has one.

Under section 517 of the Criminal Procedure Code, the jurisdiction of the Criminal Court is confined to an order at the conclusion of the trial for the disposal of the property which has been stolen and which is before it in the criminal proceedings. It need not be in the possession of the Court, but it must be capable of being ear-marked, and such an order must be made in the presence of the purchaser of the commodity who has a right to be heard.

An order under section 517 made six months after the trial is bad. A NAINI MAL v. EMPEROR, 24 Cr. L. J. 804 **708**

——— **s. 520**—*Order for disposal of property—District Magistrate, jurisdiction of, to annul order passed by First Class Magistrate—Contract Act (IX of 1872), s. 187—Person in possession of goods for sale, whether can pledge goods.*

The Legislature intended in the case of section 520 of the Criminal Procedure Code, to confer concurrent jurisdiction on the District Magistrate and the Court of Session; so that where neither of them has had any opportunity of exercising jurisdiction under that section, an applicant may go for redress to either and the Court which first obtains seisin of the case has power to act in the matter.

Criminal Procedure Code—concld.

The possession required in section 178 of the Contract Act is juridical possession of the goods and not mere custody of them.

Seager v. *Hukma Kessa*, 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837, relied on.

Dulabdass v. *Ma Win*, 59 Ind. Cas. 965; 3 U. B. R. (1920) 217, dissented from.

A person who is given possession of goods by the owner in order that he might sell them for and on behalf of the latter has such possession of the goods as is contemplated in section 178 of the Contract Act, and a pledge made by him of the goods in favour of a person who acts in good faith is valid.

Kong Lone v. *Ma Kay*, 4 L. B. R. 13; 6 Cr. L. J. 125, *Stephen Aviet* v. *King-Emperor*, 4 L. B. R. 25; 6 Cr. L. J. 135, *Annamalai Chetty* v. *Mrs. Basch*, 65 Ind. Cas. 1000; 11 L. B. R. 217; 23 Cr. L. J. 216; (1922) A. I. R. (L. B.) 17, *Naganada Davay* v. *Bappu Chettiar*, 27 M. 424; 14 M. L. J. 69, relied on. R EMPEROR *v.* NGA PO CHIT, 1 R. 199; 2 Bur. L. J. 241; (1923) A. I. R. (R.) 227; 24 Cr. L. J. 858 **1050**

——— s. 526—*Transfer of case—Magistrate having tried other persons on same charge, whether ground for transfer.*

The fact that a Magistrate trying an accused person has already tried other persons on the same charge, is not a sufficient ground for directing the transfer of the case to some other Magistrate. O DALSHER *v.* EMPEROR, 9 O. & A. L. R. 547; 24 Cr. L. J. 800 **544**

——— s. 526—*Transfer of case—Suspicion in mind of accused.*

A Magistrate, in the discharge of the multifarious duties of his office, has to perform a very large number of extra-judicial functions and in the discharge of his executive duties he may be compelled to act in a way which would raise a suspicion in the mind of an accused person that he is not likely to get justice when the Magistrate came to enquire into a particular matter judicially. In such a case it is advisable that the judicial trial should be held by another Magistrate. O MOHAMMAD YUNIS KHAN *v.* GULAB, 9 O. & A. L. R. 448; (1923) A. I. R. (O.) 1-2; 24 Cr. L. J. 811 **715**

Criminal trial—*Prosecution, duty of, to put forward all eye-witnesses of occurrence—Inference.*

It is not for the Police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a truthful witness simply because his testimony is inconsistent with it. On the other hand, if the Police or the Public Prosecutor considers a witness to be a false witness or that his evidence is unnecessary, there would be justification for not sending up that witness as a witness for the prosecution, and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit.

Queen-Empress v. *Durga*, 16 A. 84 (F. B.); A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55, relied on.

Where all the eye-witnesses called for the prosecution are partisans of the complainant and

Criminal trial—concld.

hostile to the accused and the independent eye-witnesses are not called the Court is entitled to take this fact into consideration in weighing their evidence and to draw an inference adverse to the prosecution; but if the witnesses called for the prosecution are otherwise worthy of credit the Court is not entitled to disbelieve them simply because some persons who could have thrown light upon the case, have not been put before the Court by the prosecution. Pat RAMJIT AHIR *v.* EMPEROR, 2 Pat 309; (1923) A. I. R. (Pat.) 413; 1 P. L. R. 236 Cr.; 24 Cr. L. J. 801 **705**

Custom—*Adoption, failure of—Gift to adopted son—Presumption.*

Where a deed contains a testamentary disposition in favour of a person believed to be the adopted son of the executant, it is a question for consideration whether on the failure of the adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son, but where the instrument of adoption does not mention any gift *inter vivos* or any testamentary disposition in favour of the adopted son, and contains merely a declaration, of adoption, which declaration is found to be incorrect, the deed cannot be treated as a deed of gift.

Fanindra Deb Raikat v. *Rajeswar Das*, 11 C. 463; 12 I. A. 72; 4 Sar P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 P. C and *Lali* v. *Murlidhar*, 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3. A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 P. C., relied on. L ISHER SINGH *v.* SURAT SINGH, 4 L. 356 **294**

——— *Adoption of sister's son—Hindu Jats of Hoshiarpur District*—Riwaj-i-am, *entry in, value of.*

Among Hindu *Jats* of the Hoshiarpur District the adoption of a sister's son in the presence of near collaterals is valid by custom.

Where a statement in the *riwaj-i-am* as to the existence of a custom is supported by instances, it affords sufficient proof of that custom unless rebutted by the party who denies it

Ishar Kuar v. *Raja Singh*, 9 Ind. Cas. 608; 94 P. L. R. 1911; 29 P. R. 1911; 124 P. W. R. 1911, *Chuttan* v. *Hazari Lal*, 30 Ind. Cas. 22; 7 P. R 1916; 129 P. W. R. 1915; 46 P. L. R. 1916, *Beg* v. *Allah Ditta* 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), *Wazira* v. *Marvan*, 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918, followed.

Ralla v. *Budha*, 50 P. R. 1893 (F. B.), distinguished.

Custom—contd.

Budhu v. *Bur*, 84 P. R. 1893, dissented from. L NAMAN v. RATAN SINGH, 4 L. 102; 5 L. L. J. 253 **589**

——— *Alienation—Necessity—Antecedent-debt—Alienation for purposes of trade.*

Ordinarily, the payment by an alienee of an antecedent debt due to a third person is justified and there is no necessity for the alienee to go further and to prove that the previous debt was in itself incurred for necessity.

It cannot be laid down that, under no circumstances, can a member of an agricultural tribe alienate ancestral property for the purpose of engaging in trade.

Santa Singh v. *Waryam Singh*, 24 Ind. Cas. 361; 19 P. R. 1915; 207 P L. R. 1914; 147 P. W R. 1914, explained.

Where an alienor, who owns a very small piece of land, which is not sufficient to enable him to earn his living as an agriculturist, and who has no other means of subsistence, alienates the land for the purpose of engaging in trade, the alienation cannot be challenged on the ground of want of necessity. L MUHAMMAD HASSAN-UD-DIN v. SAIF ALI SHAH, 4 L. 122; 5 L. L J. 246 **451**

——— *Alienation—Widow, whether can gift non-ancestral property of husband—Construction of document—Gift or Will.*

Under the Customary Law of the Punjab no female in possession of immoveable property inherited from her husband has power ordinarily to make a gift of such property; and no distinction can be made between ancestral property and self-acquired property in this respect.

In construing a document no part of it is, as far as possible, to be left out as redundant.

In order to decide whether a document is a deed of gift or a Will it is necessary to find out the intention of the person who executed it. If he intended that the transfer should take effect immediately in his lifetime, the document must be held to be a gift. If, on the other hand, he intended that the provisions of the document should take effect upon his death, the document must be held to be a Will.

The mere use of the word "Will" in a document will not make it a Will if it was really intended that the property should vest in the donee immediately during the lifetime of the donor. L DURGO v. PREM SINGH **653**

——— *Ancestral property—Common ancestor mentioned in pedigree-table, effect of.*

The mere mention of the common ancestor in a pedigree-table is not of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor.

Jiwan Singh v. *Har Kaur*, 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914, dissented from.

A finding as to the ancestral nature of property must be based on positive evidence. Conjecture cannot, in such a case, be allowed to take the place of proof.

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom L. R 790 (P. C.), followed. L KARTAR SINGH v. LABH SINGH, 5 L. L. J. 195; (1923) A. I. R. (L.) 355 **685**

Custom—contd.

——— *Compromise—Reversioners, whether bound.*

A compromise entered into in good faith binds the heirs of the parties, but the latter are entitled to challenge a compromise on the ground that it was not entered into in good faith. L UJAGAR SINGH v. SUCHA SINGH, 5 L. L. J. 266 **489**

——— *Pre-emption—Wajib-ul-arz, entry in, construction of.*

A clause in the *wajib-ul-arz* of a village laid down that a co-sharer was at liberty to sell his share but he must first offer it to co-sharers in his own *patti*, and if none of them was willing to take the property, he was at liberty to sell the property to co-sharers in any other *thok* or *patti* "of whom he approved," and if none of these was willing to take the property and no person in the village was willing to take a sale, he could offer the property for sale to an outsider;

Held, that the clause did not amount to a valid record of an existing custom of pre-emption. A NATHU RAM v. GHANSHYAM, (1923) A. I. R. (A.) 519 **824**

——— *Succession—Daughter's son—Alienation by female—Right to challenge—Ghirths of Kangra District—Hindu Law.*

Custom does not exclude a daughter's son from inheriting his maternal grandfather's property on the ground of his mother having predeceased her father or grandmother.

The estate of a widow under Customary Law is subject to the same restrictions as that of a widow under Hindu Law.

The restrictions on a widow's power of alienation are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death.

Collector of Masulipatam v. *Cavaly Vencata Narrainapah*, 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631, followed.

Under Hindu Law a daughter's son is competent to challenge an alienation made by a female holding the estate of his maternal grandfather.

Among Girths of Kangra District a daughter's son has a similar right to challenge alienations. L GOBINDA v. NANDU, (1922) A. I. R. (L.) 217 **644**

——— *Usage and custom, distinction between—Proof of custom—Presumption arising from recent usage—Pleadings, construction of—Impartible estates—Hindu Law—Joint family—Partition—Exclusion from enjoyment, what amounts to—Limitation Act (IX of 1908), Sch. I, Art. 127—Suit by several co-parceners for partition of united fractional share—Claim of some plaintiffs barred, effect of—Guardian and ward—Possession by guardian of property of ward—Presumption—Evidence Act (I of 1872), s. 35—State-*

Advocate High Court
Jammu & Kashmir
Srinagar.

ment in record of case reciting admission of party, admissibility of.

A custom on which a party relies must be sufficiently defined for its application to the facts of the case to be clear and undoubted, but the strict English rules of pleadings should not be applied to pleadings in India and a party should be allowed to prove a custom narrower than that alleged in its pleadings.

Abdul Hussein Khan v. *Bibi Sona Dero*, 43 Ind. Cas. 306; 45 C. 450; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 12 S. L. R. 104; 45 I. A. 10 (P. C.), followed.

An impartible estate in Hindu Law is not only consistent with but postulates that the family to which it belongs is joint. No presumption against indivisibility of possession or title can arise by reason of joint living.

The rule of impartibility never attaches itself to small estates and cannot survive as a family custom independently of some particular estate.

A family custom of succession to an estate held merely in mortgage cannot exist.

Rama Kanta Das Mahapatra v. *Shamanand Das Mahapatra*, 1 Ind. Cas. 754; 36 C. 590; 6 A. L. J. 364; 13 C. W. N. 581; 9 C. L. J. 497; 11 Bom. L. R. 530; 19 M. L. J. 239; 36 I. A. 49; 6 M. L. T. 84 (P. C.), relied on.

A succession of judgments on a question of custom is valuable evidence as to the existence of the custom.

Mahomed Ibrahim Rowther v. *Shaikh Ibrahim Rowther*, 67 Ind. Cas. 115; 49 I. A. 119; 30 M. L. T. 85; 26 C. W. N. 793; 35 M. 308; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944 (P. C.), followed.

Gujju Lall v. *Fatteh Lall*, 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112 (F. B.), distinguished.

A custom must be ancient.

It is of the essence of special usages modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

Usage should never be used as a synonym for custom. It has two distinct legitimate meanings but neither of them should be confused with custom. It is used to denote what is done by people uniformly and consistently. Used in this sense usage has not the force of law. It wolud only obtain the force of law when it is proved to be reasonable, invariable, ancient, etc., in which case it becomes what is known as custom. It is also used to denote what is done uniformly and consistently and has been so done in a certain locality or by a certain trade or profession, etc., for a period sufficient to make it probable that people in their contracts and in their contractual relationships adopt it as an implied term or condition. Where this is the case a Court which has to put a construction upon a contract imports into the terms of the contract the trade or local usage. Here, again, usage has not the force of law nor will it be sanctioned by the Courts if contrary to positive law. The parties could enter into a contract in contravention of the usage but if they enter into a contract which neither affirms nor denies the usage, the usage may be proved in order to ascertain what was in their minds when they wrote the contract.

Then, again, there is the case where usage has some legal effect not *per se* but as *prima facie* evidence of a custom. Where a well-established recent usage is proved and the proof is carried back for a period which may be regarded as covering the period of living memory, a presumption is thereby raised that this usage is in reality the exercise of an ancient and valid custom. If there is no rebutting evidence a decision in favour of the custom may be based on this evidence alone. If the presumption raised by recent usage is rebutted by proof that an ancient custom could not have come into existence, then the usage fails to possess any legal effect.

Where it was found that the usage of impartibility had been observed in a family for the last fifty years, but that evidence against the possibility of a custom of impartibility came down almost to the same date;

Held, that the necessary antiquity of the custom had not been proved.

Co-parceners in a Hindu joint family are entitled to claim partition of property even though they are excluded from possession.

Exclusion by a co-owner of other co-owners will not become adverse to the latter until they become aware of it, but nonetheless there may be exclusion in fact. It is, however, open to a co-owner to prove that exclusion of the other co-owners took place at one time and the bringing of the fact to their knowledge at another time.

In exclusion there is a mental as well as a physical element. Legal or juridical exclusion from an estate by one co-owner of his co-owners is consistent with their physical admission to it. For such mere physical admission to put an end to exclusion it must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. Such intention will be inferred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such a presumption is, however, rebuttable.

A claim for partition is one of the modes of enforcing a right to share in joint family property within the meaning of Art. 127 of Sch. I to the Limitation Act.

Kali Kishore Roy v. *Dhununjoy Roy*, 3 C. 228; 1 Ind. Dec. (N. S.) 733, relied on.

A suit by several members of a joint family for partition of their united fractional share from the whole estate, and not merely for partition of their individual shares, must fail on proof that the claim of any of the plaintiffs is barred by time.

Custom—concld.

Where a guardian takes possession of property owned or partly owned by his ward a very strong presumption arises that possession is taken on behalf of the ward, but the presumption is not irrebuttable.

The statement of a Court that a person admitted the claim of another person in a case pending before it is relevant under section 35 of the Evidence Act inasmuch as the statement forms part of the record. O RUDRA PRATAP NARAIN SINGH *v.* NIRMAN PRASAD SINGH, 9 O. L. J. 552; (1923) A. I. R. (O.) 61 **225**

——— *Widow — Alienation — Succession — Absence of agnate collaterals—Daughters and daughters' sons of collateral in 5th degree—* Bandhus*—Prospective heir—Right to control enjoyment by limited owner.*

A widow who holds a life-interest in an estate under custom has the same restrictions on her power of alienation as a widow who holds a similar estate under Hindu Law and the limited nature of her life-interest in the estate can never alter even though there be a complete want of heirs.

Collector of Musulipatam v. *Cavaly Vencatta Narrainapah,* 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 479; 1 Sar. P. C. J. 82 ; 19 E. R. 631, followed.

In the absence of agnate collaterals the daughters and the daughters' sons of a deceasad collateral in the 5th degree are *Bandhus* and heirs, who, if they survive and succeed, succeed to an absolute estate.

Mangat Ram v. *Devi Chand,* 20 P. R. 1906; 69 P. L. R. 1906; 44 P. W. R. 1906, relied upon.

Where the owner for the time being has only a limited interest in the estate, a prospective heir entitled to succeed to an absolute estate, can restrict the enjoyment of the limited interest within proper limits. L DIYAL KAUR *v.* MEHTAB KAUR, 3 L. L. J. 458 **689**

Decree *for sale on subsequent mortgage, from of.*

A decree for sale on a subsequent mortgage provided that if the decree-holder failed to pay off the prior mortgagee by the date fixed the latter would be at liberty to apply that the suit be dismissed:

Held, that the condition laid down in the decree giving the option to the prior mortgagee was perfectly valid. A PHUL CHAND *v.* SURJI, (1923) A. I. R. (A.) 457 **684**

Dedication, *ceremony of, effect of—Adverse possession—Idol—Site, acquisition of—Temple, erection of—Consent of* Mohunt*—Revocation by successor—Idol, founding of—*Shebaitship, *vesting of—Rule, application of—Foundation, public or private—Principles applicable—Endowment, founder of—Trust—Devolution—*Shebait *and* pujari, *distinction between—Pleadings and proof — Variation.*

Dedication vests property in an idol, only when the founder has title. The ceremony divests the proprietorship of the temple from the builder and vests it in the image, which by process of

Dedication—contd.

vivification, acquires existence as a juridical personage.

Where a temple has been in existence for over twelve years on a site which was taken possession of by force by a person who erected the temple thereon and dedicated it to an idol, the idol acquires an indefeasible title to the site by adverse possession.

Where a temple is erected and an idol is installed in it with the concurrence, tacit or express, of the *mohunt* of a neighbouring temple his successor is not competent to revoke the arrangement thus effected.

If a number of persons provide the original endowment they may apparently together constitute the founder. But persons, who subsequent to the foundation furnish additional contributions do not thereby become joint founders: their benefaction is regarded as nothing beyond an accretion to an existing foundation.

The rule that the parties should be kept to their pleadings is not of universal application, and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose: first, to apprise the defendant distinctly and specifically of the case he is called upon to answer and, secondly, to preser e an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. The test thus is whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence, or, as has sometimes been said, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action.

Sital Das Babaji v. *Pertap Chunder Sarma,* 3 Ind. Cas. 408; 11 C. L. J. 2, *Jalim Singh Sri Mal* v. *Choonee Lal Jahurry,* 11 Ind. Cas. 540; 15 C. W. N. 882, *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal.* 16 Ind. Cas. 741; 18 C. W. N. 473, *Hira Lal* v. *Giribala Debi,* 34 Ind. Cas. 444; 23 C. L. J. 429, *Ishan Chandra Dhupi* v. *Nishi Chandra Dhupi,* 41 Ind. Cas. 387; 29 C. L. J. 1; 22 C. W. N. 853, *Satish Kanta Roy* v. *Satis Chandra Chatterjee,* 55 Ind. Cas. 689; 30 C. L. J. 475; 24 C. W. N. 662, *Nepen Bala Debi* v. *Siti Kanta Banerjee,* 8 Ind. Cas. 41; 12 C. L. J. 459; 15 C. W. N. 158, *Ram Kissen Joydoyal* v. *Pooran Mull,* 56 Ind. Cas. 571; 31 C. L. J. 259; 47 C. 733, relied on.

Although a plaintiff must ordinarily adhere to the claim as brought, the Court will depart from strict enforcement of this rule where it is satisfied that justice will not be done between the parties if the suit were dismissed on a technical ground, with the prospect of further litigation for the determination of a controversy then substantially ripe for settlement.

Umar Abdul Rahiman v. *Gustadji,* 34 Ind. Cas. 268; 20 C. W. N. 297; 3 L. W. 308; (1916) 1 M. W. N. 137; 30 M. L. J. 444 (P. C.), *Motabhoy* v. *Mulji,* 29 Ind. Cas. 223; 42 I. A. 103; 39 B. 399; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713;

Dedication—concld.

21 C. L. J. 507; 17 Bom. L. R. 460; 12 L. W. 524; (1915) M. W. N. 522 (P. C.), *Basant Singh* v. *Mahabir Pershad*, 19 Ind. Cas. 349; 40 I. A. 86; 35 A. 273; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301 (P. C.), *Fateh Chand* v. *Kishen Kunwar*, 16 Ind. Cas. 67; 39 I. A. 247; 34 A. 579; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 17 C. L. J. 1 (P. C.), *Skinner* v. *Naunihal Singh*, 19 Ind. Cas. 267; 40 I. A. 105; 35 A. 211; (1913) M. W N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 25 M. L. J. 111 (P. C.), relied on.

When worship of an idol has been founded the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise, or there has been some usage or course of dealing which points to a different mode of devolution.

It is not always easy to determine who are the founders. One person may provide the site of the temple, another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol. Where the owner of the site relinquishes his right in the land, he may not be a founder, unless he indicates at the time, expressly or impiedly, that he will associate himself with the others in carrying out the object of the foundation. *Prima facie*, all the persons who establih the worship are entitled to take part in the management.

Whether a foundation be public or private, the threefold principle is applicable, namely, (*i*) the devolution of the trust, upon the death or default of each trustee, depends upon the terms on which it was created, or the usage of the particular institution where no express rust deed exists; (*ii*) the worship of the idol is vested in the founder and his heirs, in default of evidence to show that he has disposed of it otherwise, and (*iii*) where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment the management reverts to the founder and his representatives even though the endowment has assumed a public character.

A *pujari* or *archak* is not the *shebait*; he is appointed by the *shebait* as the *prohit* to conduct the worships but that does not transfer the rights and obligations of the *shebait* to the *prohit* and he is not entitled as a matter of right to be continued in his office as *pujari*.

Nafar Chandra Chatterjee v. *Kailash Chandra Mondal*, 62 Ind. Cas. 510; 25 C. W. N. 201, *Nanabhai* v. *Trimbak*, (1878) P. J. 195, *Narayan* v. *Ranga*, 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.) 477, *Jagannatha Chariar* v. *Seenu Bhattachariar*, 51 Ind. Cas. 869; 42 M. 618; 36 M. L. J. 361; (1919) M. W. N. 240 and *Seshadri Aiyangar* v. *Ranga Bhattar*, 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 580 10 M. L. T. 14, relied on. C NANDA CHANDRA CHAKRAVARTI v. BROJA LAL SINGH, 36 C. L. J. 356; (1923) A. I. R. (C.) 142; 50 C. 292 **793**

DEFINITIONS:—

Entire decretal amount. *See* CONTRACT ACT, 1872, S. 38 **246**

Former suit. *See* CIVIL PROCEDURE CODE, 1908, S. 11 **591**

High Court. *See* LEGAL PRACTITIONERS ACT, 1879, SCH. II **913**

If any. *See* CRIMINAL PROCEDURE CODE, 1898, S. 481 **542**

Interested. *See* CONTRACT ACT, 1872, SS. 69, 70 **416**

Interests affected by the sale. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 90 **760**

Itmam. *See* TRANSFER OF PROPERTY ACT, 1882, SS. 10, 12 **555**

Land. *See* AGRA TENANCY ACT, 1901, SS. 4, 158 **924**

Lease. *See* TRANSFER OF PROPERTY ACT, 1882, S. 107 **480**

Money passing in circulation. *See* TRUSTS ACT, 1882, SS. 63, 64 **1012**

Personally. *See* CIVIL PROCEDURE CODE, 1908, S. 145 **927**

Place of profit. *See* U. P. MUNICIPALITIES ACT, 1916, S. 16 (3) (c) **490**

Property. *See* U. P. COURT OF WARDS ACT, 1912, S. 54 **389**

Specific purpose. *See* LIMITATION ACT, 1908, S 10, SCH. I, ART. 66 **785**

Subject-matter. *See* CIVIL PROCEDURE CODE, 1908, O. XXIII, R. 1 (3) **56**

Tenant. *See* COURT-FEES ACT, 1870, S. 7 (XI) (cc) **619**

Divorce Act (IV of 1869), ss. 17, 44—*Decree nisi —Death of petitioner—Confirmation of decree —High Court, jurisdiction of—Order for custody of children.*

Where, after obtaining a decree *nisi* for dissolution of marriage, and an order for the custody of the children of the marriage, the petitione dies, the High Court has no jurisdiction to confirm the decree, or to make an o der in the proceedings for the custody of the children.

Stanhope v. *Stanhope*, (1886) 11 P. D. 103; 55 L. J. P. 36; 54 L. T 906; 34 W. R. 646; 50 J. P. 276, followed. C BUTTERFIELD v. BUTTERFIELD, 50 C. 153; (1923) A. I. R. (C.) 426 **250**

Divorce suits—*Costs to wife—Principle applicable.*

In an application for divorce, the general principle in the matter of awarding costs is, that the wife who is charged, rightly or wrongly, by the husband in a Divorce Court is entitled to be given her costs which will be taxed costs in defending the suit, except in cases where the wife has ample means of her own to defend herself or where the Solicitor who is employed has been guilty of misconduct. M ROSE CHARLOTTE v. WALTER EDGAR, 45 M. L. J. 327; 18 L. W. 354 **139**

Easement—*User, permissive.*

A right of easement cannot be acqu red on the ba is of user which in its orig n wa p rm s ve. A PANNA LAL v. BOHRA PANNA LAL, 21 A. L. J. 436 **48**

Easements Act (V of 1882), s. 15—*Easement, right of, how established—Alternative claims of ownership and easement, whether maintainable—Pleadings.*

The enjoyment necessary to qualify for a right of easement, is different from actual user.

Koylash Chunder Ghose v. *Sonatun Chung Baroote*, 7 C. 132 at p. 135; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur. 642; 3 Ind. Dec. (N.S.) 635, relied on.

In order to establish a right to an easement, the enjoyment of it must continue for 20 years; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of 20 years.

Budhu Mandal v. *Maliat Mandal*, 30 C. 1077, *Ghasiram Mondal* v. *Asirbad Mahto*, 9 Ind. Cas 69; 13 C. L. J. 670; 15 C. W. N. 259, relied on.

Hollins v. *Verney*, (1884) 13 Q. B. D. 304; 53 L. J. Q. B. 430; 51 L. T. 753; 33 W. R. 5; 41 J. P. 580, distinguished.

A suit is not liable to be dismissed because the plaintiff claims, in the alternative, over the same plot of land both rights of ownership and of easement.

Narendra Nath Barari v. *Abhoy Charan Chattopadhya*, 34 C. 51; 4 C. L. J. 437; 11 C. W N. 20; 1 M. L. T. 364 (F. B.), followed. A SRI RAM *v.* MANI RAM, 21 A. L. J. 569 **922**

——— **s. 18**—*Tenant, when can acquire easement against landlord—Customary easement, nature of—User for 30 years, effect of.*

A tenant cannot acquire by prescription an easement against his landlord, but may have a right of easement by custom.

A customary easement is not limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in section 18.

According to the custom prevailing in the United Provinces a *zemindar* has no right arbitrarily to close a way which has been used by occupancy tenants of the village for 30 years without question or opposition for access to their fields and for removing their produce. A KARAN SINGH *v.* DAL CHAND **703**

Ejectment suit—Jus tertii—Res judicata.

A mortgagor brought a suit for possession against his mortgagee on the expiry of the term of the mortgage, which was dismissed on the ground that he had come to some settlement with the mortgagee entitling the latter to retain possession even after the termination of the mortgage. Subsequently, the mortgagee was dispossessed by a stranger. In a suit by the mortgagee against him for possession, the stranger set up the title of the mortgagor as *jus tertii*:

Held, that the defendant must take the title of the mortgagor as it stood, and as the plaintiff claimed a title from the mortgagor, which in view of the previous litigation the mortgagor could not be heard to contest, that title was, under the circumstances, a good title against the defendant who was liable to be evicted. C NABA KISHORE *v.* PARO BEWA, 50 C. 231 (1922) A. I. R. (C.) 198 **283**

Equity—*Wrongful dispossession of tenant by landlord—Possession given to third person—Tenant, whether can claim crops grown.*

Where a *zemindar* wrongfully dispossesses a tenant from a plot of land and puts another person in possession of the same, and the latter raises a crop thereon, whatever, remedy the tenant may have against the landlord, he cannot on any principle of equity, claim any portion of the crop, the ownership in which rests with the person who raised it. A MIR SINGH *v.* MAKHAN, 21 A. L. J. 300; 45 A. 404; (1923) A. I. R. (A.) 421 **88**

Estoppel—Failure to object to value of suit, effect of. *See* CIVIL PROCEDURE CODE, S. 110 **214**

Evidence Act (I of 1872) ss. 9, 11, 34, 35—*Absence of entry in document, relevancy of.*

Where a document is admissible in evidence, it can be utilised for the purpose of showing that the absence of an entry therein implies the non-existence of a matter.

The fact of absence of entry is relevant but its effect is to be determined in the light of the general evidence in the case.

The question whether a document is admissible in evidence as a public document is fundamentally distinct from the question whether its contents are binding without proof of other matters. C TARA KUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH, 36 C. L. J. 389; (1923) A. I. R. (C.) 261 **383**

——— **s. 24**—*Confession under hope of pardon, whether admissible.*

During an investigation into certain dacoities the Police came into touch with one *K.* who admitted his participation in the dacoities and intimated to the Police that he was willing to tell them what he knew for consideration. He was told that if he made a true and voluntary statement the question of his pardon would be considered. He then made an elaborate statement which was recorded under section 164 of the Criminal Procedure Code, and which amounted to a confession. He was eventually put upon his trial and was convicted, and his confession was used both as against himself and as against his co-accused;

Held, that the confession having been obtained from *K.* by holding out to him the hope that he would be pardoned if he made a confession was rendered inadmissible in evidence by the provisions of section 24 of the Evidence Act and its use at the trial was, therefore, illegal.

Khelal v. *Emperor*, 73 Ind. Cas. 62; 21 A. L. J. 143; (1923) A I R (A) 352; 45 A. 300, followed. A TARA *v.* EMPEROR, 21 A. L. J. 585; 45 A. 633; 24 Cr. L. J. 785 **529**

——— **s. 24**—*"Person in authority"—Collecting and assistant* panchayat—*Confession to* panchayat *upon inducement, admissibility of—Subsequent statement to Magistrate—Confession retracted afterwards, effect of.*

Where a collecting *panchayat* and an assistant *panchayat* take a prominent part in holding an inquiry into the circumstances of the commission of a murder, they must be taken to be "persons

Evidence Act—contd.

in authority" within the meaning of section 24 of the Evidence Act, and if the accused person is assured by the assistant *panchayat* that he would be let off if he disclosed everything, and in consequence of that assurance he makes a statement, that statement is inadmissible under the provisions of the section above quoted. A similar statement made subsequently to a Magistrate, and retracted afterwards, would be inadmissible in evidence, unless it could be shown that the impression which was made upon the accused's mind had been entirely removed therefrom. O EMPEROR *v.* GANESH CHANDRA GOLDAR, 50 C. 127; (1923) A. I. R. (C.) 458; 24 Cr. L. J. 760 **264**

——— s. 33—*Statement recorded in one case, when can be treated as evidence in another—Essentials to be proved—Practice.*

The evidence of a witness recorded in one case cannot be admitted as evidence in another case unless the requirements of section 33 of the Evidence Act are complied with.

Where, therefore, in a case under section 394 of the Penal Code, the complainants were not examined, a Police Constable having been produced to show that an attempt was made to summon them but they were not found, and the evidence of one of the complainants recorded in another case was admitted by the Magistrate:

Held, that in the absence of proof that the complainant could not be procured without an amount of delay, expense and inconvenience, her evidence could not be treated as evidence in the case. O DWARKA SINGH *v.* EMPEROR, 25 O. C. 142; (1922) A. I. R. (O.) 254; 24 Cr. L. J. 828 **860**

——— s. 35—*Revenue Records, Burma, admissibility of.*

Revenue Records, as made in Burma, are relevant evidence under section 35 of the Evidence Act, but they are not enough, taken by themselves to prove a fact, such as, a partition.

Mi Sa U v. *Nga Pyan*, 2 U. B. R. (1904-06) Evidence, p. 3, *Mi Se Baw* v. *Mi Min Ya*, 4 Ind. Cas. 1084; 2 U. B. R. (1907-09) Evidence, p. 19, relied on. L B MAUNG PO LUN *v.* MA E MAI (1923) A. I. R. (R.) 57 **47**

——— s. 44, *scope of—Judgment, objection to—Gross negligence.*

Section 44 of the Evidence Act is applicable not only where a previous judgment is attacked on the ground of fraud or collusion but also where it is alleged to have been obtained owing to the gross negligence of the gurdian of the person disputing it.

Rajib Panda v. *Lakhan Sendh Mahapatra*, 27 C. 111 3 C. W. N. 660; 14 Ind. Dec. (N. S.) 8, *Jogeshwar Narain Singh* v. *Roy Radha Raman*, 16 Ind. Cas. 543, followed. M KARRI BAPANNA *v.* SUNKARI YERRAMMA, 18 L. W. 49; 45 M. L. J. 324; 33 M. L. T. 46 (1923) A. I. R (M.) 718 **218**

——— s. 70—*Admission of execution—Admission by representative of executant, value of.*

Under section 70 of the Evidence Act an admission by the representative of a party to an attested document o its execution by the party, cannot be treated as an admission by the party himself. C BENOY BHUSAN ROY *v.* DHIRENDRA NATH DE, 38 C. L. J. 114 **178**

——— s. 70—*Admission of execution of document, effect of.*

The admission of the execution of a document is sufficient proof as against the executant himself but does not make it binding upon other persons who were not parties to it. Pat ARJUN SAHU *v.* KELAI RATH, 2 Pat. 317; (1923) A. I. R (Pat.) 436 **150**

——— s. 71—*Attesting witnesses turning hostile—Execution, method of proving—Proof of attestation, whether necessary.*

When the attest ng witnesses to a document have been won over and turn hostile, the execution of the document may be proved by any evidence that may be available; it is not necessary, in this event, to prove attestation also.

Narain Das v. *Dilawar*, 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250, *Laksman Sahu* v. *Gokhul Maharana*, 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat.) 415, followed. A PALESHWARI PRASAD *v.* SHANKAR DAYAL **969**

——— s. 90—*Presumption, applicability of, to copies.*

Documents more than thirty years old, purporting to be true copies of the originals and coming from proper custody, can be presumed to be genuine under section 90 of the Evidence Act. M SHESHADU REDDI *v.* PICHI REDDI, 16 L. W. 839; (1923) A. I. R. (M.) 163; 32 M. L. T. 89 **35**

——— s. 92—*Mortgage-deed containing forfeiture clause—Oral agreement suppressing forfeiture clause, whether admissible.*

A deed of mortgage contained a forfeiture clause to the effect that the mortgagor would be debarred from redeeming the property after the expiration of two years from the date of the mortgage. Some considerable time after the forfeiture clause had taken effect, the mortgagor brought the present suit for redemption alleging a subsequent oral agreement whereby the mortgagee promised to allow redemption at any time:

Held, that the subsequent agreement not being in writing and registered, the plaintiff was precluded under proviso (4) to section 92 of the Evidence Act, from proving the oral agreement. L B U KYO *v.* MG PAN YO, (1923) A. I. R. (R.) 102 **164**

——— s. 108—*Presumption as to death, extent of—Date of death, whether can be presumed*—Res judicata.

What the Court may presume under section 108 of the Evidence Act is confined to the *factum* of death. It cannot presume that, because a person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause.

Muhammad Sharif v. *Bande Ali*, 11 Ind. Cas. 474; 34 A. 36; 8 A. L. J. 1052 (F. B.), followed.

Section 108 of the Evidence Act enables a Court to shift the burden of proof, that a person who was alive at a given date is still alive, on

Evidence Act—contd.

to the party who asserts it, if he has not been heard of for seven years by people who presumably would have heard of his being still alive; and if the Court is satisfied, in the circumstances of the case, that he is dead, having regard to the definition of "proof" in section 3 of the Evidence Act, it may presume and find as a fact that he is dead. But it does not follow that merely because a person has not been heard of for seven years, where there is no positive or reliable evidence that he is in fact alive, the Court must find that he was dead at the date of suit, much less that he was dead at any given particular date.

A person belonging to a Hindu joint family disappeared. More than seven years after his disappearance, his widow adopted a son. The missing husband's co-parceners sued for a declaration that the adoption was invalid as made during the lifetime of the husband. The widow relied on the presumption raised by section 108 of the Evidence Act. The Court decided that the husband was dead but decreed the suit on the ground that no presumption under the section in question could be raised about the death of the husband before the date of the suit, and consequently before the date of the adoption. The widow made a second adoption after the suit. The co-parceners of the missing husband again disputed the adoption but the widow urged that the question of the death of her husband at the date of the previous suit was *res judicata*:

Held, that the point was not *res judicata* as the only question material for the decision of the previous suit was whether the husband had died before the date of the adoption and as the point about his death at the date of that suit was not "substantially or directly in issue," the finding on that point was not binding. A REKHAB DAS *v.* SHEOBAI, 21 A. L. J. 393; (1923) A. I. R. (A.) 495; 45 A. 466 **656**

——— s. 165, *applicability of—Witness called by Court—Right to cross-examine.*

Section 165 of the Evidence Act applies to Court witnesses, as the expression "any witness" appears to include a witness. The cross-examination of a Court witness is not a matter of absolute right but requires the leave of the Court. Where, however, such a witness makes an important statement which is against the case set up by one or other of the parties, the Court should allow the witness to be cross-examined.

Empress v. *Grish Chunder Talukdar*, 5 C. 614; 5 C. L. R. 364; 2 Ind. Dec. (N. S.) 998, *Gopal Lal Seal* v. *Manick Lall Seal*, 24 C. 288; 12 Ind. Dec. (N. S.) 859, *Mohendro Nath Das Gupta* v. *Emperor* 29 C. 387; 6 C. W. N. 550, *Chintamon Singh* v. *Emperor*, 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146 and *Tarinee Churn Chowdhury* v. *Sharoda Soonduree Dossee*, 3 B. L. R. (A. C. J.) 145 at p. 158; 11 W. R. 468, not approved. O MAKUND SINGH *v.* GHAFUR-UN-NISSA; 9 O. & A. L. R. 549 **108**

Execution—*Decree for maintenance creating charge on immoveable properties of judgment-debtors*

Execution—concld.

—Decree, whether executable without bringing fresh suit—Properties of decree-holder's husband in hands of judgment-debtor, whether liable—Procedure—Civil Procedure Code (Act V of 1908), O. XXXIV.

A decree allowed maintenance at a specified rate payable in two equal instalments annually during the lifetime of the decree-holder. The Court directed that the amount of maintenance then in arrear as well as future maintenance was to be realised as a charge, on certain immoveable properties in the possession of the judgment-debtors, members of the family of the decree-holder's deceased husband. In her execution petition the decree-holder prayed that as one of the judgment-debtors had in her possession some property belonging to the estate of her deceased husband, she was entitled to recover the judgment-debt by sale of that property. She also prayed that as the remaining judgment-debtors had realised a decree in which her husband was interested, she was entitled to the proportionate share of her husband in the amount realised;

Held, (1) that the decree was one enuring for the duration of the decree-holder's life and it was open to her to execute her present claim for arrears of maintenance without bringing a fresh suit;

(2) that the charge created in the case was a lien not antecedent to the decree but created by the decree itself and it could not be said that there was any mortgage on the property or that the decree was a true mortgage-decree;

(3) that the decree-holder could, at any time after the mortgage properties were exhausted, proceed to execute the decree against the properties which belonged to her husband and were in the possession of the judgment-debtor;

(4) the procedure of the execution of the decree was not limited to the provisions of O. XXXIV of the Civil Procedure Code. PAT SIA SHACHARI PEARI *v.* RAM KISHORI KUER, 2 Pat. 796 **867**

Execution of decree—*Decree against partners—Successive applications, whether permissible—Limitation on the right.*

There is nothing to prevent a succession of execution applications directed against persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. But if there has been a previous application, in which there has been a definite decision affecting a particular piece of property, or a particular person, and from that decision nothing has been done by way of appeal or institution of suit, if either of these methods were available, that decision is a final decision between the parties; and if in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision, and the matter cannot be re-opened. A KAPUR CHAND *v.* KANHAIYA LAL, 21 A. L. J. 641 (1924) A. I. R. (A.) 34 **513**

——— *Execution application dismissed for default—Restoration.*

If an application for execution is dismissed for default, the decree-holder has no right in law

to apply for the restoration of the same and the Execution Court is not competent to entertain such an application.

Bharat Indu v. *Asghar Ali Khan*, 73 Ind. Cas. 453; 21 A. L. J. 135; 45 A. 148, followed.

A BHIKAM KHAN *v.* DAN SINGH, (1923) A. I. R. (A.) 544 7

——— *Land belonging to member of agricultural tribe, whether can be alienated.*

A Civil Court can order the temporary alienation of land belonging to a member of an agricultural tribe in satisfaction of a money-decree.

Datar Kaur v. *Ram Rattan*, 58 Ind. Cas. 603; 1 L. 292; 2 L. L. J. 333 (F. B.), followed.

Salih Mohammad v. *Mehar Singh*, 51 Ind. Cas. 399; 1 P. R. 1919 Rev., approved of.

Ahmad Khan v. *Parmanand*, 43 Ind. Cas. 356; 8 P. R. 1917 Rev.; 7 P. W. R. 1917 Rev., dissented from. L SAIN DITTA *v.* NUR AHMAD, 4 L. L. J. 476 194

——— *Sale of equity of redemption—Symbolical possession, delivery of, whether necessary—Redemption, suit for, without setting aside auction-sale, whether competent.*

Where the equity of redemption in respect of property which is in the possession of mortgagees is purchased at an auction-sale, it is not necessary that symbolical possession of the intangible right purchased should be given to the auction-purchaser in order to complete his title, if in fact he does exercise rights of ownership over the property which he has purchased.

Plaintiff sued to redeem a mortgage and alleged in the plaint that a certain sale of the equity of redemption in execution of a decree was fraudulent, collusive and illegal:

Held, (1) that the allegation with regard to the auction-sale did not amount to an allegation that the sale was a nullity but that the sale was such as might upon proper proceedings being taken possibly be set aside;

(2) that no proceedings having been taken to set aside the auction-sale the suit for redemption was not competent. Pat BALDEO SINGH *v.* MEGHU SINGH, (1919) Pat. 386 202

Execution sale—*Fraudulent decree — Auction-purchaser, position of—Protection to* bona fide *purchaser without notice, nature of—Principles of justice, equity and good conscience, application of—Pleadings—Plea not specifically raised—Procedure.*

Per *Mookerjee, J.*—An execution sale which is brought about by fraud practised on the Court by the decree-holder, is liable to be set aside on that ground, on application to the Execution Court, even though the auction-purchaser may not have participated in or may not have been cognizant of the fraud.

Chitambar v. *Krishnappa*, 26 B. 543; 4 Bom. L. R. 249, *Nemai Chand Kanji* v. *Deno Nath Kanji* 2 C. W. N. 691, *Rojoni Kant Bagchi* v *Hossain-ud-din Ahamd*, 4 C. W. N. 538, *Hira Lal Ghose* v. *Chundra Kanto Ghose*, 26 C. 539; 3 C. W. N. 493; 13 Ind. Dec. (N. S.) 946, *Bhubon Mohun Pal* v. *Nunda Lal Dey*, 26 C. 324; 3 C. W. N. 399; 13 Ind. Dec. (N. S.) 811, *Hungsha Majillya* v. *Tincowri Das*, 8 C. W. N. 230, *Ambika Prasad Singh* v. *Whitwell*, 6 C. L. J. 111, *Abbubaker Sahib* v. *Mohidin Sahib*, 20 M. 10; 7 Ind. Dec. (N. S.) 7; *Adhar Mani Dassi* v. *Monmotha Nath Bose*, 6 C. W. N. 279, *Bishun Chand* v. *Bijoy Singh*, 11 Ind. Cas. 399; 13 C. L. J. 588; 15 C. W. N. 648; 8 A. L. J. 587; 13 Bom. L. R. 440; (1911) 2 M. W. N. 418; 21 M. L. J. 652; 10 M. L. T. 335 (P. C.), *Radha Madhab Paikara* v. *Kalpataru Roy*, 16 Ind. Cas. 811; 17 C. L. J. 209, relied on.

Subject to the conditions prescribed by O. XXI, r. 90 of the Code of Civil Procedure, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice.

But where the validity of an execution sale is impeached on the ground that the decree which is the foundation of the sale was obtained by fraud, the position of a *bona fide* purchaser for value without notice must be determined with reference to the principles of justice, equity and good conscience.

Where there is no statutory provision directly conclusive on the question of the rights and liabilities of the parties, the only justice, equity and good conscience which Judges steeped in the principles of English jurisprudence can and do administer, in default of any other rule, is so much of English Law and usage as seem reasonably applicable in this country.

Satis Chandra v. *Ram Dayal*, 59 Ind. Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31, relied on.

Execution purchases on the basis of fraudulent decrees are of no effect when the purchaser is aware of, if not a party to, the fraud.

Having regard to the facts of each case, the Court has to bear in mind that the protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of Equity acts solely upon the conscience of the litigant parties, by compelling the defendant to do what and only what, *in foro conscientiæ* he is bound to do. The protection given to the *bona fide* purchaser simply means that from the relations subsisting between the two parties especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so; that Court will not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between the parties. It is in most cases available only by way of defence.

It would be a well-merited reproach to the administration of justice if the Court were compelled to uphold fraudulent execution purchases by the application, without discrimination, of the formula of *bona fide* purchaser for value without notice.

Execution sale—concld.

The p ea of defence of purchase for value without not ce should not be overruled on the ground that the question was not specifically raised in the pleadings or in the issues; the defect may be remedied, if necessary, by a remand on terms as to costs, especially as the defence has sometimes been enterta ned, when it has been pleaded in substance and is a just inference from the facts a eged.

Per *Rankin, J.*—Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfu ly deceived is one which, upon the issue as to the purchaser's good faith, must be of very different value in different circumstances. But in all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value. C BIRESWAR GHOSE *v.* PANCHCOURI GHOSE, 37 C. L. J. 1451; 27 C. W. N. 587; (1923) A. I. R. (C.) 538 **975**

First Information Report, *nature and value of—Contradictory statement on oath—Court, whether can rely on report for conviction.*

The First Information Report in a criminal case is not substantive evidence of the facts recorded therein and cannot serve as the basis of a conviction.

It is not legitimate for a Court when witnesses tell a different story in the witness-box and contradict the report mac e by them to discard the evidence given on oath and to rely on the report. A JAMALUDDIN *v.* EMPEROR, 24 Cr. L. J. 812 **716**

Fraud—Ex parte *decree—Application to set aside decree on ground of fraud—Subsequent suit on same ground, whether maintainable—Invalid claim, whether fraud.*

When an application to set aside an *ex parte* decree has been dismissed, a subsequent suit for a declaration that the decree is null and void as against the plaintiff can only be maintained if the plaintiff can prove that, apart from the fraud alleged in the previous proceedings, there are other grounds of fraud which remain to be investigated.

Plaintiff purchased a house from defendant No. 2; defendant No. 1 sued for a declaration that the sale was invalid and obtained a decree against both plaintiff and defendant No. 2. Plaintiff applied to have the decree set aside on the ground that the service of process in the suit was fraudulently suppressed by defendant No. 1 in collusion with defendant No. 2. The application having been dismissed, he brought this suit for a declaration that the decree was null and void as against him;

Fraud—concld.

Held, that inasmuch as the plaint was not founded on any other ground of fraud than that in the matter of service of processes, the suit was not maintainable.

Every invalid claim is not necessarily a fraud upon the Court. **Pat** RAMRUP GHOSHAIN *v.* MAHABIR SHAH, 2 Pat. 833 **825**

Ghatwali tenure, *incidents of—Birbhum and Kharagpur* Ghatwalis, *difference between—Succession to* Ghatwali *tenures, regulation of—Bengal Ghatwali Lands Regulation (XXIX of 1814) applicability of—Hindu Law—*Mitakshara *—Impartible estates, devolution of.*

One of the main distinctions between tenures of the nature of Birbhum *Ghatwalis* and those of the nature of Kharagpur *Ghatwalis* is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom the revenue is paid direct; whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid.

Bengal Ghatwali Lands Regulation XXIX of 1814 applies to Birbhum *Ghatwalis* only and has no application to tenures of the nature of Kharagpur *Ghatwalis*.

The incidents that attach to the *Ghatwali* tenure in *Taluka* Dumri are:

(1) that it is impartible and permanent;
(2) that it descends by lineal primogeniture; and
(3) that it is alienable with the consent of the *zemindar*.

Succession to this *Ghatwali* is governed by the Mitakshara Law, subject to the incident of impartibility, that is, on the death of a *Ghatwal* the estate devolves upon his male agnates by survivorship, to the exclusion of his widows. There is no special custom in the family which entitles the widow of a deceased *Ghatwal* to succeed to the tenure in preference to his eldest agnate in the most direct line, with whom the deceased was joint.

In a Mitakshara family living in commensality the inheritance even of impartible estates is confined to male members, to the exclusion of females, unless the estate itself is separate or self-acquired property.

An impartible estate is not necessarily the separate estate of the holder for the time being. It may be held as common family property, in which case, subject to impartibility and the rule of primogeniture, it will descend according to the canons of devolution applicable to such property, that is to say, the joint male agnates will succeed to the exclusion of females, and of the agnates the eldest in the most direct line will take.

The mere fact that an estate is impartible does not, in a case governed by the Mitakshara Law, make it separate or self-acquired property. It may be self-acquired or it may be the property of a joint undivided family. In the latter case, succession will be regulated according to the rule of survivorship, but as one person alone can hold the estate at a time, the person designated is

Ghatwali tenure—concld.

the eldest male member of the senior branch of the joint family.

Although the members of a joint Mitakshara family do not acquire in impartible property the same rights as in partible property belonging to the family, such as the right of joint enjoyment the right of partition or the right of restraint, on alienation, they at least retain the right of survivorship. **Pat** PHULBATI KUMARI *v.* MAHARAJ KUMAR RAO MAHESHWARI PRASHAD SINGH, (1923) Pat. 161; 4 P. L. T. 473; (1923) A. I. R. (Pat.) 453; 2 Pat. 685 **668**

Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—*Civil Procedure Code (Act V of 1908), ss. 73, 115—Rival decree-holders—Decision under s. 73—Revision—High Court, when will interfere—Proviso to s. 73, applicability of—Rateable distribution.*

Although decisions under section 73 of the Civil Procedure Code, made with reference to the claims of rival decree-holders, are not ordinarily revisable under section 115 of the Code, yet where such a decision is hopelessly inadequate, in that it contains no particulars as to the claims made by the contending parties, the evidence given, the arguments advanced and the reasons upon which the decision is based, the High Court will interfere under section 107 of the Government of India Act.

The proviso (*b*) to clause (1) of section 73 of the Civil Procedure Code applies only to a mortgagee whose charge is valid against the executing decree-holder, and it is open to such mortgagee to apply for rateable distribution in the proceeds of a sale held in execution of a decree in favour of the executing decree-holder where he, the mortgagee, holds a money-decree against the judgment-debtor apart from the mortgage. **Pat** BISHUN MOHAN *v.* NARAYAN PRASAD **140**

Guardian and ward—*Hindu widow—Mortgage of minor sons' property as owner—Legal necessity—Mortgage, validity of.*

Where a Hindu widow has mortgaged the property of her minor sons, who form a joint family, not as representing the family, but in the capacity of an owner claiming under a Will from her deceased husband, and the Will is found to be invalid, the mortgagee cannot enforce the charge against the family property on showing that the widow was the *de facto* guardian of her sons and the mortgage was created for legal necessity, for the widow having transferred as owner property which did not belong to her, the mortgage is void and it is quite irrelevant what was the widows' motive in executing the mortgage or what she did with the mortgage-money.

Balwant Singh v. *Rev. Rockwell Clancy*, 14 Ind. Cas. 629; 34 A. 296; 39 I. A. 109; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422 (P. C.), followed. **A** NANDAN PRASAD *v.* ABDUL AZIZ, 21 A. L. J. 372, 45 A. 497; (1923) A. I. R. (A.) 531 **367**

Guardians and Wards Act (VIII of 1890), s. 17—*Minor, guardianship of—Mother, unchaste, position of.*

The mere fact, that a woman gives birth to an illegitimate child is not a sufficient reason for not appointing her a guardian of her minor legitimate son's person and property. **N** GANGU *v.* KONGSHI, (1923) A. I. R. (N.) 305 **53**

Hindu Law—*Husband and wife—Suit for restitution of conjugal rights by husband—Defence of cruelty—Legal cruelty, what is.*

Where a Hindu falsely charged his wife with having attempted to poison him, and treated her generally with loathing and disgust, threatened her with personal violence, and on one occasion pushed her out of the house by the neck, in a suit for restitution of conjugal rights by the husband:

Held, that under the Hindu Law the circumstances were sufficient to constitute "legal cruelty" so as to establish a good defence to the plaintiff's suit and disentitle him to a decree.

Cruelty in the legal sense need not necessarily be physical. Constructive cruelty may also be a ground of relief.

A course of conduct pursued by the husband which is calculated to break the spirit of the wife or by which force, physical or moral, is systematically exerted towards the wife to such a degree and during such a length of time as to injure or undermine her health is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights notwithstanding that there is no actual physical violence.

Russell v. *Russell*, (1897) A. C. 395; 66 L. J. P. 122; 75 L. T. 249; 61 J. P. 756, *Evans* v. *Evans*, (1790) 161 E. R. 466; 1 Hag. Con. 35, *Bethune* v. *Bethune*, (1891) P. 205; 60 L. J. P. 18; 63 L. T. 259, *Patterson* v. *Patterson*, (1850) 3 H. L. C. 308 at p. 328; 88 R. R. 101; 10 E. R. 120, *Surjyamoni Dasi* v. *Kali Kanta Das*, 28 C. 37; 5 C. W. N. 195, *Thompson* v. *Thompson*, 15 Ind. Cas. 886; 39 C. 395, *Armour* v. *Armour*, 1 A. L. J. 318, considered.

Before passing a decree in favour of the husband for restitution of conjugal rights the Court should be satisfied that by giving its aid to him it does not thereby endanger the life, limb, liberty or the health of the wife. If there is danger to any of these the Court will be amply justified in refusing the husband any decree.

The Courts in India are Courts of Justice, equity and good conscience. In cases where no specific rules exist, they look to the English decisions for guidance. The Common Law of England furnishes precedents which are in conformity with equity, justice and good conscience. But the Ecclesiastical Law of England is not the Common Law of England and the former is applicable to a state of things which does not obtain in India and, therefore, great care should be exercised in importing wholesale into India the strict principles of the Ecclesiastical Law of England which are embodied in the decisions of English Courts. Where, therefore, the decisions of the English Courts rest not upon the principles of Common Law but on the peculiar principles

Hindu Law—contd.

of the Ecclesiastical Law, the Courts in India are not bound to follow them since the strict and peculiar principles of the English Ecclesiastical Law are inapplicable to India. **M** KONDAL RAYAR *v.* RANGANAYAKI AMMAL, 45 M. L. J. 186; (1923) M. W. N. 499; 18 L. W. 465; 46 M. 791 . **166**

——— *Mortgage by father—Son, liability of—Debt whether immoral—Burden of proof.*

A Hindu son cannot escape liability under a decree obtained by a mortgagee against his father and *karta* of the joint family unless he proves that the mortgage-debt was contracted for immoral or illegal purposes or was of an illusory character, whether the decree had been executed or not. **O** RUP KISHORE *v.* KANHAIYA LAL, 10 O. L. J. 141; (1923) A. I. R. (O.) 227; 26 O. C. 266 **563**

——— *Transfer of Property Act (IV of 1882), s. 6—Spes successionis, transfer of, validity of.*

The transfers of expectations of inheritances—*spes successione*—are invalid both under the Transfer of Property Act and the Hindu Law, and contracts for the transfer of such expectations in the future, cannot be validly entered into. **P C** ANNADA MOHAN ROY *v.* GOUR MOHAN MULLICK, 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189. (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929 **499**

——— **Alienation** *by manager of joint family—Co-parceners, whether can contest—Reversioner, right of, to challenge alienation.*

An alienation by the manager of a joint Hindu family without necessity is not void but voidable only at the instance of persons whose interests are affected by it, namely, the co-parceners in the property.

Subbe Goundan v. *Krishnamachari*, 63 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 . W. 537; (1922) M. W N. 269; 1922) A. I. R. (M) 112, *Ramaswami Aiyar* v. *Subramania Aiyar*, 74 Ind. Cas. 804; 46 M. 4 ; 16 L. W. 297; 43 M. L. J. 406; (1923) A. I. R. (M) 147, *Sheo Ghulam* v. *Badri Narain Lal*, 19 Ind. Cas. 560, 11 A. L. J. 798, relied on.

A reversioner has no right to challenge an alienation made by a father as manager of a joint Hindu family which the son, who had a right to challenge it, did not challenge during the father's life-time. **A** JAGESOR PANDE *v.* BEG DAT PANDE, 21 A. L. J. 608; 9 O. & A. L. R. 879; 45 A. 654 **931**

——— *by widow — Necessity—Existence of arrears of revenue—Presumption—Execution of document, proof of— Attestation, proof of, whether necessary—Second appeal—Point not raised in memorandum, whether can be argued.*

The existence of arrears of revenue for which an estate is liable to be sold is at least presumptive evidence of necessity, even though when a debt is incurred, measures have not been taken to enforce the liability. This presumption of necessity can, however, be rebutted by showing that a widow had sufficient income to enable her to pay the revenue without borrowing.

Hindu Law—contd.

Where the attesting witnesses of a document deny its execution, all that is necessary to be proved by other evidence is the execution of the document; it is not necessary further to prove execution before the attesting witnesses.

Narain Das v. *Dilawar*, 52 Ind. Cas. 830; 17 A. L. J. 141; 41 A. 250, and *Laksman Sahu* v. *Gokhul Maharana*, 70 Ind. Cas. 298; 1 Pat. 154; (1922) A. I. R. (Pat.) 415, relied upon.

A point not specifically raised in the grounds of appeal cannot be allowed to be urged at the hearing. **A** LALTA PRASAD *v.* DARSHAN SINGH **839**

——— **Alienation** *by widow—Necessity—Vendee, whether bound to see to the application of money—Fair price, how calculated.*

A Hindu widow in possession of her deceased husband's estate sold certain immoveable property in order to satisfy a decree for sale obtained on the footing of a mortgage executed by the husband in regard to this property. Plaintiff, a reversioner of the husband, sued for a declaration that the sale will not affect his interest and contended that the sale was a bogus transaction and the property had been alienated for less than its real value:

Held, (1) that, although the vendees bought the property as a speculation, the sale was a genuine and not a sham sale:

(2) that it was no part of the duty of the vendees to see how the purchase-money was used:

(3) that the mere fact that the vendees had subsequently sold the same land in small plots to competing tenants at a higher price did not shew that the widow had not got a fair price:

(4) that, under the circumstances, the plaintiffs' suit was liable to be dismissed. **P C** MEDAI DALAVOI THIRUMALAIYAPPA MUDALIAR *v.* NAINAR TEVAN, 16 L. W. 478; 4 U. P. L. R (P. C.) 92; (1922) A. I. R. (P. C.) 307; (1922) M. W. N. 804; 27 C. W. N. 365; 21 A. L. J. 282; 31 M. L. T. 149 **604**

——— **Joint family**—*Alienation — Antecedent debt—Pre emption decree, money due under—Civil Procedure Code (Act V of 1908), O. XVI, r. 1—Witnesses served, failure of, to attend—Adjournment.*

A pre-emption decree merely gives the pre-emptor the option of acquiring certain property at a certain price. He is laid under no obligation to acquire the property unless he chooses.

Money required to satisfy a pre-emption decree cannot be regarded as an antecedent debt due from the pre-emptor.

Nathu v. *Kundan Lal*, 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182, dissented from.

Where the witnesses of a party have been duly served but fail to appear an adjournment should be granted for re-summoning the witnesses.

Per *Walsh, J.*—Money payable under a pre-emption decree cannot be regarded as a debt.

To give true effect to the doctrine of antecedency in time there must be real dissociation in fact.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437 at p. 449; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R.

498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), followed. A CHATURBHUJ v. GOVIND RAM, 21 A. L. J. 348; 45 A. 407 **571**

——— **Joint family**—*Alienation by manager—Benefit of estate—Mortgage to satisfy pre-emption decree, whether binding.*

Although the strict Hindu Law does not allow the manager of a Hindu joint family to alienate property for the benefit of the estate, the only warrant for a valid transfer of this kind being to avert distress of the family; yet the Hindu Law, as administered by the Courts in British India, does give effect to the doctrine of the benefit to the family.

Nathu v. *Kundan Lal*, 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182, relied on.

A mortgage executed by a Hindu manager to satisfy a pre-emption decree, being for a family benefit is binding on the family. A SHANKAR SAHI v. BUICHU RAM, (1923) A. I. R. (A.) 569 **18**

——— *Alienation by manager—Recital in deed, value of—Necessity—Enquiry, proof of—Antecedent debt, what is—Debt whether binding on son during lifetime of father—Pre-emptor from vendee, position of.*

A recital in a deed by the manager of a joint Hindu family, which is impugned by the other members of the family, is not by itself sufficient to establish necessity, but it is clear evidence of the representation, and when proof of actual enquiry has become impossible, the recital coupled with circumstances, such as to justify a reasonable belief that an enquiry would have confirmed the truth of the recital, would be sufficient evidence to support the necessity stated.

A representation by the father, even if he is not the manager, is, for the purpose of affecting the question whether the deed was in consideration of the payment of antecedent debts, no less and no more admissible in evidence than the representation of the father as manager: for, the real value of the representation is that it indicates the scope of enquiry that has or may be presumed to have been made.

Ramman Lal v. *Ram Gopal*, 47 Ind. Cas. 987; 5 O. L. J. 629; 21 O. C. 200 and *Suraj Narain* v. *Ratan Lal*, 40 Ind. Cas. 988; 20 O. C. 211 at p. 219; 21 C. W. N. 1065; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159; 44 I. A. 201, considered and explained.

The definition of an antecedent debt as a debt "incurred irrespective of the credit obtainable from joint family property" is to be regarded as one to be construed in the light of the particular facts before a Court, and as not excluding from the category of antecedent debts money borrowed on a hypothecation-bond, since the personal liability for debts so secured continues to exist independently of the hypothecation.

In the absence of any covenant to that effect, a usufructuary mortgagor, as such, is not personally liable to re-pay the loan.

The antecedency of a debt incurred by a father may be invoked to uphold a transfer by him as against the sons even during the father's lifetime.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.), interpreted.

A pre-emptor cannot stand in a better position against the sons of the vendor than the vendee from the father, except that, being in a less favourable situation than the vendee to prove proper enquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree. O JAMNA PERSHAD v. BALBHADDAR, 9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O.) 147 **353**

——— **Joint family**—*Alienation by one co-parcener — Co-parcener contesting alienation whether can sue for his share only—Amendment of plaint, whether can be allowed in second appeal.*

A co-parcener in a joint family property who establishes that a member of the family has alienated the property without legal necessity can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof, for the simple reason that in a Mitakshara joint family no particular share can be predicated as belonging to any individual member.

Plaintiff sued to recover his share of the joint family property from the transferees who had purchased it from a co-parcener. The plaintiff alleged that his father had separated from the vendors and held his half share separately. It was found that the plaintiff was not separate at the time of the sale:

Held, (1) that inasmuch as the plaintiff had not only omitted to ask for the recovery of the whole property but had also failed to implead his co-sharers, the suit could not be entertained;

(2) that it could not be contended that as the plaintiff was entitled to sue for the whole he was entitled also to relinquish his claim to half and to ask for a decree for the remainder;

(3) that the plaint could not be allowed to be amended at that stage in second appeal and the plaintiff could not be allowed to alter the whole aspect of the litigation by including an additional prayer for relief and by bringing new parties on the record. Pat SHYAM SUNDER RAI v. JAGARNATH MISRA, 1 P. L. R. 373; (1923) Pat. 263; (1923) A. I. R. (Pat.) 590; 2 Pat. 925 **758**

——— *consisting of brothers—Partition suit by mortgagee-decree-holder from one brother—Mother, whether entitled to share—Devolution of share after her death.*

In a suit for partition of share belonging to one of two joint Hindu brothers, by a mortgagee

Hindu Law—contd.

who has obtained a foreclosure decree in respect of the same, the mother is entitled to claim a share equal to that of each of the two brothers. Such share after the death of the mother will pass equally to the mortgagee-decree-holder and the other brother who had not mortgaged his share.

Bilaso v. *Dina Nath*, 3 A. 88; 5 Ind. Jur. 489; 2 Ind. Dec. (N. S.) 61 (F. B.) and *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.) followed. **N** RAMNATH *v.* SITARAM, 19 N. L. R. 147; (1923) A. I. R. (N.) 288 **81**

——**Joint family**—*Contract by* karta—*Necessity—Interest—Creditor, duty of.*

A solemn agreement duly and freely entered into cannot be rescinded and the parties to the contract cannot be allowed to avoid the terms thereof which they agree to with their eyes open and with no restraint upon their freedom of will.

But when a contract entered into by a head member or *karta* of a joint Hindu family is sought to be enforced against the other members on the ground of necessity, it must be shown, not only that there was necessity to borrow the principal sum, but that the rate of interest agreed upon was also a necessity: in other words, that it was impossible for the *karta* or the head member to obtain the loan for family necessity except at the rate of interest agreed upon.

The creditor has not only to show that there was a family necessity so as to bind the members of the family on behalf of the parties to the contract with respect to the loan advanced but that the rate of interest was the market or commercial rate. **Pat** MAHADEO PRASAD *v.* BISSESSAR PRASAD, 2 Pat. 483; 4 P. L. T. 707 **695**

——*Decree in favour of one branch—Compromise agreement by manager releasing rights under decree—Minor son, whether bound—Additions to family* pendente lite, *effect of.*

In a suit brought by one member of a joint Hindu family against the manager for rendition of accounts, partition and other reliefs, two decrees were passed making the manager liable to pay to *R* and his branch of the family certain sums. *R* purporting to act on behalf of himself and his son entered into a compromise whereby he relinquished all claim under the decrees. The son on attaining majority sued to recover under the decrees on behalf of the joint family and it was eventually held by the Privy Council that the compromise agreement was not binding upon him and that he ought to be remitted to his original rights under the decree. The suit was remanded for decision as to the share to which he was entitled. Meanwhile, two other sons had been born to *R*:

Held, that, in the events that had happened, the compromise agreement must be regarded as failing wholly to convey any of the joint, estate at all. **P C** VENKATA ROW *v.* TULJARAM ROW, 45 M. 298; 26 C. W. N. 646; 30 M. L. T. 262; 4 U. P. L. R. (P. C.) 33; (1922) A. I. R. (P. C.) 69; (1922) M. W. N. 392; 24 Bom. L. R. 1191; 36 C. L. J. 319; 20 A. L. J. 833 **765**

Hindu Law—contd.

——**Joint family**—*Manager, debt contracted by—Benefit of family—Presumption.*

There is no presumption that a debt contracted by the manager of a joint Hindu family is contracted for the benefit of the family.

Brij Lal v. *Jaishi Ram*, 30 Ind. Cas. 500; 106 P. W. R. 1915; 172 P. L. R. 1915 dissented from.

Ganpat Rai v. *Munni Lal*, 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54, *Bhura* v. *Banarsi Das* 30 Ind. Cas. 481; 113 P. W. R. 1915; 174 P. L. R. 1915. *Paras Ram* v. *Gian Chand*, 50 Ind. Cas. 36; 48 P. W R. 1919 and *Ram Dhan Das* v. *Ramji Das*, 50 Ind. Cas. 215, relied on. **L** KHAZANA MAL *v.* JAGAN NATH, 5 L. L. J. 236; 4 L. 200 **484**

——*Mortgage by manager—Interest, excessive rate of—Necessity to borrow at particular rate—Court, power of, to reduce rate.*

There is no general rule of law that a rate of interest over 10 per cent. per annum must always be treated as excessive where there is ample security for the loan.

Whether a certain rate of interest is excessive or not is a question which must depend upon the particular circumstances of each case.

A rate of interest on a mortgage loan at 15 per cent. per annum compoundable yearly is not by itself sufficient to raise the presumption that undue influence was exercised in obtaining it by the mortgagee on the mortgagor.

Abdul Majid v. *Kesherode Chandra Pal*, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809 dissented from.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show, not only that there was necessity to borrow, but that it was not unreasonable to borrow at such rate of interest and upon such terms as are contained in the mortgage, and if it is not shown that there was necessity so to borrow, that rate and those terms cannot stand. Where a Court comes to the conclusion that the rate of interest is excessive and that no necessity for borrowing at that rate existed, it is quite within its right to reduce the contract rate to a reasonable rate of interest. **O** BASANT RAI *v.* KESHO RAM, 9 O. L. J. 612; (1923) A. I. R. (O.) 139 **346**

——*Mortgage of family property—Legal necessity—Burden of proof—Series of renewals of mortgage—Presumption—Transferee of mortgaged property—Right to question validity of mortgage—Admission of validity of mortgage by family, effect of—Voidable transaction—Transferee of rights—Option, exercise of.*

Where a person wishes to enforce a mortgage against Hindu joint family property, the burden lies on him to satisfy the Court that the transaction was entered into for family necessity, or in

lieu of antecedent debt, or with the consent, express or implied, of all the members of the family.

As regards legal necessity, all that a transferee of Hindu joint family property is required to show is that like an ordinary person he was reasonably satisfied as to its existence.

A long series of renewals of mortgage transactions concerning Hindu joint family property extending over a generation without any protest from any member of the family would show its acquiescence and raise a fair presumption that if there had not been a valid necessity for them, some objection would have been raised.

It is open to a transferee of Hindu joint family property to plead that a prior mortgage on the property was without legal necessity.

Muhammad Muzamilullah Khan v. *Mithulal*, 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 901 (F. B.), followed.

The members of a Hindu joint family transferred certain property subject to some mortgages, expressly admitting that they were binding on them, and actually left with the vendee the whole sum due in order that the same may be paid to the prior mortgagees. The vendee, however, refused to pay the money alleging that the mortgages were not binding on the family:

Held, that, though the admission by the members of the family that the mortgages were binding on them could not operate as an estoppel against the vendee inasmuch as there was no privity of contract between the mortgagees and him, the admission was a very strong piece of evidence in favour of the view that the transactions were valid and binding on the family.

A transaction which is voidable remains good so long as it is not challenged by the person who has the option to have it set aside. It is for him to exercise or not to exercise the option. If without exercising the option and in fact admitting the validity of the transaction, he transfers his rights, the transferee cannot be allowed to say that he has acquired that option by the transfer.

Quaere:—Whether a mortgage of Hindu joint family property without legal necessity and not in lieu of any antecedent debt and without the consent, express or implied, of all members of the family, is void or only voidable. A INAYAT ILAHI *v.* HARDEO SAHAI, 21 A. L. J. 610; (1924) A. I. R. (A.) 29 **325**

——— **Joint family**—*Separation of one member—Presumption—Re-union, proof of —Partnership —Accounts, suit for—Limitation — Limitation Act (IX of 1908), Sch. I, Art. 106.*

Under the Hindu Law there is no presumption, when one co-parcener separates from the others, that the latter remain united. An agreement amongst the remaining members of the family to remain united or to re-unite must be proved like any other fact.

Balabux Ladhuram v. *Rukhmabai*, 30 I. A. 130 at p. 137; 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar P. C. J. 470 (P. C.) and *Balkishen Das* v. *Ram Narain Sahu*, 30 I. A. 139 at p. 151; 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar P. C. J. 489 (P. C.), followed.

Four brothers who formed a joint Hindu family carried on a family business. One of them separated from the others, and the latter carried on the business, the profits being carried to the separate accounts of the three remaining brothers in equal shares. Subsequently, one of the three brothers died, and although his share continued to be dealt with in the books, his widow was only paid maintenance. More than six years after his death, his widow brought a suit for partnership accounts and recovery of one-third of the partnership assets;

Held, (1) that there was no presumption that on the separation of one of the brothers the three remaining brothers had remained united;

(2) that after the separation the business carried on by the three brothers became an ordinary partnership subject to the law relating to partnership;

(3) that on the death of the plaintiff's husband the partnership was dissolved and a right to an accounting arose;

(4) that the suit having been brought more than six years after that date was barred by time;

(5) that the mere fact that the deceased's share continued to be dealt with in the books after his death was no evidence of a partnership with his widow. P C JATTI *v.* BANWARI LAL, 21 A. L. J. 582; (1923) A. I. R. (P. C.) 136; 18 L. W. 273; 45 M. L. J. 355; (1923) M. W. N. 687; 25 Bom. L. R. 1256; 4 L. 350 **462**

——— **Mitakshara** — *Bombay School — Joint family—Adoption—Adoptive father reserving free power of management, effect of—Alienation by manager, validity of.*

Plaintiff was adopted under a deed of adoption which contained the following clause:—

"You have acquired whatever rights and authorities a natural son should have acquired had I got any, and you have from to-day become the owner of the property moveable and immoveable. You should stay with us and take care of us as long as we, *i. e.*, my wife and I, live. After our death you are the sole owner and should thereafter make *Vahiwat* as owner. In whatsoever manner the estate, moveable or immoveable is managed (*Vyavastha*), as long as I live it is to be taken that you approve of it. You have no authority to object to it. On this condition I have taken you in adoption of my free will on your and your father's consenting to it."

Held, that the clause conferred on the adoptive father power of management of the family property free from any interference on the part of the adopted son, but it did not give him an unrestricted power of alienation.

A member of a joint family in Bombay can alienate his undivided share in the family property without the consent of his co-owners.

Therefore, an alienation of the whole interest in a portion of the family property by the manager

Hindu Law—contd.

is good at least to the extent of his own share in the property alienated.

Kasam v. *Jorawar Singh*, 68 Ind. Cas. 573; 49 I. A. 358; 31 M. L. T. 46; 16 L. W. 223; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.), followed. B BALAPPA GHENAPPA *v.* AKKUBAI 220

——— **Mitakshara**—*Daughters inheriting as joint tenants — Partition with surrender of mutual rights of survivorship— Alienation by one daughter—Reversioners, right of, to sue for possession—Transfer of Property Act (IV of 1882), s. 6, applicability of.*

Two daughters, governed by the Mitakshar School of Hindu Law, who had inherited their father's property, partitioned it by a document, which provided that they would in future severally enjoy for ever absolutely such items of property as had fallen to their respective shares from generation to generation with right of sale, etc., and that neither of them would have any right over the properties set apart for the other. One of the daughters, subsequently, alienated some of the item which had fallen to her share. After her death, the sons of the other daughter sued for recovery of possession of the same from the alienees:

Held, (1) that the document of partition amounted to a relinqu shment by each party to it, in case she should survive the other, of her right to the other's share;

(2) that, as heirs of the alienor, the plaintiffs had no *locus standi* to challenge her alienation;

(3) that, as reversioners of the alienor's father, the plaintiffs could not maintain a claim for possession during the lifetime of the other co-tenant for life;

(4) that the agreement between the co-tenant for life as to the enjoyment of the estate, to which the plaintiffs were not parties could not have the effect of accelerating their right to possession.

Per *Oldfield, J.*—A relinquishment by a co-tenant for life in favour of other co-tenant's can be, when that is entailed by the language used, not only of the life-estate, so far as it can be enjoyed simultaneously by the sharers, but of that estate, as they take it, limited only by the lifetime of the survivor; and the uncerta nty as to which of the transferors will survive to benefit does not make the transfer one of a *spes successionis* so as to offend against section 6 of the Transfer of Property Act.

Ramakkal v. *Ramasami Naickan*, 22 M. 522; 9 M. L. J. 101; 8 Ind. Dec. (N. S.) 373. *Kanni Ammal* v. *Amma Kannu Ammal*, 23 M. 504; 10 M. L. J. 253; 8 Ind. Dec. (N. S.) 754. *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty*, 24 C. 339; 12 Ind. Dec. (N. S.) 893, *Muthiyalu Chengappa* v. *Burada Gunta*, 60 Ind. Cas. 135; 43 M. 855; 39 M. L. J. 567; 12 L. W. 656; 28 M. L. T. 272; (1921) M. W. N. 29 and *Sudalai Ammal* v. *Gomati Ammal*, 16 Ind. Cas. 428; 23 M. L. J. 355; (1912) M. W. N. 908; 12 M. L. T 288; followed.

Hindu Law—contd.

Ridnamma v. *Venkata Ramappa*, 3 M. H. C. R. 268 and *Subbammal* v. *Krishna Aiyar*, 22 Ind. Cas 399; 26 M. L. J. 479, distinguished.

Per *Venkatasubba Rao, J.*—According to the Mitakshara School of Law, two or more daughters succeeding to their father take as joint tenants with rights of survivorship. They may effect a partition, each daughter giving her right of enjoyment over the properties allotted to the other daughter during the lifetime of the latter; and even an arrangement by which each daughter gives up her interest not merely during the lifetime of the other daughter but during the whole of her own lifetime is legally valid and enforceable.

A male reversioner's right to possession of property cannot be accelerated by an agreement between intervening limited-estate-holders to which he is not a party. M AMMANI AMMAL *v.* PERIASAMI UDAYAN, 32 M. L. T. 323; 45 M. L. J. 1; (1923) M. W. N. 652 58

——— **Mitakshara**—Impartible estates, devolution of. *See* GHATWALI TENURE 668

——————— *Minor co-parcener—Guardian of property, appointment of—Principles applicable.*

It is not the practice of the Bombay High Court to appoint a guardian of the property of a minor member of a Hindu joint Mitakshara family owning no separate property. But when the person applying to be appointed guardian is the manager of the fam ly, an order appointing him guardian may, under proper circumstances be made, as in such a case there is no introduction of any element of possible disturbance in the family.

A father and an only minor son formed a Hindu joint Mitakshara family. There was a mortgage on certain property belonging to the family. They received an offer for purchase of the property considerably above its real value, but the purchaser insisted that an order of the Court sanctioning the sale should first be obtained. Upon this, the father, who was the manager of the family, applied to be appointed guardian of the property of his minor son:

Held, that, under the circumstances, the manager may be appointed guardian on the condition that after the mortgage was discharged and the different costs and charges in respect of the property paid, he should invest one-half of the sale-proceeds for the benefit of the minor. C HARI NARAIN DAS, *In re*, 50 C. 141; (1923) A. I. R. (C.) 409 244

——— **Succession**—Stridhan—*Daughter's daughter* v. *son's son.*

According to the Mitakshara School of Hindu Law, a daughter's daughter has preferential rights of succession to *stridhan* property over a son's son.

A Hindu daughter taking the *stridhan* property of her mother by inheritance does not take it as her own *stridhan*, but she takes it as a limited estate with the remainder after her death to the

Hindu Law—contd.

heirs of her predecessor. A SHAM BEHARI LAL v. RAM KALI, 21 A. L. J. 656; (1924) A. I. R. (A.) 15 **495**

——— **Widow**—*Alienation—Legal necessity—Evidence—Inquiry by alienee—Recitals, value of.*

When a person claims title under an alienation effected by a Hindu widow in respect of the estate of her deceased husband, the burden lies on him to establish either that there was legal necessity in fact which justified the alienation, or that he made proper and *bona fide* inquiries and did all that was reasonable to satisfy himself as to the existence of such necessity.

Bhagwat Dayal Singh v. *Debi Dayal Sahu*, 35 I. A. 48; 35 C. 420; 7 C. L. J. 335; 10 Bom. L. R. 230; 12 C. W. N. 393; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49 (P. C.), *Amarnath Sah* v. *Achan Kuar*, 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec (N. S.) 637 (P. C.), *Nabakishore* v. *Upendrakishore*, 65 Ind. Cas. 305; 35 C. L. J. 116; 26 C. W. N. 322; 20 A. L. J. 22. (1922) M. W. N. 95; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.), relied on.

In applying this rule, however, it must be borne in mind that recitals in conveyances and mortgages of the existence of legal necessity are not, by themselves, evidence of the fact, and there must ordinarily be some evidence to substantiate the allegations *aliunde*.

Thakur Vasonji Morarji v. *Chanda Bibi*, 29 Ind. Cas. 781; 37 A. 369 at p. 376; 22 C. L. J. 180; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 29 M. L. J. 130, followed.

But when, by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and other circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and when evidence of actual inquiry by him has become impossible, the recital, coupled with circumstances which justify a reasonable belief that an inquiry would have confirmed its truth, is sufficient evidence to support the transaction.

Chintamanibhatta v. *Rani Saheba of Wadhwan*, 55 Ind. Cas 538; 47 I. A. 6; 43 M. 541; 38 M. L. J. 393; 11 L. W. 451; 18 A. L. J. 367. (1920) M. W. N. 315; 22 Bom. L. R. 541; 2 U. P. L. R. (P. C.) 77; 28 M. L. T. 457 (P. C.), *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh*, 36 Ind. Cas. 499; 43 C. 417 (P. C.), *Nanda Lal* v. *Jagat Kishore*, 36 Ind. Cas. 420; 43 I. A. 249; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177 (P. C.), *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh*, 12 Ind. Cas. 931; 38 C. 721, relied on. C CHANDRAKISHORE DATTA MAJUMDAR v. UPENDRA CHANDRA CHOUDHURY, 37 C. L. J. 319; (1923) A. I. R. (C.) 5[illegible]3 **612**

Hindu Law—contd.

——— **Widow**—*Gift to third person with consent of next reversioner—Reversioner an adjudicated insolvent—Donee, rights of.*

A conveyance by a Hindu widow of her husband's estate in favour of a third party, with the consent of the next reversioner is based on the notion that she surrenders the estate into the hands of the reversioner, instantly followed by a conveyance to the third party. Where, however, on the date of the conveyance the consenting reversioner is an adjudicated insolvent whose estate has vested in the Receiver in insolvency, the conveyance would confer no rights on the donee, because, if there is any vesting of the estate for a single moment in the reversioner on the day on which the conveyance is executed, in that very same instant whatever rights vest in the reversioner would pass to the Receiver in insolvency, and there would be nothing which the reversioner could convey to the donee. A HARIHAR PRASAD v. UDAI NATH SAH, 21 A. L. J. 77; (1923) A. I. R. (A.) 190; 45 (A.) 260 **113**

——— **Widow's estate** — *Rent-decree agains widow, personal—Sale in execution—Auction-purchaser, rights of.*

The question whether the whole estate or only the right, title and interest of the widow passes on an execution sale against the widow depends on the nature of the suit. If the suit is a personal claim against the widow only her interest passes, but if the suit is in respect of the family estate or upon a cause not merely personal against her, the whole inheritance passes by the execution sale.

Jugul Kishore v. *Jotindro Mohun*, 16 C. 985; 11 I. A. 66; 8 Ind. Jur. 485; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.), followed.

A decree for arrears of rent against a widow is not necessarily in all cases personal whether the holding is ancestral or not.

Jiban Krishna Roy v. *Brojo Lal*, 30 C. 550; 5 Bom. L. R. 428; 7 C. W. N. 425; 30 I. A. 81; 8 Sar. P. C. J. 444 (P. C.) and *Baijun Doobey* v. *Brij Bhookun Lal*, 1 C. 133; 24 W. R. 306; 2 I. A. 275; 3 Suth. P. C. J. 207; 3 Sar. P. C. J. 541; 1 Ind. Dec. (N. S.) 86 (P. C.), distinguished.

Kristo Gobind Majumdar v. *Hem Chunder Chowdhry*, 16 C. 511; 8 Ind. Dec. (N. S.) 337, dissented from.

An execution sale against a widow which purports to pass the entire estate stands on the same footing as a voluntary alienation by her.

Where a decretal debt is not of a nature to support a sale of the entire interest of a Hindu widow in possession, an auction-purchaser at a sale in execution of a decree against her acquires a title to the property which is voidable only at the instance of the reversioners on the widow's death; and until challenged by them he has a good title, which cannot be treated as a nullity by any trespasser who has succeeded in getting possession of the property.

Sitaram Ravaji v. *Khandu Mairala Shinde*, 59 Ind. Cas. 480; 45 B. 105; 22 Bom. L. R. 1155 and *Kesho Prasad Singh* v. *Chandrika Prasad*

Hindu Law—concld.

Singh, 68 Ind. Cas. 394; 2 Pat. 217; 3 P. L. T. 797; (1923) A. I. R. (Pat.) 122, relied upon. A JHARI KOERI *v.* BIJAI SINGH, 21 A. L. J. 562; 45 A. 613 **865**

——— **Will**—*Guardian, testamentary, whether can be appointed—Guardians and Wards Act (VIII of 1890), ss. 47, 48—Order refusing to remove guardian—Appeal, whether lies.*

Under the Hindu Law, a Hindu father can by Will appoint a guardian for the person and property of his minor child.

An order refusing to remove a guardian is not appealable under section 47 of the Guardians and Wards Act and becomes final under section 48 of the Act.

Mohima Chunder Biswas v. *Tarini Sunker Ghose*, 19 C. 487; 9 Ind. Dec. (N. S.) 769, *Pakhwanti Dai* v. *Indra Narain Singh*, 23 C. 201; 12 Ind. Dec. (N. S.) 134, *In re Bai Harkha*, 20 B. 667; 10 Ind. Dec. (N. S.) 1013 and *Imtiaz-un-nissa* v. *Anwar-ul-lah*, 20 A. 433; A. W. N. (1898) 97; 9 Ind. Dec. (N. S.) 637, followed. **M** KONTHALATTAMMAL *v.* SOUNDARATHACHI, 18 L. W. 256; 45 M. L. J. 481; 33 M. L. T. 80; 46 M. 873; (1923) M. W. N. 902 **896**

Hindu Widow's Re-marriage Act (XV of 1856), s. 5 —*Re-marriage, effect of—Widow, whether loses right of succession to son's property.*

A Hindu widow does not, by her re-marriage, lose her right of succession to the property of her son.

Akora Suth v. *Boreani*, 11 W. R. 82; 2 B. L. R. (A. C. J.) 199; 4 Mad. Jur. 286; 1 Ind. Dec. (N. S.) 781, followed.

Sheobaran Mahto v. *Bhogea*, 46 Ind. Cas. 884; 3 P. L. J. 639, distinguished. **Pat** PALTI *v.* NIRDHAN GOPE, 1 P. L. R. 390; 4 P. L. T. 650 **815**

Hindu Wills Act (XXI of 1870), s. 2. *See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 4, 12, 14, 15, 41 **630**

Income Tax Act (VII of 1918), s. 2 (12)—*Registration of some members of Hindu joint family as Firm—Liability of family to super-tax on income of Firm.*

The registration of some members of a Hindu joint family as a firm as defined under section 2 (12) of the Income Tax Act precludes the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm unless the firm so registered is shown to carry on its business on behalf of and for the benefit of the joint family.

Members of a joint family may engage in trade in such a way as to embark on the adventure funds of the joint family property and pledge its credit to their undertaking. On the other hand, the members of a joint family may embark on a trade without involving the funds of the joint family in it, and, in that event, their profits as traders will be self-acquisitions and the losses would not be recoverable from the joint family property, the members who actually take part in the trade may enter into a deed of partnership between themselves, or between themselves and a stranger partner, which would regulate their dealings *inter*

Income Tax Act—concld.

se and with the stranger partner, but need not necessarily affect the question as to whether and how far the property of the joint family is to be regarded as involved in the venture. It is not conclusive to show that some funds of the joint family were invested in the trade; because they might have been borrowed by the trading members as a loan of a definite sum to be re-paid by the trading firm just if it was a loan from strangers. **M** SECY. TO THE CHIEF COMMR. INCOME TAX, MADRAS *v.* DORAISWAMI AIYENGAR, (1923) M. W. N. 413; 18 L. W. 96; 45 M. L. J. 150; 46 M. 673; (1923) A. I. R. (M.) 682 **22**

——— **s. 51**—*Case stated to High Court—Decision of High Court, nature of—Appeal to Privy Council, whether competent.*

A decision of the High Court on a reference by case stated under section 51 of the Income Tax Act, is merely advisory, and not in the proper and legal sense of the word final, and is, therefore, not appealable to His Majesty in Council.

Special leave to appeal to His Majesty in Council will not be granted, when the subject is adequately dealt with in the High Court's Letters of Patent. **P C** TATA IRON AND STEEL CO. TD. *v.* CHIEF REVENUE AUTHORITY, BOMBAY, 21 A. L. J. 675; 25 Bom. L. R. 908; (1923) A. I. R. (P. C.) 148; (1923) M. W. N. 603; 45 M. L. J. 295; 18 L. W. 372; 9 O. & A. L. R. 783; 33 M. L. T. 301, 47 B. 724; 28 C. W. N. 307; 39 C. L. J. 16 **469**

Insolvency — *Adjudication, effect of—Judgment-debtor adjudicated insolvent—Attachment in execution—Receiver not impleaded—Attachment, whether operative.*

An adjudication of insolvency of a judgment-debtor divests the rights of his decree-holder as such and remits him to the position of an ordinary creditor.

In execution of a decree a house belonging to the judgment-debtor was attached on the 24th December 1915. On the 3rd March 1916 the judgment-debtor applied to have the attachment set aside on the grounds that no notice of attachment was served on him and that the decree was barred by the law of limitation. The application was dismissed, but on appeal a remand was ordered on the 23rd November 1916. Nothing further was done and, in the meanwhile, the judgment-debtor died on the 5th April 1918. On the 5th August 1918 the decree-holder took out summons against the sons and heirs of the deceased judgment-debtor to show cause why the decree should not be executed as against them. The matter of remand was thus brought on for hearing and it appeared that the judgment-debtor had been declared an insolvent on the 23rd November 1916, and the Receiver was not made a party, but the point was not specifically taken in the Trial Court:

Held, that the point could not be raised in appeal and that the execution could proceed;

(2) but that if the adjudication was still subsisting, the order of attachment made in the absence of the Receiver was inoperative against him.

Insolvency—concld.

P C SRIPAT SINGH DUGAR *v.* HARIRAM GOENKA, 31 M. L. T. 38; 26 C. W. N. 739; (1922) A. I. R. (P. C) 51; 4 U P. L. R. (P. C.) 68; 16 L. W. 447; (1922) M. W. N. 671 **507**

Interest, excessive rate of—Necessity to borrow at particular rate—Court, power of, to reduce rate. *See* HINDU LAW—JOINT FAMILY **346**

International Law—*Agreement opposed to Indian Law entered into in Foreign Territory—Enforcement in British India—Public policy.*

Where on a person being threatened with criminal prosecution in Pondicherry for the offence of criminal breach of trust, which, under the French Law, is compoundable, executed a promissory note payable in British India and the criminal proceedings were thereupon dropped:

Held, that the transaction which was perfectly legal under the French Law was enforceable in British India, since the compounding of criminal offences is not in violation of the fundamental principles of public policy and natural justice and the Indian Statute Law itself does not regard the conception of evading criminal proceedings by monetary compensation as one wholly and from its very nature to be discountenanced.

Subraya Pillai v. *Subraya Muaali*, 4 M. H. C. R. 14, followed. M VENKATASUBRAMANIA AIYAR *v.* USUFF 45 M. L. J. 59; 18 L. W. 314; (1923) A. I. R. (M.) 708 **1006**

Joinder of parties—*Rent suit against some of several heirs of tenant, whether maintainable.*

On the death of one of several joint tenants leaving a number of heirs, no question can arise as to whether the liability of the heirs for the payment of rent is joint or several, because the bundle of rights and liabilities which was in the deceased, is, by operation of law, transferred to a number of parceners who constitute in law one heir.

Ahinsa Bibi v. *Abdul Kader Saheb*, 25 M. 26 at p. 35, relied on.

A suit to recover rent against some only of the heirs of a deceased joint tenant is bad for non-joinder of necessary parties. C ABINASH CHANDRA ROY *v.* FULCHAND CHAUDHURI, 50 C. 717 **1032**

Joint decree—Appeal against—Some decree-holders not made party, effect of. *See* CIVIL PROCEDURE CODE, O. XXII, R. 4 **14**

Joint Hindu family—*Partnership—Inference—Contract Act (IX of 1872, s. 253 (10).*

In the case of a partnership between members of a joint Hindu family, a stipulation that the partnership will not be dissolved by the death of any one partner is ordinarily to be inferred. A FAKIR CHAND *v.* NANUG RAM **721**

Joint tenants—Surrender of entire lease by one tenant—Benefit to other tenants. *See* SURRENDER **58**

Joint trial—Allegations against two accused mutually exclusive. *See* CRIMINAL PROCEDURE CODE, 1898, s. 239 **78**

Jurisdiction of Civil and Revenue Courts—Suit by *pattidar* to recover revenue paid from sub-*pattidars*. *See* OUDH RENT ACT, S. 108 (16) **253**

Jurisdiction of Courts—*Suit for declaration of grove-holder's title—Civil Court, power of.*

A Civil Court cannot give a declaration regarding a plaintiff's right to hold a grove as long as the grove exists. But it is perfectly competent to declare that the plaintiff is the owner of the trees in the grove.

Manna v. *Rang Lal*, 39 Ind. Cas. 859, followed A LALTA PRASAD *v.* RAM BAHADUR, 21 A. L. J 434; (1923) A. I. R. (A.) 540 **349**

——— *Suit for declaration of title to crops—Civil Courts, jurisdiction of.*

A suit for a declaration that plaintiff is entitled to the value of crops grown in a certain plot of land is cognizable by a Civil Court.

Ram Singh v. *Girrah Singh*, 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252, distinguished. A MIR SINGH *v.* MAKHAN, 21 A. L. J. 300; 45 A. 404; (1923) A. I. R. (A.) 421 **88**

Jurisdiction of Revenue Court. *See* AGRA TENANCY ACT, 1901, S. 95 (A) **220**

Justice, *administration of—Courts, duty of.*

It is the duty of the Courts to administer justice taking a broad view, and not to allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law. L B MAUNG PO LUN *v.* MA E. MAI, (1923) A. I. R. (R.) 57. **47**

Lambardar, *powers of—Lease of* Zemindari *land.*

A *lambardar* has authority, with reference to a particular reason, to grant a lease of *zemindari* land A. HARDIAL *v.* ALAM **177**

Land Acquisition Act (I of 1894), s. 6 (3), *declaration under, whether conclusive.*

A declaration by the Collector under sub-section (3) of section 6 of the Land Acquisition Act to the effect that the land is needed for a public purpose or for a Company, as the case may be, is conclusive evidence of such purpose, and the Courts are barred from enquiring into the question.

Trustees for the Improvement of Calcutta v. *Chandra Kanta Ghosh*, 56 Ind. Cas. 32; 47 C. 500; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98; 47 I. A. 43 (P. C.) *Manick Chand Mahata* v. *Corporation of Calcutta*, 66 Ind. Cas. 600; 48 C. 916, distinguished. A SECRETARY OF STATE FOR INDIA *v.* AKBAR ALI, 21 A. L. J. 338; 45 A. 443; (1923) A. I. R. (A.) 523 **8**

Land Registration Act (VII of 1876), s. 55. *See* CIVIL PROCEDURE CODE, 1908, S. 115 **474**

Landlord and tenant—Abadi *land forming part of town—Tenant, whether entitled to sell site of house—Presumption*—Muhalla *Zabtaganj, Najibabad, whether town.*

The presumption which obtains in agricultural villages that tenants have not ordinarily the right

to transfer the sites of their houses has no application to towns.

Muhalla Zabtaganj is a part of the town of Najibabad and the residents of the *Muhalla* have a right to transfer the sites of their houses as proprietors. A SAHU GOVIND PRASAD *v.* KUNDAN **760**

——— *Lease of undetermined area—Area determined in rent suit—Subsequent suit on basis of Record of Rights*—Res judicata.

A village with fixed boundaries was leased at a rental of Rs. 2-4-0 per *bigha* per annum. The land was roughly estimated at 675 *bighas* but it was agreed that if the land was found less or more on measurement, the rent would be reduced or enhanced accordingly. In a rent suit between the lessor and the lessee it was held that the area of the village was 400 *bighas*. Subsequently there was a Survey of the village and its area was entered as 545 *bighas* in the Record of Rights. The lessor then brought a suit for rent on the basis of the area entered in the Record and urged that at best the finding in the previous suit was conclusive for the years in suit in that case and could not bind the plaintiff for all time:

Held, that the finding in the previous suit was *res judicata*; a fixed parcel of land was demised whose boundaries were known and the only question was what was the area of that parcel and, in the absence of encroachment, increment, fraud or error, it was not possible, when once that question had been answered to urge that the decision was not binding in all future litigation.

Prankissen Bagchee v. *Monmohinee Dassee*, 17 W. R. 33, *Lakhi Narain* v. *Sri Ram Chandra Bhunya*, 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146, *Dhrupad Chandra Koley* v. *Harinath Singh Roy*, 45 Ind. Cas. 660; 27 C. L. J. 563; 22 C. W. N. 826, *Kesho Prasad Singh* v. *Tribhuan*, 39 Ind. Cas. 611; 2 P. L. J. 276; 1 P. L. W. 409, *Bishun Pragash Narayan Singh* v. *Achaib Dusadh*, 66 Ind. Cas. 82; 1 Pat. 459; (1922) A. I. R. (Pat.) 215; 3 P. L. T. 807, distinguished.

In a suit by a landlord against a tenant for recovery of enhanced rent, if the landlord can prove what was the area upon which rent has been paid and what is the increased area upon which he claims rent, the Court will give him a decree in respect of the excess. Pat RADHIKA RAMAN *v.* SATNARAIN KOERI **961**

——— *Rent suit—Ejectment proceedings—Suit for declaration of under-proprietary rights—Limitation, commencement of—Cause of action, continuation of*—Shankalap koshist — *Under-proprietary tenure—Limitation Act (IX of 1908), Sch. I, Art.* 120.

In 1914 defendant brought a suit under the provisions of the Oudh Rent Act for the recovery of rent in respect of the land in suit against the plaintiffs. In that suit interest was also claimed on the rent due. The plaintiffs pleaded that they being under-proprietors of the land in question were not liable to pay interest. On 14th August 1914 the Court decided on the basis of entries in the Revenue papers that the plaintiffs were not under-proprietors of the land and were consequently liable to pay interest. In 1915 defendant instituted proceedings in ejectment against the plaintiffs under the provisions of the Rent Act. The basis of the proceedings was the decree in the rent-suit. Ejectment was ordered by the Rent Court on 30th April 1915. On 6th December 1920 the plaintiffs filed the present suit for a declaration that they were under-proprietors of the land. It was contended by the defendant that the suit was barred by time:

Held, that the limitation for the suit being six years under Art. 120 of Schedule I to the Limitation Act, it was not time-barred, inasmuch as time was to be calculated from the date of the decision of the ejectment proceedings, as those proceedings were corollary to the decree in the suit for recovery of rent and were expressly founded on the decree, and as the cause of action which arose on the passing of the decree in the rent-suit continued until the order in the ejectment proceedings was pronounced.

A *shankalap koshist* may or may not be an under-proprietary tenure. The expression is not a term of art always denoting an under-proprietary tenure. O MANOHAR LAL *v.* ACHHUTANAND, 9 O. L. J. 618; (1923) A. I. R. (O.) 27 **340**

——— *Rent, suit for—Lease not proved—Decree for compensation for use and occupation, whether can be granted.*

Where a plaintiff in a suit for rent fails to prove a lease, he can be given a decree on the basis of use and occupation if the defendant is proved to have held the land.

Sheo Karan Singh v. *Parbhu Narain Singh*, 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347, relied on. O AJODHYA SINGH *v.* KHUSRO BEGAM, 9 O. & A. L. R. (O.) 321 **582**

Law, *administration of—Duty of Courts.*

It is not the province of a Judge to alter the law however opposed it may be to the consciousness of the people. It is his duty to administer it as he finds it. M ABUVAKKAR . KUNHIKUTTIYALI, 16 L. W. 768; 31 M. L. T. 389; (1923) A. I. R. (M.) 153 **27**

Legal cruelty, what is. *See* HINDU LAW—HUSBAND AND WIFE **166**

Legal Practitioners Act (XVIII of 1879), s. 36 —*Government of India Act*, 1915, (5 & 6 *Geo. V, C.* 61), *s.* 107—*Order including person in list of touts—Power of High Court to interfere—General principles.*

The High Court can only interfere with the order of a District Judge including a person's name in the list of touts, in the exercise of the general powers of superintendence conferred upon it by section 107 of the Government of India Act.

In the matter of the Petition of Madho Ram, 21 A. 181; A. W. N. (1899) 15; 9 Ind. Dec. (N. S.) 825, relied upon.

The High Court will not interfere with an order such as the above in the exercise of its powers of superintendence where the sole ground on which interference is sought is, that the

decision of the District Judge is against the weight of the evidence.

But the High Court will interfere if the District Judge, in convtravention of the direction given in section 36 of the Legal Practitioners Act, has included in the list of touts the name of a person to whom no notice was given to show cause why his name should not be so included.

The decision of a District Judge to include a person's name in the list of touts need not necessarily be based on direct evidence, or evidence which must be legal or relevant, it is enough if there is laid before the District Judge circumstantial evidence from which he draws the inference as against that person, that he habitually acts as a tout. A KASHI NATH *v.* EMPEROR, 21 A. L. J. 671 **11**

Legal representative—*Application for substitution of names—Reasonable diligence—Affidavit—Patna High Court Rules, Chapter VI, r. 6.*

In an application under Chapter VI, r. 6 of the Rules of the Patna High Court for an order that the Memorandum of Appeal to the High Court be amended by ubstituting for a deceased respondent her son who was her legal representative, it appeared that the death of the deceased occurred on the 18th November 1922 before the institution of the appeal. The process-server reported the death on the 23rd March 1923 and the application was made on the 10th May:

Held, that as the deceased respondent was a *purda nashin* lady it was well within probability that the appellant did not know of her death prior to the time when the peon went to serve the processes on her;

(2) that the application was made with all reasonable diligence and should be allowed. **Pat** NATH SAHAI *v.* IMAM REZA **912**

Legal representative, *object of appointing—Suit by son attacking alienation by father—Death of son—Father whether legal representative of son—Legal representative brought on record and case decided, whether can be re-opened on the application of another legal representative.*

The object of appointing a legal representative of a deceased party to a suit, is that the suit might proceed and a decision be arrived at.

N. brought a suit attacking an alienation made by his father *G.*; during the pendency of an appeal by the vendees *N.* died without issue, and on the application of the vendees appellants *G.* was substituted on the record as *N.*'s legal representative:

Held, that *G.* could not, for the purposes of the suit, be regarded as the legal representative of his son, and that as the proper legal representative of *G.* had not been brought on the record the vendees' appeal had abated.

Once the legal representative of a deceased appellant in a case is brought on the record and the case disposed of, it cannot be re-opened if some other legal representative of the deceased comes to Court within six months of his death

and claims to be made a legal representative. L GULLI *v.* SAWAN, 4 L. 72; 5 L.L.J. 482 **146**

Limitation Act (XIV of 1859), s. 15—*Oudh Civil Courts Act (XXXII of 1871), ss 29, 30—Mortgage, declaration of, by Settlement Court—Period of redemption.*

A suit for redemption of a mortgage based on the terms of a declaratory decree obtained in a Regular Settlement Court is maintainable. The period of limitation in the case of a decree obtained while the Limitation Act of 1859 was in force is 60 years according to section 15 of that Act, and is not affected by the provisions is of sections 29 and 30 of the subsequent Act of 1871. O BALDEO *v.* SHER BAHADUR SINGH, 9 O. & A. L. R. 761 **42**

Limitation Act (XV of 1877), Sch. II, Art. 179—*Appeal dismissed in default—Execution of decree—Limitation, operation of—Decree nisi in mortgage suit—Limitation—Construction of document—Mortgage, equitable, by mortgagee—Mortgage, original, satisfied—Deed of indemnity to protect mortgagor—Payment by mortgagor of barred decree on equitable mortgage—Mortgagor's right to be indemnified.*

In the case of the dismissal of an appeal against a decree for want of prosecution, the period of limitation for execution of the decree under the Limitation Act of 1877 runs from the date of the decree and not from that of the dismissal of the appeal.

In the case of a decree *nisi* made in a mortgage suit, the period of limitation for execution under the Limitation Act of 1877 is only three years and not three years plus the period given by the decree for redemption.

There is no provision in the Limitation Act of 1908 so retrospective in its effect as to revise and make effective a decree, which, before the date of its coming into operation, had become unenforceable by lapse of time.

A mortgagee created an equitable mortgage by depositing the mortgage-deed with a third party. Subsequently the mortgagor having satisfied his mortgage, he contracted to indemnify him against "all losses, damages, actions, claims, suits, demands and accounts" in respect of the mortgage-deed or "any money owing or due thereunder or otherwise howsoever or for any act done by him, the mortgagee, with respect to the said mortgage-deed." Subsequently, the third party got a decree on his equitable mortgage against the original mortgagor but did not enforce it within limitation. The mortgagor, satisfied it after it had become unenforceable by lapse of time, and then sued his own mortgagee to recover the amount paid on the basis of the indemnity contract. It was urged in defence that the payment being voluntary, the mortgagee was not liable to make good the amount:

Held, that, although the payment made by the mortgagor was voluntary in the sense that it was made in payment of a decree that had become unenforceable by lapse of time, yet the mortgagee by depositing the mortgage-deed as security with the third party had blistered, encumbered and

Limitation Act, 1877—concld.

lessened the value of the mortgagor's equity of redemption, and that the latter was, under the very general terms of the indemnity contract, entitled to recover from the mortgagee what it had cost him to remedy the damage done to the property by paying off the encumbrance which the mortgagee had by his own act created. **P C** SACHINDRA NATH ROY *v.* MAHARAJ BAHADUR SINGH, 4 U. P. L. R. (P. C.) 57; 30 M. L. T. 96; 28 Bom. L. R 659; (1922) M. W. N. 338; 26 C. W. N. 858; (1922) A. I. R. (P. C.) 187; 49 C. 203; 48 I. A. 335 (P. C.) **660**

Limitation Act (IX of 1908), s. 5—*Admission of appeal filed out of time.*

Where certain connected appeals could not have been brought in without copies of the judgments, until after the main appeal had been lodged with complete sets of papers, the Appellate Court would without hesitation exercise in favour of the appellants its discretion under section 5 of the Limitation Act. **C** TARA KUMAR GHOSE *v.* KUMAR ARUR CHANDRA SINGH, 36 C. L. J. 389; (1923) A. I. R. (C.) 261 **383**

——— **s 5**—*Appeal—Delay in filing—Mistake of Court—Extension of time—Sufficient cause.*

A mistake of law might be a sufficient reason for asking the Court to exercise its discretion under section 5 of the Limitation Act, more so when the mistake is one in which the Court which was seized of the suit shared.

Brij Indar Singh v. *Kanshi Ram*, 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917. 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.), followed.

A suit was filed in the Civil Court. The Civil Court declined jurisdiction and returned the plaint for presentation to the Revenue Court. The Revenue Court held that it had no jurisdiction to hear the suit. Plaintiff went up on appeal to the Collector, but the latter upheld the order of the lower Court Plaintiff then re-filed the plaint in the Civil Court, but that Court held that the matter was *res judicata*. Plaintiff then appealed to the District Judge against the first order of the Civil Court declining jurisdiction. The appeal was considerably beyond time:

Held, that the plaintiff having acted in good faith in prosecuting the suit in the Revenue Courts before he came back to the Civil Court and there having been no undue delay in the meanwhile in filing the appeal, he was entitled to the benefit of section 5 of the Limitation Act. **O** BENI MADHO *v.* SHAMSHAD ALI, 26 O. C. 56; (1923) A. I. R. (O.) 238 **253**

——— **s. 5**—*Appeal filed beyond time—Delay caused by seeking review on insufficient grounds—Sufficient cause.*

Where an appeal is presented after expiry of the time prescribed therefor, and the appellant applies for exclusion of the time taken up in prosecuting an application for review, the Appellate Court should not exercise its discretion under section 5 of the Limitation Act, if the grounds of the application for review seem to be unreasonable. **L B** MAUNG LUN *v.* MAUNG DUN, (1923) A. I. R. (L. B.) 75 **39**

Limitation Act, 1908—contd.

——— **s 5**—*Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLII—Appeal, second—Copy of judgment of Trial Court filed after expiry of limitation—Extension of time—Sufficient cause—Ignorance of rule.*

A memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of first instance, and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation.

Molu Mal v. *Sri Ram*, 63 Ind. Cas. 33; 2 L. 227; 3 U. P. L. R. (L.) 99, followed.

Where it was found that the copy of the judgment of the Court of first instance was not presented within limitation owing to the fact that sufficient time had not elapsed after the publication of the rule requiring such copy to be filed along with a memorandum of second appeal, for the rule to become well known at the time when the appeal was filed:

Held, that there was sufficient cause, within the meaning of section 5 of the Limitation Act, for extending the period of limitation prescribed for the appeal. **L** MUHAMMAD HUSSAN-UD-DIN *v.* SAIF ALI SHAH, 4 L. 122; 5 L. L. J. 246 **451**

——— **s. 5**—*Delay in filing appeal—Refusal to extend time—Discretion, exercise of—Appeal, second—Interference by High Court.*

Where a lower Appellate Court exercises a judicial discretion and refuses to extend the time limited for filing an appeal, the High Court will not interfere in second appeal, even if it might, had it been the lower Appellate Court, have taken another view of the matter.

When, however, a Judge purporting to exercise such discretion does so under the view that there is no general rule, when in fact there is one which he ought to follow as being binding on him, he misdirects himself as to the law to be applied to the case, and cannot be said to have exercised a judicial discretion. In such a case the High Court should either remand the case or exercise the discretion itself. **A** AHMAD HUSSAIN *v.* MUHAMMAD FASIHULLAH, 21 A. L. J. 319; (1923) A. I. R. (A.) 455. 45 (A.) 432 **1039**

——— **s. 10**, *applicability of—Suit by trustee against co-trustee for joint possession and management of trust property—Guardian of minor sons of deceased trustee in possession with consent of co-trustee—Possession, whether adverse.*

Section 10 of the Limitation Act applies to a suit by one trustee against his co-trustee for joint possession and joint management of the trust property and the section is not limited to cases where a trustee is called to account by a stranger.

Though, generally speaking, guardians cannot make admissions on behalf of their wards, in considering a question of fact, namely, whether

or not the possession of the guardian on behalf of her minor children is adverse to another person, a statement by the guardian as to the character of such possession is perfectly admissible as showing the animus.

Where the guardian of certain minor sons of a deceased trustee is in sole possession by request and with the consent of another co-trustee, the sole possession of such guardian cannot be adverse possession amounting to ouster of the other trustee. M SHUNMUGAPPA *v.* SANGARYA CHETTY, 18 L. W. 907; (1924) M. W. N. 90 **120**

——— **s. 10**, application of. *See* CIVIL PROCEDURE CODE, 1908, S. 2 (2) **373**

——— **s. 10, Sch. I, Art. 66**—*"Specific purpose," meaning of—Bond payable after demand at certain place, suit on—Limitation.*

"A specific purpose" within the meaning of section 10 of the Limitation Act is a purpose that is either actually specifically defined in the terms in which the trust is created or a purpose which from the specified terms can be certainly affirmed.

The East India Company, while taking possession of the properties of the Raja of Tanjore in 1824, entered into an arrangement with his creditors by which the Company agreed to give them transferable bonds or certificates and to set apart a sufficient portion of the Tanjore revenues for the payment of the debts. The bonds were payable on demand being made after the expiry of fifteen months' notice of payment at the General Treasury at Madras. In a suit on one of such bonds against the successors of the Company:

Held, (1) that the Company and its successors were persons in whom property had been vested in trust for a specific purpose within the meaning of section 10 of the Limitation Act, and the suit, therefore, fell within the purview of that section;

(2) that treating the bond as a simple contract debt, limitation did not begin to run in respect of it till demand was made at the General Treasury at Madras after the expiry of a fifteen months notice of payment. M SECRETARY OF STATE FOR INDIA *v.* RADHIKA PRASAD, 44 M. L. J. 685; 46 M. 259; 18 L. W. 210; (1923) A. I. R. (M.) 667 **785**

——— **s. 12**—*Appeal filed without copy of order appealed against—No order drawn up on date of appeal—Time spent in obtaining copies of judgment and decree, whether excluded.*

In cases in which the formal order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone and time can run from the date of the judgment; but where a separate order is drawn up copies of both the judgment and formal order ought to be attached to the memorandum of appeal and the appellant is entitled to deduct the time spent in obtaining copies thereof.

Kamala Dasi v. *Tarapada Mukerji*, 14 Ind. Cas. 1006; 15 C. L. J. 498, followed.

Mool Raj v. *Nladar Mal*, 55 Ind. Cas. 315; 18 A. L. J. 208; 2 U. P. L. R. (A.) 54; 42 A. 260, distinguished.

An appeal was filed on the 4th February 1921 against an order passed on the 7th January 1921, but without any copy of the decree, as no decree had been passed till then. On the 10th February, the appellant applied for a copy of the decree, on the 15th the formal order was drawn up, and a copy of it was ready on the 17th and delivered to him on the 19th. On the 23rd February, he filed a copy of the formal order;

Held, that as no formal order had been prepared on the date on which the appeal was originally filed the appellant was entitled to a deduction of the time spent in obtaining copies. A KEDAR NATH *v.* NANAK **486**

——— **s. 14, Sch. I, Art. 182**——*Execution of decree—Direction that execution should take place in certain manner—Appeal, whether step-in-aid of execution—Exclusion of time spent in prosecuting previous application—Subsequent application, whether in continuation of previous application.*

A decree-holder made an application for execution on which the District Judge directed that execution should proceed on the basis of a certain report. The decree-holder took no further steps in the matter and some time after made a fresh application for execution on which the Executing Court made the same order which the District Judge had made on the previous application. The decree-holder appealed to the District Judge, but his appeal was dismissed. A second appeal to the High Court was also dismissed. A third application for execution was made more than three years after the dismissal of the appeal by the District Judge but within three years from the date of the dismissal of the second appeal by the High Court:

Held, (1) that the second appeal to the High Court could not be treated as a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, inasmuch as the High Court was not in this case the 'proper Court" within the meaning of clause (2) of Art. 182;

(2) that the decree-holder was not entitled under section 14 of the Limitation Act to the exclusion of the time spent in prosecuting the second application for execution inasmuch as it was not a proceeding which the Court had been unable to entertain from defect of jurisdiction or other cause of a like nature;

(3) that the previous application having proved infructuous owing to the conduct of the decree-holder himself, the subsequent application could not be treated as one made in continuation of the previous application.

Qamar-ud-din Ahmad v. *Jawahir Lal*, 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.) and *Hulasi* v. *Mathu*, 5 A. 236; A. W. N. (1883) 55; 3 Ind. Dec. (N. S.) 214, distinguished.

Limitation Act, 1908—contd.

Kristo Coomar Nag v. *Mahabat Khan*, 5 C. 595; 2 Ind. Dec. (N. S.) 986 and *Biroda Kanta Basu* v. *Chandra Kanta Ghose*, 6 C. W. N. 706; 29 C. 682, relied on. C RAJANI BANDHU CHATTERJEE v. KALI PRASANNA CHATTERJEE 279

——— s. 19—*Evidence Act (I of 1872), s. 92—Acknowledgment of debt in writing unstamped—Parol evidence, admissibility of, to prove debt.*

A written acknowledgment of a debt is a mere piece of evidence, it is a collateral, not a primary document and parol evidence is admissible to prove a debt, acknowledged in writing by the debtor, when such acknowledgment being unstamped is inadmissible in evidence. L TIKKAM RAM v. LAL, (1923) A. I. R. (L.) 301 939

——— s. 19—*Promissory-note—Admission of execution not inter partes—Acknowledgment.*

The mere fact that in some other case between different parties the defendant admitted the execution of a promissory-note, the basis of the suit, is not an acknowledgment of liability within the meaning of section 19 of the Limitation Act.

Sri Ram v *Firm Sobha Ram-Gopal Rai*, 67 Ind Cas 513; 20 A L. J 315 (1923) A I R. (A) 213; 4 U. P. L. R. (A) 153; 44 A. 521, distinguished. A LALLU MAL v. REOTI RAM, 21 A. L. J. 669; 9 O. & A. L. R. 674 353

——— ss. 19, 20, 21—*Joint debt—Part payment recorded by one defendant and signed by other—Acknowledgment.*

Where two persons are liable on a debt embodied in a *khata* and they make payments towards satisfaction of the debt, it is not necessary that both should make entries in the creditor's books.

If one of two joint contractors has done anything which starts a new period of limitation, then that new period starts only as against him, not as against his joint contractor.

In a suit for recovery of money due on an entry made in the plaintiff's book by both the defendants it appeared that part payments had been made, which appeared in the handwriting of one of the defendants with the signature of the other added.

Held, that the payment clearly amounted to an acknowledgment that the liability was continuing and both the defendants were jointly liable. B DEV CHAND CHATRAJI v. JAMSEDJI SHAHPURJI, 25 Bom. L. R. 334; (1923) A. I. R. (B.) 309 302

——— s. 20—*Payment towards principal and interest—Limitation, saving of.*

A payment towards interest operates to save limitation even though a part of the principal is also paid at the same time.

Mohan Shaha v. *Lakshu Karikar*, 6 Ind. Cas. 16 and *Subraya Kamati* v. *Pakaya*, 4 Bom. L. R. 231, relied on.

Lodd Govindass Krishnadass v. *Rukmani Bhai*, 21 Ind. Cas. 302; 38 M. 438; 14 M. L. T. 310; 1 L. W. 529, distinguished. M RAMAKRISHNA ANNAVI v. PICHANDI CHETTIAR, (1923) M. W. N. 564 777

——— s. 23, applicability of, to declaratory suit. *See* MUHAMMADAN LAW—WAKF 408

Limitation Act, 1908—contd.

——— s 28, Sch. I, Art. 139—*Lease of land for term—Rent not paid for more than 12 years after expiry of term—Suit to recover possession—Plaintiffs' title, whether extinguished.*

In a suit to recover possession of certain property it appeared that the defendants' ancestor had a lease of the property in suit, which expired more than 12 years before the date of the suit and that no fresh agreement was entered into between the parties:

Held, (1) that the suit was barred under Art. 139 of the Limitation Act;

(2) that the Statute operated to revoke the estate that was originally vested in the plaintiff and to confer statutory estate on the defendants and, therefore, no declaration of the plaintiff's title could be made. P C BHAGWAN RAMANUJ v. RAMKRISHNA BOSE, (1922) A. I. R. (P. C.) 184; 26 C. W. N. 722 561

——— Sch. I, Art. 11—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim proceedings—Claim, dismissal of, without investigation—Suit to establish title—Limitation.*

Where a claim is rejected under O. XXI, r. 58 of the Civil Procedure Code, without investigation, on the ground that it has been preferred too late, and a suit is subsequently brought by the unsuccessful claimant to establish title, the suit falls under r. 63 of O. XXI, and is governed by Art. 11 of Sch. I to the Limitation Act.

Venkataratnam v. *Ranganayakamma*, 48 Ind Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.) relied on.

Article 11 of Sch. I to the Limitation Act applies to suits arising out of orders passed after investigation of the claim as well as to those arising out of orders in which the claim has not been investigated at all but has been rejected on the ground that it was preferred too late. A GOBERDHAN DAS v. MAKUNDI LAL, 21 A. L. J. 342; (1923) A. I. R. (A.) 435; 45 A. 438 1024

——— Art. 16—*Madras Revenue Recovery Act (II of 1864), s. 59—Suit for recovery of water cess paid under protest—Limitation.*

A suit for recovery of money alleged to have been illegally collected by Government as water-cess and paid under protest is governed by Art. 16 of Sch. I to the Limitation Act.

Section 59 of the Madras Revenue Recovery Act is confined particularly to the cases of persons aggrieved by illegal or irregular proceedings taken for the collection of revenue under the provisions of the said Act. M SECRETARY OF STATE FOR INDIA v. NAGARAJA AIYAR, 17 L. W. 618; 32 M. L. T. 230; (1923) M. W. N. 327; 44 M. L. J. 645, (1923) A. I. R. (M.) 665 281

——— Art. 62—*Rent recovered by person not entitled thereto—Suit by real owner—Limitation.*

Where rent of certain property is recovered by a person who is not entitled in law to recover it, he must be deemed to have realised the money for the real owner's use, and limitation for

a suit by the latter to recover the amount of the rent from the former would commence to run from the date of realisation of the amount by him. The mere fact that a suit for rent by the real owner would have been barred by limitation on the date of realisation or that the defendant was, owing to his minority, able to recover rent for a longer period than the real owner would have been able to do, would not disentitle the latter from recovering from the former the amount realized by him. A MAHABIR PRASAD *v.* PARSANDI, 21 A. L. J. 345; 45 A. 410; (1923) A. I. R. (A.) 532 **939**

——— **Sch. I, Arts. 62, 120, 123**—*Debts due to deceased person collected by person holding Succession Certificate—Suit by heirs of deceased for recovery of their share—Limitation.*

A person who collects debts due to a deceased person by virtue of a Succession Certificate obtained by him cannot be described to be a person who either as an executor or an administrator represents the estate of the deceased. Such a person is not under any obligation to distribute their shares in the amount collected to the persons entitled to them.

A suit by the heirs of a deceased person for an account and for recovery of their shares of the debts due to the deceased collected by the defendant by virtue of a Succession Certificate obtained by him is governed not by Arts. 120 or 123, but by Art. 62 of Sch. I to the Limitation Act.

Abdul Gaffar v. *Nur Jahan Begam*, 29 Ind. Cas. 347; 37 A. 424; 13 A. L. J. 626, relied on. C AHIDANNESSA BIBI *v.* ISUF ALI KHAN, 50 C. 610; 27 C. W. N. 941 **1010**

——— **Art. 85**—*Mutual accounts, meaning of—Test of mutuality—Suit by Bank on floating account.*

Mutual accounts are such as consist in reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits.

Ram Pershad v. *Harlans Singh*, 6 C. L. J. 158, followed.

Although a shifting balance is a test of mutuality, its absence is not a conclusive proof against mutuality.

In a suit for the recovery of a sum of money found due to the plaintiff bank upon what was described in the plaint as a "floating, open, current and mutual account" it appeared that there were dealings between the parties which amounted to mutual debits and credits on both sides so that sometimes the balance was in favour of one party and sometimes of the other:

Held, that this was a mutual, open and current account within the meaning of Art. 85 of Schedule I to the Limitation Act and the suit having been brought within three years from the close of the year when the last item was entered in the account was not barred. THE EASTERN BANK LTD. ARRAH BRANCH *v.* BANDYAL MARWARI, 4 P. L. T. 571 **831**

——— **Sch I, Art. 91**—*Limitation bar apparent on the face of it—Duty of plaintiff.*

When a suit or an application is, on the face of it, barred, it is for the plaintiff or applicant to satisfy the Court of the circumstances which could prevent the Statute from having its ordinary effect.

Purna Chandra Mandal v. *Anukul Biswas*, 2 Ind. Cas. 844; 36 C. 654 at p. 657, followed. O YAQUB BEG *v.* RASUL BEG, 10 O. L. J. 86; (1923) A. I. R (O.) 254 **517**

——— **Arts. 91, 120**—*Suit for declaring instrument inoperative—Limitation applicable.*

Art. 91 of Sch. I to the Limitation Act can only be applied when the plaintiff has been himself, or through his predecessor-in-interest, a party to the instrument assailed. Where a third party sues for a declaration that an instrument is inoperative as against him, Art. 120 is applicable. L B MI SAN MA KHAING *v.* SHWE BA, (1923) A. I. R. (R.) 82 **164**

——— **Art. 110**—*Suit for recovery of jodi—Limitation.*

Jodi is merely favourable rent and not a charge on the land, and the period of limitation for a suit to recover arrears of *jodi* is three years under Art. 110 of Schedule I to the Limitation Act.

Venkatagiri Rajah v. *Venkat Rau* 21 M. 243 at p. 244; 7 Ind. Dec. (N. S.) 528 and *Gajapati Rajah* v. *Suryanarayana*, 22 M. 11; 8 Ind. Dec. (N. S.) 8, followed. M SAMPASADASIVA HINNA RAYAL VARU *v* BANDAR MADDULAPPA, (1923) M. W. N. 52 **968**

——— **Art. 119**—*Interference with rights of adopted son, what amounts to—Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit dismissed—Finding against defendant, whether res judicata.*

The interference mentioned in Art. 119 of Schedule I to the Limitation Act is an interference which must amount to an absolute denial of the status of adoption held by the plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status.

Ningawa v. *Ramappa*, 28 B. 94; 5 Bom. L. R. 708, relied on.

A mere denial of the status of the plaintiff as an adopted son does not amount to an interference with his rights as such adopted son within the meaning of Art. 119 of Schedule I to the Limitation Act.

In an earlier suit defendant sued to redeem certain land which had belonged to plaintiff's adoptive mother as her heir and specifically denied the plaintiff's adoption which was put in issue and decided against plaintiff. But the redemption suit was eventually dismissed:

Held, (1) that the suit having been dismissed the plaintiff had no right of appeal against the finding that there was no adoption, and that that finding did not operate as *res judicata*;

(2) that the unsuccessful attempt of the defendant in the redemption suit to exclude plaintiff from his right to redeem certain property as an adopted son did not amount to an

Limitation Act, 1908—contd.

interference with the latter's rights as an adopted son within the meaning of Art. 119 of Sch. I to the Limitation Act. R MAUNG GYI v. MAUNG ON GAING, 1 R. 186 **970**

——— **Sch. I, Art. 120**—Declaratory relief—Starting point of limitation. *See* MUHAMMADAN LAW—WAKF **403**

——— **Art. 144**—Chaukidari chakran *lands—Suit by* putnidar—*Adverse possession—Limitation, commencement of.*

A *putnidar* is entitled to the *chaukidari chakran* lands within the *putni* and the recovery of possession of such lands by the *putnidar* is not barred unless for more than twelve years prior to the institution of the suit, the possession of the *Zemindar* had been adverse to the plaintiff, and, having regard to the language of Art. 144 of the First Sch. to the Limitation Act, the Court must in each case ascertain on the facts on record when the possession of the *Zemindar* became adverse to the plaintiff.

The possession of the *Zemindar* may become adverse to the *putnidar* in a variety of ways, *e.g.*, when the lands are settled by the *Zemindar* with tenants or when the *putnidar* after being invited to come and take the lands does nothing and the *Zemindar* thereafter makes other arrangements either for holding the lands in *khas* possession or for settling the same with *ijaradars* or the like. C NOGENDRA BALA v. BEJOY CHAND, 50 C. 577; (1923) A. I. R. (C.) 734; 28 C. W. N. 114 **153**

——— **Arts. 144, 148,** *applicability of—Mortgage—Suit for redemption—Denial of mortgage by mortgagee, whether curtails period of limitation.*

A mortgagee cannot by denying the existence of the mortgage curtail the period of limitation provided for a suit for redemption.

Article 144 of the Limitation Act is only a residuary Article and does not apply so long as Art. 148 of that Act is applicable. A RAGHUNATH SINGH v. JETO SINGH, (1923) A. I. R. (A.) 613 **830**

——— **Arts. 166, 181**—*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22, 90—Execution of decree—Sale—Failure to give notice to judgment-debtor—Application to set aside sale, nature of—Limitation.*

An application under section 47 of the Civil Procedure Code to set aside an auction-sale is governed by Art. 166 and not by Art. 181. of Sch. I to the Limitation Act.

Muthiah Chettiar v. *Bava Sahib*, 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969, *Thekkedath Neelu Neithiar* v. *Subramania Moothan*, 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59; *Satish Chandra* v. *Nishi Chandra Dutta*, 54 Ind. Cas. 431; 46 C. 975, *Pasumarti Payidanna* v. *Ganti Lakshminarasamma*, 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525, followed.

Shivbai Babya Swami v. *Yesu Cheoo Nayakin*, 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925, *Baldeo Singh* v. *Meghu Singh*, 74 Ind. Cas. 202; (1919) Pat. 386, distinguished.

Limitation Act, 1908—contd.

Quaere :—Whether an application to set aside an auction-sale on the ground of want of notice to the judgment-debtor falls under section 47 of O. XXI, r. 90, of the Civil Procedure Code. M KONDINE KAMAYA v. KAVIDENA RAMAMMA, (1922) M W. N. 176; (1922) A. I. R. (M.) 951 16 L. W. 934 **458**

——— **Sch. I, Art. 181**—*Decree, preliminary, for sale on mortgage—Confirmation on appeal—Application for decree absolute—Starting point of limitation.*

In a suit for sale on a mortgage, if an appeal has been preferred against the preliminary decree, and the decree has been confirmed, the starting point of limitation for an application for a final decree is the date of the appellate decree.

Nizamuddin Shah v. *Bohra Bhim Sen*, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85 and *Gajadhar Singh* v. *Kishen Jiwan Lal*, 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734, followed.

Gayan Singh v. *Ata Husain*, 60 Ind. Cas. 817; 19 A. L. J. 83; 43 A. 320, distinguished. A MAHABIR PRASAD v. KANHAIYA LAL, 21 A. L. J. 526 **372**

——— **Art. 182**—*Application for execution—Limitation, objection as to, not entertained—Subsequent application—Objection, whether can be reviewed.*

Once a Court has decided either directly or indirectly that an execution case is a fit one to try and, therefore, not barred by limitation, there is an end to the matter and it is not open to either of the parties thereafter to raise the same question in a fresh execution.

An instalment order was passed against a judgment-debtor whereby he was allowed to pay a certain sum in 14 instalments. Some instalments were paid and then there was a default. The decree holder then applied for execution and it was contended on behalf of the judgment-debtor that the application was time-barred. The objection was, however, dismissed for default of both the parties on the date fixed for the hearing thereof and an order was made that the decree-holder should take further steps. No steps having been taken by the decree-holder, his application for execution was dismissed for default of prosecution. To a subsequent application for execution objection was taken on the ground that the previous application was time-barred:

Held, that the previous application having been treated as a valid and subsisting execution case, it was not open to the judgment-debtor to raise that objection now, and the question of limitation was no bar to the execution case proceeding.

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.), *Sheoraj Singh* v. *Kameshar Nath*, 24 A. 282; A. W N. (1902) 63, followed.

Bholanath Dass v. *Prafulla Nath Kundu Chowdhry*, 28 C. 122; 5 C. W. N 80, *Khosal Chandra Roy Chowdhury* v. *Ukiladdi*, 3 Ind. Cas. 47; 14 C. W. N. 114, distinguished. Pat JAGO MAHTON v. KHIRODHAR RAM, 2 Pat. 759 **13**

——— **Sch. I, Art. 182**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 11 to 14—Application for execution, requirements of—Return of execution application for additional Court-fee—Court-fee not paid, effect of—Application, whether "in accordance with law"—Decree-holders, several—Verification of application by all, whether necessary.*

The fact that an execution application returned for amendment is not amended and re-filed within the time allowed, does not necessarily make the application one not in accordance with law for the purposes of Art. 182 of Schedule I to the Limitation Act.

Gopal Sah v. *Janki Koer*, 23 C. 217; 12 Ind. Dec. (N. S.) 145, not followed.

Order XXI, rr. 11 to 14 gives the particulars which the law requires to be stated in an application for execution. If the application conforms with those rules and is presented on a properly stamped paper, it must be taken to have been properly presented in accordance with law, even though it is returned for some other reason.

An execution application was returned for supplying a copy of the Record of Rights concerning the property sought to be made liable in execution and for payment of Court-fee on the additional amount of interest claimed between the date of the plaint and the date of the application. The order was not complied with. Within three years another execution application was made and the question was whether the previous application operated to save limitation:

Held, that assuming these were matters which the Court might have required to be done, a failure to do them could not affect the validity of the application as such, and that under Art. 182 of Sch. I to the Limitation Act the later application filed within three years from it was within time.

Under O. XXI, r. 11 (2) of the Civil Procedure Code it is not necessary that an execution application should be verified by all the applicants where there are more than one. It may well be that some of them may not be acquainted with the facts of the case. It would be straining the language of the rule too far to say that where there are more applicants than one, the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more are acquainted with the facts, their verification is not sufficient. **Pat** BHAGWAT PRASHAD *v.* DWARKA PRASAD SINGH 4 P. L. T. 513; (1923) Pat. 229; 2 Pat. 809; 1 P. L. R. 453; (1924) A. I. R. (Pat.) 23 **174**

——— **Art. 182**—*Execution of decree—Application for substitution by assignee decree-holder—"Step-in-aid of execution"—Application accepted by Court, whether can be questioned subsequently.*

An application made by the assignee of a decree to have his name substituted in place of the original decree-holder is a step-in-aid of execution within the meaning of Art. 182 of the Second Schedule to the Limitation Act.

Pitam Singh v. *Tota Singh*, 29 A. 301; 4 A. L. J. 184; A. W. N (1907) 74 and *Sheo Ram* v. *Ram Bharosey*, 69 Ind. Cas. 660; 9 O. L. J. 444; 26 O. C. 71; 4 U. P. L. R. (O.) 97; (1923) A. I. R. (O.) 9, followed.

Kuppuswami Chettiar v. *Rajagopala Iyer*, 70 Ind. Cas. 324; 42 M. L. J. 303; 15 L. W. 348; 45 M. 466; (1922) M. W. N. 113; (1922) A. I. R. (M.) 79, not followed.

Where an application to take some step-in-aid of execution is accepted by the Court, it must, even if defective, be treated as one in accordance with law so as to satisfy all the requirements of Art. 182 of the Limitation Act although notice to the judgment-debtor may not have been issued or served. The defect must be discovered at the time, otherwise as a general rule it will save limitation. **O** MARIAM BEGAM *v.* MOHAMMAD MEHDI, 9 O. & A. L. R. 635 **40**

——— **Sch. I, Art. 182 (2)**—*Execution of decree—Appellate Court dismissing appeal on ground of deficient payment of Court-fees—Limitation, operation of.*

The word "appeal" in Art. 182 (2) of the Schedule to the Limitation Act should not be restricted to mean *bona fide* appeal. The fact that there was an appeal of which the Appellate Court had seizen and which was determined by a judgment of that Court, is sufficient to bring the provisions of Art. 182 (2) of Sch. I to the Limitation Act into operation and the period of limitation for execution of the decree would run from the date of the final decree or order of the Appellate Court.

Where an appeal is admitted, heard and an order passed dismissing it on the ground that proper Court-fees had not been paid on the Memorandum of Appeal, the order is equivalent to a decree and limitation would run with regard to execution from the date of that order.

Dianatullah Beg v. *Wajid Ali Shah*, 6 A. 438; A. W. N. (1884) 153; 4 Ind. Dec. (N. S.) 99, distinguished. **C** BASANTA KUMAR ROY *v.* MANJURI DASSI **679**

——— **Art. 182 (5)**—*Execution of decree—Application to summon necessary witness, whether step-in-aid of execution.*

A written application by a decree-holder for the summoning of a necessary witness in execution proceedings has the effect to further the proceedings, and is, therefore, an application to take a step-in-aid of execution within the meaning of clause (5) of Art. 182 of Schedule I to the Limitation Act.

Juggi La v. *Ganga Prasad*, 10 Ind. Cas. 182; 14 O. C. 124, *Manna Lal* v. *Sardar Singh*, 43 Ind. Cas. 342; 20 O. C. 332, distinguished.

Muhammad Siddiq Khan v. *Misri Lal*, 64 Ind. Cas. 524; 19 A. L. J. 843; (1922) A. I. R. (A.) 432, relied on. **O** MATHARA SINGH *v.* KANDHAI PATHAK, 9 O. & A. L. R. 465 **816**

——— **Art. 182 (5)**—*Civil Procedure Code (Act V of 1908), ss. 38, 39—Execution of decree—Decree transferred — Application in*

Limitation Act, 1908—concld.

Court which passed decree, whether step-in-aid of execution—Limitation.

Under the provisions of sections 38 and 39 of the Civil Procedure Code a decree may be executed either by the Court which passes it or by the Court to which it is sent for execution; it cannot be executed simultaneously in two Courts.

Maharajah of Bobbili v. *Sree Rajah Narasaraju Peda Baliara Simhulu Bahadur Garu*, 36 Ind. Cas. 682; 39 M. 640; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 909; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.), relied on.

Where, therefore, a decree has been transferred to another Court for execution, an applicaton made to the Court which passed it cannot be regarded as a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, so as to save limitation. Pat JNANENDRA NATH GHOSH *v.* KUMAR JOGENDRA NARAIN SINHA, 2 Pat. 247; (1923) A. I. R. (Pat.) 384 **608**

Limitation and the Code of Civil Procedure (Amendment) Act (XXVI of 1920), s. 3—*Delay in depositing security, when can be excused—High Court, power of.*

The discretionary power of the High Court to excuse delay in furnishing security for costs of appeal to His Majesty in Council is not general but is explicitly restricted to a period of 60 days by section 3 (1) of Act XXVI of 1920.

Clause 9 of the Order in Council of 1920 does not enlarge such power. M KACHI REDDI *v.* NARAYANA REDDI, 18 L. W. 29; (1923) M. W. N. 510, (1924) A. I. R. (M.) 44 **703**

Lis pendens doctrine of, applicability of. *See* PROBATE AND ADMINISTRATION ACT, 1881 S. 60 **54**

Madras Civil Rules of Practice, rr. 32 to 36—*Inspection of proceedings by party—Liability for payment of fees.*

Under rule 36 of the Madras Civil Rules of Practice, fees are payable not only in cases of inspection of documents by a stranger under rules 33 to 35, but also in cases of inspection of proceedings by a party under rule 32. M ZAMINDAR GARU OF NUZVID *v.* GOVERNMENT PLEADER, 45 M. L. J. 721 **944**

Madras Estates Land Act (I of 1908), ss. 27, 28. *See* CIVIL PROCEDURE CODE, 1908 **584**

Madras Revenue Recovery Act (II of 1864), s. 59. *See* LIMITATION ACT, 1908, ART. 10 **281**

Malabar Law—Tarwad—Karnavan, *position of—Money paid by* karnavan *to third person, whether can be recovered—Trusts Act (II of 1882), ss. 63, 64—Money passing in circulation, meaning of—Pleadings, construction of—Decision based on one of two alternative legal positions arising from facts stated—Prejudice.*

The *karnavan* of a Malabar *tarwad* is not a mere trustee but his position is similar to that of the manager of an undivided Hindu family.

Where a *karnavan* misappropriates *tarwad* money and gives it away to a third person, the money being trust money in the latter's hands with notice of its character, the latter is bound under section 63 of the Trusts Act to restore it to the *tarwad*.

The reference to money passing in circulation in section 64 of the Trusts Act means and includes the passing of money in the ordinary course of business and not the transfer of money by a specific act such as payment on behalf of a person to some other.

Where a plaint submits the general facts of a case to the Court without specification of their exact legal implications, and the evidence required is the same for both of two possible legal positions arising from the facts stated in the plaint though the conclusions from it would differ, the defendant cannot be held to have been prejudiced by the Court basing its decision on one of the two legal positions on the evidence on record. M MEENAKSHI VETHIAR AMMA *v.* CHERIYA PARVATHI NETHIAR, (1923) M. W. N. 657 **1012**

——**Tarwad**—Thavazhi—Karnavan —*Decision against Karnavan, whether binding on members —Succession —Self-avquisitions—Lawful administration of—Duty of Courts.*

In the absence of fraud or collusion, a decision in a suit honestly defended by a Karnavan in his representative capacity is binding on the members of the Tarwad or the Thavazhi whom he represents.

Under Malabar Law all acquisitions of a male member of a family undisposed of at his death form part of the family property and fall to the management of the eldest surviving male.

Kallati Kunju Menon v. *Palat Erracha Menon*, 2 M. H. C. R. 162 at p. 163, followed.

Acquisitions with the help of the funds of the acquirer's own Thavazhi owning Puthravagasam properties, become the property of the Thavazhi and the Karnavan of the whole Tarwad cannot claim them in opposition to the Thavazhi. M ABUVAKKAR *v.* KUNHIKUTTIYALI, 16 L. W. 768 31 M. L. T. 389; (1923) A. I. R. (M.) 153 **27**

Malabar (Restoration of Order) Ordinance (I of 1922), ss. 10, 11, 16—*Criminal Procedure Code (Act V of 1898), ss. 57, 503—Refusal to issue process to witness in warrant-case—Powers of Special Judge to issue commission—Illegality—Failure of justice.*

Under section 257 of the Criminal Procedure Code in trials of warrant-cases, if the accused, after he has entered upon his defence, applies to the Magistrate to issue process for examination of witnesses, the Magistrate is bound to comply with the request unless he is satisfied that the application should be refused, on the ground that it is made for purpose of vaxation or delay or for defeating the ends of justice in which case he is bound to record his reasons.

The accused's right to have his defence witnesses examined by the Judge or the Magistrate who disposes of the case is one which has been secured for him by the Code and where the action of the Court has deprived him of this right, it must

Malabar (Restoration of Order) Ordinance—concld.

be held that a failure of justice is the natural result of the irregularity.

In a trial under the provisions of the Malabar (Restoration of Order) Ordinance I of 1922, the Special Judge refused to issue process for the attendance of certain material de ence witnesses but examined them by commission without assigning any reason. In reply to a reference by the High Court the Judge reported that he did so on the ground that to obtain the witnesses from distant places would entail unreasonable delay, expense and inconvenience:

Held, (1) that the Special Judge was wrong in refusing to issue process for the attendance of the witnesses as by virtue of section 10 of the Ordinance, he was bound to follow the procedure laid down in section 257 of the Criminal Procedure Code;

(2) that inasmuch as the powers of a Special Judge under section 10 of the Ordinance were confined to those of a "Magistrate" and did not include those of a District Magistrate or a Presidency Magistrate the issue of a commission by him under section 503, Criminal Procedure Code was *ultra vires*;

(3) that the irregularity in procedure could not be held to have been cured by the provision contained in section 16 of the Ordinance, which was analogous to section 537 of the Criminal Procedure Code, as the natural result of the illegal action of the Judge was a failure of justice. M *In re* AYARVALI POKKER, 45 M. L. J. 305; (1923) M. W. N. 758; 18 L. W. 899; 24 Cr. L. J 840 **952**

Malabar tarwad—Kanom *granted by* karnavan—Anandravans, *whether entitled to redeem—Collusion—Prejudice.*

The *anandravans* of a Malabar *tarwad* are entitled to maintain a suit for redemption of a *kanom* granted by their *karnavan* on proof of special circumtances, such as the existence of collusion between the *karnavan* and the *kanomdar* or prejud ce to the *tarwad* interest by the continuance of the *kanom*.

Mandoth Veetil Chappan v. *Puthanpurayil Ranu*, 15 Ind Cas. 587; 37 M. 420; 13 M. L. T. 118, *Olaprakal Thazath* v. *Charich i Pallikal*, 55 Ind. Cas. 760; 43 M 393; 38 M. L. J. 207; 1 L. W. 200; (1920) M W. N. 279; 27 M L. T. 169, distinguished. M KANNATHAYAPARKUM PUTHULATH AMINA UMMA v. ANANDRAVAN CHERIYA RAYARAPPANN, (1923) M. W. N. 518; (1923) A. I. R. (M) 706 **1026**

Maritime Law—*Seamen's wages, security for—Chief Engineer, whether seaman.*

Seamen have a triple security for their wages, namely, the vessel, the owner and the Master.

The term "seaman" is not confined to those who actually take part in the navigation of the ship. Every one who is regularly attached to the ship and who contributes to her successful handling is a seaman although he may not know one rope from another.

A Chief Engineer of a ship is a "seaman."

A Master of a ship is entitled to recover from the owner the wages and messing charges paid by him to the Chief Engineer. C J. R. B. MORRIER v. RACHUMULL, 50 C. 29; (1923) A. I. R. (C.) 439 **287**

Mesne profits—*Preliminary decree—Negation or omission of profits—Commissioner appointed to ascertain profits—Remedy—Revision—Appeal—Appointment of Commissioner—Method o challenging correctness of order—Appeal against final decree—Revision against interlocutory order.*

If the right to mesne profits is negatived in the preliminary decree and no appeal is preferred against the order disallowing them the question cannot be raised again at the stage of passing the final decree, but if the omission to provide for the mesne profits in the preliminary decree is due to inadvertence, the question cannot be treated to be finally concluded up till the passing of the final decree.

Gulusam Bivi v. *Ahmadsa Rowther*, 51 Ind. Cas. 140; 42 M. 296; 9 L. W. 541; (1919) M. W. N. 284, doubted.

Where a preliminary decree omits by inadvertence to provide for mesne profits and later on a Commissioner is appointed to ascertain the same, whether the order of his appointment is correct, or incorrect, the proper method of challenging it is not a revision but an appeal against the final decree.

Gulusam Bivi v. *Ahmadsa Rowther*, 51 Ind. Cas. 140; 42 M. 206; 9 L. W. 541; (1919) M. W. N. 284, doubted. M HUSSAIN SAHIB v HAMMAD SAHEB, 36 L. W. 212; 31 M L. T. 180; (1922) M. W. N. 562; (1923) A. I. R. (M.) 43 **81**

Minor—*Arbitration award—Minor party—Compromise for fresh submission to arbitration—Court, duty of—Benefit to minor—Civil Procedure Code (Act V of 1908), Sch. II.*

As an arbitration award is binding on the parties, where one of the parties to it is a minor, the Court should not uphold a compromise by the parties to refer the dispute to arbitration a second time, unless the award is set aside on any of the grounds mentioned in Schedule Second to the Civil Procedure Code or unless the Court considers the compromise to be in the interest of the minor.

Per *Walsh, J.*—The jurisdiction of Equity Courts over the interests of a minor has always been considered parental and of very solemn obligation, and a Judge sitting in any civil suit has to exercise that jurisdiction when the facts arise and the question of a minor's consent is involved. No contract amounting to an apparent surrender or variation of an infant's right ought to be sanctioned or listened to for one minute by any Court without satisfying its mind that the proposed arrangement is *bona fide* intended for the benefit of the minor. A JHINKU SINGH v. SITAL SINGH, 21 A. L. J. 815 (1923) A. I. R. (A.) 267; 45 A. 263 **133**

——— *Compromise by guardian—Suit to set aside compromise on ground that plaintiff had attained majority before compromise, whether maintainable.*

Minor—contd.

A *quondam* minor cannot maintain a suit for a declaration that a decree passed against him on a compromise accepted on his behalf by his guardian *ad litem* with the consent of the Court shall be of no effect on the ground that at the time of the compromise and decree the plaintiff had become *sui juris* and, consequently, was not represented before the Court.

Bibee Solomon v. *Abdool Azeez*, 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446, *Biraj Mohini Dasi* v. *Chinta Moni Dasi*, 5 C. W. N. 877 and *Surendra Nath Ghose* v. *Hemangini Dasi*, 34 C. 83, distinguished. **L** GHULAM NABI *v.* BASHESHAR MAL, 4 L. L. J. 298; (1922) A. I. R. (L.) 407 **603**

——— De facto *trustee, transactions by—Execution proceedings by minor on attaining majority —Ratification.*

Where a minor on attaining majority conducted the execution proceedings of a decree obtained by the *de facto* trustees of his monies and obtained payment:

Held, that this did not amount to a ratification and did not estop the minor from bringing any claims which he may have against the trustees. **A** FAKIR CHAND *v.* NANUG RAM **721**

——— *Sale of minor's property by person acting as guardian—Sale, to third person by minor, after attaining majority—Possession, suit for, maintainability of.*

A judicial sale is binding on the persons who are parties to it unless it is set aside. But a person who has the right of avoiding a private sale executed by another may elect to avoid it merely by selling the property to some third person on the footing that the prior sale is not binding on him. The result of such a sale is that the vendor has a complete title from his point of view though it will become effective only if the Court ultimately finds that the prior sale is not binding on him. But contingent on that event, the vendor has got not merely a bare right to sue but a complete title to the property which in law is assignable.

Malkarjun v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar P. C. J. 339 (P. C.). *Muthukumara Chetty* v. *Anthony Udayan*, 24 Ind. Cas. 120; 38 M 867; 15 M. L. T. 361; 29 M. L. J. 617, *Fitzroy* v. *Cave*, (1905) 2 K. B. 364; 74 L. J. K. B 829; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612, *Prosser* v. *Edmond*, (1835) 1 Y. & C. 481; 41 R. R. 322; 160 E. R. 196, *Krishna Dhone* v. *Bhagaban Chandra*, 34 Ind. Cas. 188, *Ganpat Lal* v. *Bindasini Prashad Narayan Singh*, 56 Ind. Cas. 274; 47 I. A. 91; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 24 C. W. N. 954; 28 M. L. T. 330; 47 C. 924 (P. C.), distinguished.

The mother of a minor, as his guardian, alienated certain properties belonging to the minor. The minor on attaining majority, sold the properties to a third person ignoring the sale by his guardian, on the footing that no valid title was conveyed by it:

Minor—concld.

Held, that a suit by the vendee from the minor for possession of the properties was not bad for want of a prayer to set aside the alienaton by the minor's mother. **M** PUTIEVU KAMRAJU *v.* CHUNDURI GUNNAYYA, 45 M. L. J. 240; 18 L. W. 233; (1923) M. W. N. 756 **1003**

Mortgage—*Lease in favour of mortgagor—Distinct transactions—Suit on lease—Subsequent suit on mortgage, whether barred—Civil Procedure Code (Act V of 1908), O. II, r. 2.*

Where a mortgage and a lease of the mortgaged property in favour of the mortgagor are executed on the same day but the mortgage-deed contains no reference to the lease and the mortgagee is not restricted in his choice of tenants the mortgage and the lease are two distinct transactions even though the amount of rent is equal to the amount of interest.

In such a case a suit for rent on the basis of the lease would not operate under O. II, r. 2 of the Civil Procedure Code to bar a subsequent suit on the mortgage-deed to recover the money due thereunder.

Muhammad Hussain v. *Abdul Ghafur*, 65 Ind. Cas. 102; 3 L. 1; 8 P. W. R. 1922; (1922) A. I. R. (L.) 111, followed.

Natha Singh v. *Chunni Lal*, 47 Ind. Cas. 364; 69 P. R. 1918; 112 P. W. R. 1918; 117 P. L. R. 1918, distinguished. **L** RALIA RAM *v.* AMIR CHAND, (1923) A. I. R. (L.) 203; 4 L. 52; 5 L. L. J. 259 **122**

——— *Mortgage of moveable property—Possession not given—Mortgagor disposing of property —Mortgagee, rights of.*

Where, in the case of a mortgage of moveable property, possession is not given, and the mortgagor disposes of the mortgaged property to a third person, the mortgagee cannot follow the property into the hands of that third person unless he can show that that person had, at the time he took the property, notice of the mortgage. **L B** MAUNG SHWE HNYIN *v.* FUL CHAND, (1923) A. I. R. (R.) 60 **52**

——— *Mortgagees, several—Suit by one mortgagee to recover his share of mortgage-money.*

Where one of several mortgagees brings a suit to recover only his share of the mortgage-money, he is not entitled to bring the whole of the mortgaged property to sale to realize simply his share; he is entitled to recover his share of the mortgage money as against a proportionate part of the mortgaged property. **A** MOHAN LAL *v.* PRASADI LAL, 45 A. 46; (1924) A. I. R. (A.) 11 **999**

——— *Mortgagor deprived of portion of mortgaged property—Substituted security, doctrine of, application of.*

The doctrine of substituted security only applies where possession of a particular property has been awarded to the mortgagor in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when the en-

tire property mortgaged belonged to the mortgagor, and a person with no title subsequently obtained possession of a portion of it behind the back of the mortgagee. A AFTAB BEGAM v. MUHAMMAD AYUB, 21 A. L. J. 607; 45 (A.) 653; (1924) A. I. R. (A.) 65 **345**

——— *Prior and subsequent mortgagees—Equity of redemption, purchase of, by prior mortgagee, effect of—Priority—Usufructuary mortgage—Possession not delivered—Interest, whether can be claimed—Decree for sale on subsequent mortgage, form of.*

A prior mortgagee who has purchased the equity of redemption is entitled to hold up the earlier mortgages which are satisfied out of the sale consideration as a shield against any attempt to deprive him of the property.

When a usufructuary mortgagee is unable to obtain possession of the mortgaged property and there is a definite covenant in the mortgage-deed that, in the event of his being unable to obtain possession, the mortgagee would be entitled to interest, he can claim interest on the mortgage amount.

A prior charge-holder in possession of the mortgaged property is not liable to have his possession disturbed until his charge is paid off.

A decree for sale on a subsequent mortgage provided that if the decree-holder failed to pay off the prior mortgagee by the date fixed the latter would be at liberty to apply that the suit be dismissed:

Held, that the condition laid down in the decree giving the option to the prior mortgagee was perfectly valid. A PHUL CHAND v. SURJI, (1923) A. I. R. (A.) 457 **684**

——— *Prior and subsequent mortgagees—Subsequent mortgagee agreeing to pay off prior mortgagee—Priority—Prior mortgagee purchasing equity of redemption, position of.*

A prior mortgagee who takes a further mortgage of the property and agrees, out of a portion of the consideration left in his hands, to pay off a mortgage on the property executed between his first and second mortgages and fails to do so, cannot, as against the subsequent mortgagee, claim priority in respect of the sum due to him on his prior mortgage which was incorporated in the consideration for his second mortgage.

Muhammad Sadiq v. *Ghaus Muhammad*, 7 Ind. Cas. 200; 33 A. 101; 7 A. L. J. 914, followed.

Where the purchaser of an equity of redemption who is also a prior mortgagee allows his claim on the prior mortgage to become barred by time as against a subsequent mortgagee, he cannot, as against the latter, claim priority in respect of the amount of his prior mortgage. A MAKHAN LAL v. NATTHI, 21 A. L. J. 382; (1923) A. I. R. (A.) 509 **640**

——— *Prior and subsequent simple mortgages—Execution sale under second mortgage—Subsequent sale under prior mortgage—Suit for possession by prior mortgagee, maintainability of.*

A second mortgagee entered into possession of the mortgaged property in execution of a decree for sale obtained in a suit on his mortgage to which a prior simple mortgagee was not made a party. The prior mortgagee subsequently purchased the same property in execution of a decree for sale obtained in a suit on his mortgage to which the second mortgagee was not made a party. The prior mortgagee then brought a suit against the second mortgagee for recovery of possession of the property, and, in the alternative, for a conditional decree that the defendant should redeem his mortgage and in case of his failure to do so, he, the plaintiff, should be put in possession of the property in dispute:

Held, that the suit was misconceived and should be dismissed as the plaintiff had no right to the possession of the property under his simple mortgage on which he based his title.

Madan Lal v. *Bhagwan Das*, 21 A. 235; A. W. N. (1899) 41; 9 Ind. Dec. (N. S.) 859, followed. A RAM NARAIN v. SOMI, 45 A. 189; (1923) A. I. R. (A.) 449 **277**

——— *Prior mortgagee, whether can sue without impleading subsequent mortgagee—Mortgagee holding two different mortgages on same property—Suit to enforce mortgage—Cause of action—Mortgages, whether separate subjects—Court-Fees Act (VII of 1870), s. 17.*

There is nothing in law to prevent a prior mortgagee from bringing a suit to enforce his mortgage without impleading a subsequent mortgagee.

A person holding two mortgages from the same mortgagor hypothecating the same property and even when the due date in both is the same can bring suits separately on both bonds; in other words, he may sue on the first mortgage without joining the second mortgage and *vice versa*.

Nilu Roy v. *Asirbad Mandal*, 60 Ind. Cas. 809; 33 C. L. J. 232; 25 C. W. N. 129, followed.

The causes of action on both the bonds are separate and the mortgages are separate subjects within the meaning of section 17 of the Court-Fees Act. **Pat** WAZIRI BEGAM v. SASHI BHUSAN RAI, 4 P. L. T. 546; (1923) Pat. 293; 2 Pat. 874 **820**

——— *Redemption—Clog on equity of redemption—Long term—Onerous conditions.*

A mortgagee cannot be allowed to fetter redemption by terms which are unreasonable or oppressive. An agreement made at the time of the mortgage between a mortgagor and the mortgagee cannot operate to make that mortgage irredeemable. Incidental to every mortgage is the right of the mortgagor to redeem it, which is called his equity of redemption. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage shall not be redeemable or that the right shall not be exercised except in a particular manner or under certain onerous conditions. If the conditions are one-sided and designed to thwart or defeat redemption equity will interpose in favour of the mortgagor and relieve him of the oppressive conditions which unreasonably hinder redemption without interfering with what might really be due to the

Mortgage—contd.

mortgagee on account of the principal and interest secured by the mortgage.

A long term may not by itself operate as a clog on the equity of redemption but where such a long term is accompanied, by other conditions, rendering redemption extremely difficult and onerous without any corresponding benefit to the mortgagor, the mortgagee cannot be allowed to take advantage of those conditions to defeat the right of redemption.

Each case must, however, be decided on its own facts and circumstances. There is nothing more dangerous and misleading than to apply the inferences to be drawn from one set of facts to the facts and circumstances proved elsewhere.

A mortgage was made for a period of 101 years and it was provided that the mortgagee would remain in possession for that period and enjoy the usufruct in satisfaction of interest agreed upon between the parties and that on the expiry of the said period the mortgagor would be entitled to obtain possession of the mortgaged property on payment of three times the principal money. There was a further provision that the mortgagor would not be entitled to a rendition of accounts or the re-payment of the surplus profits, if any but that the mortgagee would be entitled to claim any deficit from the mortgagor. The net profits of the mortgaged property were estimated and found to be sufficient to pay the interest settled to be payable:

Held, that these covenants taken together operated as a clog on the equity of redemption and that the mortgagor was entitled to claim redemption before the period fixed in the mortgage.

Saheb Bakhsh Singh v. *Mohammad Ali Mohammad Khan*, 58 Ind. Cas. 115; 7 O. L. J. 382, *Zulfiqar Ali* v. *Suraj Prasad*, 68 Ind. Cas. 998; 9 O. L. J. 365; (1922) A. I. R. (O) 221 and *Genu Tukaram Tapkir* v. *Narayan Raghu Tamhane*, 59 Ind. Cas. 258; 45 B. 117; 22 Bom. L. R. 1147, distinguished from. **O** ABDUL HAKIM v. SAJJAD HUSSAIN, 10 O. L. J. 46; 26 O. C. 209; 9 O. & A. L. R. 733; (1923) A. I. R. 209 **304**

——— *Two mortgages on same property—Covenant to redeem together—Clog on redemption.*

A person who had executed a usufructuary mortgage of his property, mortgaged it again to the same mortgagee, and it was agreed that in case interest on the amount secured by the second mortgage was not paid annually, the mortgagee could, if he so desired, sue to recover the money due on the second mortgage. It was also agreed that the first mortgage would not be redeemed without the redemption of the second mortgage being effected:

Held, that the condition was a clog on the equity of redemption and the mortgagor could redeem the first mortgage alone without redeeming the second.

Har Pershad v. *Ram Chander*, 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A) 139; 44 A. 37; (1922) A. I. R. (A) 174, distinguished.

Mortgage—concld.

Kesar Kunwar v. *Kashi Ram*, 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634, followed. **A** MAKHAN LAL *v.* KISHUN LAL, (1923) A. I. R. (A.) 454 **320**

Muhammadan Law—Gift, *requisites of—Presumption from possession.*

Under the Muhammadan Law a gift can be made orally and need not be made by a registered instrument, but there must be evidence from which a declaration by the donor, acceptance by the donee and transfer of possession are proved.

A man might allow his property to be recorded and possessed by his sons without any intention that they should be owners of it, as, for instance, if he wishes to baffle his creditors, but, in the absence of a formal declaration of gift, a gift cannot, under the Muhammadan Law, be presumed from the mere fact of possession. **O** KHALIL ULLAH SHAH *v.* EWAZ ALI, 26 O. C. 128; (1923) A. I. R. (O.) 214 **390**

——— **Waqf** — *Alienation by trustee—Beneficiary, whether can sue for recovery of possession—Mussalman, right of, to maintain action against* mutwalli—*Courts, powers of—Specific Relief Act (I of 1877), s. 42—Suit for declaration that alienation by trustee is illegal, whether maintainable—Consequential relief—Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120—Declaratory relief—Recurring cause of action—Starting point of limitation.*

A beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of r. 8, O. I, Civil Procedure Code, and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated.

Delrus Banoo Begum v. *Nowab Syud Asgur Ali Khan*, 15 B. L. R. 167; 23 W. R. 453, disapproved.

Jan Ali v. v. *Ram Nath*, 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21, *Zafaryab Ali* v. *Bakhtawar Singh*, 5 A. 497; A. W. N. (1883) 91; 3 Ind. Dec. (N. S.) 432, *Jawahra* v. *Akbar Husain*, 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390 (F. B.), followed.

Every *Mussalman* who derives any benefit from such a *waqf* is entitled to maintain an action against the *mutwalli* to establish his right thereto or against a trespasser to recover any portion of the *waqf* property which has been misappropriated without joining any other person who may participate with him in the benefit.

Kazi Hassan v. *Sagun Balkrishna*, 24 B. 170; 1 Bom L. R. 649; 12 Ind. Dec. (N. S.) 651; *Afiman* v. *Hamid-ud-din Husain*, 51 Ind. Cas. 790; 58 P. W. R. 1919, followed.

The power of the Courts in India to entertain suits of a civil nature does not carry with it the general power of making declarations except in so far as such power is expressly covered by Statute.

Muhammadan Law—contd.

Courts have paid more regard to the protection of trust property than to the protection of the alienee from the trustee, and even if the grantor has himself been implicated in the abuse of the trust, the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust property.

Where a transfer is void in law no question of equity as between the transferor and the transferee can arise.

A declaration obtained in a suit for possession is merely ancillary and is generally unnecessary; but where the cause of action is based upon a shadow cast upon the title of a person who is not entitled to consequential relief at the moment, limitation must run from the date on which the challenge to his title commences.

The principle of section 23 of the Limitation Act can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief.

Plaintiff, a member of the family of the founder of a charitabe *waqf*, sued for a declaration that the defendant had no proprietary right in the *waqf* properties and that a mortgage bond executed by him in respect to those properties and the auction-sale following thereon were illegal and inoperative:

Held, (1) that consequential relief being clearly available to the plaintiff, he was not entitled to a mere declaration;

Deokali Koer v. *Kedar Nath*, 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C 704, followed.

Ashraf Ali v. *Mahammad Nurajjama*, 49 Ind. Cas. 355; 23 C. W. N. 115, distinguished.

(2) that the suit was governed by Art. 120 of the Limitation Act and having been brought more than 6 years from the date of the alienation was time-barred.

Thazhe Vittil Pantheeradi Ananda Varar v *Kavumpreth Illath Vasudevan Nambudiri*, 8 Ind. Cas 357; 8 M. L. T 249; (1910) M. W N. 594, followed. **Pat** MUHAMMAD FAHIMUL HUQ *v.* JAGAT BALLAV GHOSH, 2 Pat. 391; (1923) A. I. R. (Pat.) 475; 4 P. L. T. 675 **403**

——— **Waqf**—*Deed of* waqf, *construction of*—Waqif *old and infirm*—Waqf *of cash, whether valid—Suit to set aside* waqf—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 91—*Limitation bar apparent on the face of it—Duty of plaintiff.*

The principles of law applicable to a *pardanashin* woman cannot be extended to a man on the ground that he happens to be old and not in robust health.

According to Muhammadan Law a *waqf* of cash is valid.

Ameer Ali, Vol. I, p. 246 (4th Edition) and Tyabji pp. 574, 578 and 579 (2nd Edition), followed.

When a suit or an application is, on the face of it, barred, it is for the plaintiff or pplicant to satisfy the Court of the circumstances which could prevent the Statute from having its ordinary effect.

Muhammadan Law—concld.

Purna Chandra Man al v. *Anukul Biswas*, 2 Ind. Cas. 844; 36 C. 654 at p. 657, followed.

In a suit to set aside a *waqf* it was found that the executant of the deed of *waqf* was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing. On an interpretation of the deed, it appeared that the executant had appointed himself *mutwalli*, that his possession of the *waqf* property continued with him as before and that he had declared that he would in his lifetime perform every *waqf* duty and not incur any such expenses or make any such private transfer for household purposes in respect of the *waqf* property as might tend to reduce it:

Held, (1) that the deed of *waqf* was not vitiated by undue influence and was binding on the plaintiffs;

Wajid Khan v. *Ewaz Ali Khan*, 18 C. 545; 18 I. A. 144; 6 Sar. P. C. J. 46; Rafique & Jackson's P. C. No. 123; 9 Ind. Dec. (N. S.) 364 (P. C.), *Sital Prasad* v. *Parbhu Lal*, 10 A. 535; A. W. N. (1888) 221; 6 Ind. Dec. (N. S.) 360, *Bai Manigavri* v. *Narondas Callianidas*, 15 B. 549; 8 Ind. Dec. (N. S.) 371, *Lakshmi Doss* v. *Roop Laul*, 30 M. 169; 17 M. L. J, 19 2 M. L .T. 4 (F. B), distinguished.

(2) that not having been executed under undue influence, the period to set it aside started from the date of execution and the suit was, therefore time barred;

(3) that the *waqf* was not invalid for want of possession because the executant's declaration in the deed was sufficient to prove a change in the nature of possession. **O** YAQUB BEG *v.* RASUL BEG, 10 O. L. J. 86; (1923) A. I. R. (O.) 254 **517**

——— **Waqf**—Waqif *first* Mutwalli—*Mutation of names not affected, effect of*—Waqif *and his wife retaining control over whole income for their lives*—Waqf, *validity of.*

If a person dedicating his property appoints himself the first *Mutwalli* and holds the property as such *Mutwalli*, the *waqf* is not invalid for want of delivery of possession even if the *waqif* has not got the mutation of his name effected as such *Mutwalli*.

Mohammad Abdul Jalil Khan v. *Mohammad Ubedullah Khan*, 62 Ind. Cas. 725; 19 A. L. J. 227; 43 A. 416, followed.

If a *waqif* reserves the whole of the income of the *waqf* property, as distinct from the corpus, for his life or for his life and after him for the life of his wife, the *waqf* is still valid, if the property is ultimately devoted to the proper object of the *waqf*.

Jaun Beebee v. *Abdollah Barber*, (1838) Fulton 345; 1 Ind. Dec (o. s) 848, *Cassamally Jairajbhoy Peerbhoy* v. *Sir Currimbhoy Ebrahim*, 12 Ind. Cas. 225; 36 B. 214; 13 Bom. L. R. 717, followed **A** MOHAMMAD ZAIN KHAN *v.* NURUL HASSAN KHAN, 21 A. L. J. 650 **142**

Municipal Octroi Schedule—Value of goods prescribed—Octroi, whether can be charged on actual value. *See* CONSTRUCTION OF DOCUMENT **205**

Negotiable Instruments Act (XXVI of 1881), s. 7 —*Acceptance, method of—Oral acceptance, when binding.*

A *hundi* can be accepted only by the drawee signing his acceptance thereon, a verbal acceptance will not be binding, except possibly by local custom, which to be effective must be specifically set up and proved by evidence. **A** DAWARKA DAS-AJODHIYA PRASAD *v.* LACHMI NARAIN-GIRDHARI LAL **692**

——— s. 87. *See* PROMISSORY NOTE **20**

Oaths Act (X of 1873), ss. 8, 9—*Agreement to abide by oath of opponent, validity of—Ordinary oath—Court, whether can go behind agreement—Revision.*

An agreement by a defendant in a suit to abide by the oath of one of the plaintiffs is binding, and the fact that the oath to be taken is in the ordinary form and is not specifically covered by sections 8 and 9 of the Oaths Act does not affect its validity.

Muhammad Asghar Ali Khan v. *Muhammad Imtiaz Ali*, A. W. N. (1898) 200, *Kesho Ram* v. *Peare Lal*, 71 Ind. Cas. 761; 21 A. L. J. 209; (1923) A. I. R. (A.) 443, followed.

In a suit on a pro-note, the defendant agreed to abide by the oath of one of the plaintiffs. The required oath was taken and, on the basis of this evidence, the Munsif decreed the suit. On appeal the District Judge remanded the case for further evidence on the facts:

Held, that the District Judge acted illegally and with material irregularity in entering into evidence on the question of consideration and in setting aside the decree of the Munsif. **A** MITHU LAL *v.* SRI LAL **918**

Opium Act (I of 1878), s. 3—"Special empowering," what amounts to. *See* CRIMINAL PROCEDURE CODE, 1898, s. 30 **958**

Oudh Civil Courts Act (XXXII of 1871), ss. 29, 30 *See* CONTRACT ACT, 1872, s. 62 **42**

Oudh Laws Act (XVIII of 1876), ss. 14, 15—*Pre-emption decree—Extension of time—Payment into Court, whether necessary*—Benamidar *of vendee, whether can object—Vendee obtaining payment out of Court after date fixed for payment—Estoppel.*

A Court which has passed a decree for pre-emption has no jurisdiction to extend the time for the payment of the purchase-money fixed in the decree, and in order to render the payment valid, the money should be paid into Court. A vendee, however, who, by inducing the pre-emptor to believe that he would part with the property on receipt of the purchase-money even after the due date, obtains the purchase-money from him, is estopped from contesting the latter's right to execute the decree.

A *benamidar* for the vendee who has no interest in the property has no right to object to the execution of the decree by the pre-emptor where the vendee himself is estopped from objecting. **O** SHAMSHER SINGH *v.* RAM KALI, 9 O. & A. L. R. 424 **784**

Oudh Laws Act—concld.

——— **ss 14, 15**—*Pre-emption decree—Failure to deposit purchase-money within time—Loss of right—Appeal, whether competent.*

Where a pre-emption decree under section 14 of the Oudh Laws Act directs payment of the purchase-money within a specified time and the plaintiff commits a default in making such payment, the decree becomes void, and under the provisions of section 15 of the Act, the right of pre-emption is lost.

Nor can the premptor prefer an appeal thereafter as there is no decree in existence; **O** IMAM DIN KHAN *v.* ABDUL SATTAR KHAN **62**

Oudh Rent Act (XXII of 1886), s. 108 (10)—*Jurisdiction of Civil and Revenue Courts—Suit to recover occupancy holding on basis of title, whether cognisable by Civil or Revenue Courts.*

Section 108 (10) of the Oudh Rent Act has no application to a suit for the recovery of an occupancy tenure based on title, where the plaintiff has not been in actual occupation or possession of the tenure. Such a suit is not, therefore, cognizable by a Revenue Court.

Raghubar Dayal v. *Chandan*, 10 O. C. 23. *Chandrika Bakhsh Singh* v. *Raghunath Kunwar*, 18 Ind. Cas. 284; 16 O. C. 105, followed.

Jagra v. *Kalpi*, 33 Ind. Cas. 270; 2 O. L. J. 750, dissented from. **O** ASHIQ ALI *v.* GHULAM SARWAR, 9 O. & A. L. R. 521 **553**

——— **s. 108 (16)**—*Jurisdiction of Civil and Revenue Courts—Suit by* pattidar *to recover revenue paid from sub-*pattidars.

A suit by a *pattidar* to recover from the sub-*pattidars* the amount of land revenue paid by him on their account is cognisable by a Civil Court and not by a Revenue Court, as the parties are not co-sharers within the meaning of section 108 clause (16) of the Oudh Rent Act. **O** BENI MADHO *v.* SHAMSHAD ALI, 26 O. C. 56; (1923) A. I. R. (O.) 238 **253**

Partition—*Record of Rights, preparation of—Collector, duty of.*

When partition is made, it is the duty of the Collector or Assistant Collector to prepare a fresh Record of Rights.

Dalganjan Singh v. *Kalka Singh*, 22 A. 1; A. W. N. (1899) 111; 9 Ind. Dec. (N. S.) 1035 (F. B.), followed. **A** SITA RAM TEWARI *v.* FAUJDAR RAI, 45 A. 490; (1923) A. I. R. (A.) **525** **315**

Partnership, *dissolution of—Accounts not settled—Goods purchased before but received after dissolution of partnership—Profits, whether to be accounted for—Contract Act (IX of 1872), s. 263.*

Plaintiff and defendant entered into a partnership for carrying on a business. The partnership was subsequently dissolved, but all that was done at this dissolution was the division of the stock in the shop between the parties. No accounts were settled on that date. Before the dissolution of the partnership orders had been placed for the purchase of certain goods on behalf of the firm and the payment of the price was

Partnership—concld.

also made on behalf of the firm; but the goods were received after the dissolution of the partnership. The defendant sold those goods. The plaintiff filed a suit for settlement of accounts and claimed his share of the profits arising out of the sale of the said goods:

Held, that, although the terms of section 263 of the Contract Act did not cover the case in its entirety, yet on principles of equity the plaintiff was entitled to his share of the profits made by the defendant in selling the goods in question. **O** JANKI PERSHAD *v.* SOMESHAR PERSHAD, 9 O. L. J. 599; (1923) A. I. R. (O.) 23 **324**

——— *Dissolution—Settlement of accounts—Subsequent falling in of assets—Method of disposal.*

If a partnership has been dissolved and accounts have been wound up and each partner has paid what he has to contribute for the debts of the partnership and received his share of the profits the mutual rights and obligations having been thus all discharged, and then some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or of any other cause, afterwards becomes of value and falls in, it ought to be divided between the parties in proportion to their shares in the original partnership.

If, on the other hand, no accounts have been taken and there is no contract that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken. **P C** GOPALA CHETTY *v.* VIJAYARAGHAVACHARIAR, 45 M 78; 30 M. L. T. 283; (1922) A. I R. (P. C.) 115; (1922) M. W. N. 386; 16 L. W. 200; 26 C. W. N. 977; 43 M. L. J. 305 24 Bom. L. R. 1197; 20 A. L. J. 862; 36 C. L. J. 308 **621**

Patna High Court Rules, Chap. VII, r. 6—Second appeal—Copy of judgment of Trial Court not filed within limitation—Appeal, whether barred. *See* CIVIL PROCEDURE CODE, 1908, s. 122 **330**

Penal Code Act (XLV of 1860), ss. 34, 114, 302 *—Murder—Several accused—Doubt as to actual murderer—Procedure—Jury trial—Verdict of Jury partly accepted by Magistrate—Reference to High Court—Case, whether re-opened—Criminal Procedure Code (Act V of 1898), s. 307.*

Section 34 of the Penal Code does not create an offence, but merely lays down a rule of law.

An accused person cannot be convicted under section 114, Penal Code, when no charge has been framed against him under that section.

A person was waylaid by two men one of whom stabbed him in the neck with a dagger. They were pursued and one *P.* was seized while the other escaped. *P.* was identified by the deceased as one of the assailants. In consequence of a statement made by *P. M.* was also arrested. The two men were tried under sections 302 and 34 302, Penal Code. The Jury unanimously found *M* not guilty and further said that there

Penal Code—contd.

was a doubt as to whether *P.* struck the fatal blow. The Sessions Judge accepting the verdict as to *M.* acquitted him but as to *P* while accepting that there was a doubt as to whether he struck the fatal below, the Judge did not agree that there was any doubt as to the two acting in furtherance of a common object and holding that *P* was guilty under section 302/34, Indian Penal Code, referred the case to the High Court:

Held, (1) that the Jury having found that there was a doubt whether *P.* struck the blow and the Judge having accepted the verdict, the High Court could not enter upon the consideration of that question;

(2) that under the circumstance it was doubtful whether section 34 of the Penal Code was applicable, and that, instead, *P.* should be tried again under section 302 read with section 114 of the Code. **C** EMPEROR *v.* PROFULLA KUMAR MAZUMDAR, 50 C. 41; (1923) A. I. R. (C.) 453: 24 Cr. L. J. 763 **267**

——— **ss. 80, 304, 304A, 325**—*Death of child caused by accidental blow—Offence.*

Accused was beating a person with his fists when the latter's wife with a baby on her shoulder interfered. Accused hit at the woman but the blow accidentally struck the baby and two days later, it died from the effects of the blow;

Held, (1) that, although the child was hit by accident the accused's act was not covered by the exception contained in section 80 of the Penal Code, inasmuch as he was not at the time, doing a lawful act in a lawful manner by lawful means;

(2) that the accused's act being in its nature criminal was not covered by the provisions of section 304A of the Penal Code;

(3) that when wanting to hit the woman the accused did not intend or knew himself to be likely to cause death and that he could not, therefore, be convicted under section 304 of the Penal Code;

(4) that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grevious hurt.

Empress v. *Sahai Rae*, 3 C. 623; 2 C. L. R. 304; 1 Ind. Dec. (N. S.) 980, relied on. **O** JAGESHAR *v.* EMPEROR, 9 O. & A. L. R. 203; 24 Cr. L. J. 789 **533**

——— **s. 84**—*Unsoundness of mind—Prior and subsequent conduct of accused.*

In order to bring a case within the purview of section 84 of the Penal Code, the accused must satisfy the Court that his unsoundness of mind is of such a nature and degree that by reason thereof he is incapable of knowing the nature of the act or of knowing that he is doing what is either wrong or contrary to law.

Muhammad Husain v. *Emperor*, 18 Ind. Cas. 641; 15 O. C. 321; 14 Cr. L. J. 81, *Emperor* v. *Harka*, A. W. N. (1906) 193; 4 Cr. L. J. 88, referred to and distinguished.

In a case where an accused sets up the plea of insanity, the Court can judge only by inference

Penal Code—contd.

to be derived from the prior and subsequent conduct of the prisoner as to the state of his mind at the time of the commission of the offence. O BHAGWATI PRASAD *v.* EMPEROR, 9 O. & A. L. R. 850; 24 Cr. L. J. 741 **69**

——— s. **97**—*Private defence of proprety—Possession, re-taking of.*

The fact that a person has title to a plot of land, does not give him the right to forcibly eject a trespasser in peaceful possession of the same. His remedy is to eject him by civil process.

The right of private defence of property does not cover a case of taking or re-taking possession by means of criminal force or show of criminal force. Pat JASURAM MARWARI *v.* EMPEROR, 24 Cr. L. J. 745; 2 P. L. R. 13 Cr. **73**

——— s. **124A**—*Sedition—Construction of speech—Duty of Court.*

In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt or disaffection, it should be viewed from the standpoint of the type of persons to whom it is primarily addressed. On the one hand, their limitations, if any, must be taken into account; on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which should be considered. The Court ought not to look to a sentence or an isolated expression but should take the speech as a whole and give due weight to every part of it and undue weight to none, and give it a full, free and generous consideration R U DAMADAYA *v.* EMPEROR, 1 R. 211; (1923) A. I. R. (R.) 212; 24 Cr. L. J. 842 **954**

——— ss. **141, 149, 307**—*Criminal Procedure Code (Act V of 1898), s. 537—Unlawful assembly—Common object—Charge—"Harassing Hindus", whether sufficiently clear—Irregularity—Failure of justice.*

Where the common object in regard to offences under sections 149 and 307 of the Penal Code was stated in the charge to be "harassing Hindus" and in the prosecution thereof Hindus were attacked with guns and swords:

Held, (1) that the language of the charge was sufficient to satisfy the requirements of section 141 of the Penal Code and to give the accused persons a sufficiently clear idea of the charge against them;

(2) that the band of harassers being armed with swords and guns each of them may be credited with the knowledge that murder was likely to be committed in the course of harassing.

Referred Trial No. 88 of 1922, not followed.

Where the language of a charge is alleged to be defective, it is the duty of the Appellate Court to determine whether there is any error omission or irregularity in the charge which has in fact occasioned a failure of justice within the meaning of section 537, Criminal Procedure Code.

The phrase "harassing" implies infliction of injury on person and property.

Per *Odgers, J.*—In a case of unlawful assembly it is necessary that the accused should have reasonably distinct notice of the common object imputed to them and of the manner in which that common object is to be brought within the language of section 141 of the Penal Code. M PARAKUZHIYIL AYAMAD *v.* EMPEROR, 18 L. W. 350; 24 Cr. L. J. 852 **1044**

——— ss. **148, 302**—*Concerted attack by several persons armed with* lathis—*Death of victim, liability of attackers.*

Where five persons joined in beating an elderly person and beat him so mercilessly with *lathis* that his skull was fractured and eleven ribs were broken, and as a result of injuries he died two days afterwards:

Held, that all the assailants were guilty of murder and that it was immaterial by whose *lathi* the fatal injury was inflicted.

Emperor v. *Ram Newas*, 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615, *Hanuman* v. *Emperor*, 21 Ind. Cas. 1005; 35 A. 560; 11 A. L. J. 926; 14 Cr. L. J. 685, *Emperor* v. *Gulab*, 47 Ind Cas. 805; 40 A. 686; 16 A. L. J. 731; 19 Cr. L. J. 953 and *Sipahi Singh* v. *Emperor*, 71 Ind. Cas. 234; 20 A. L. J. 900; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 106; 45 A. 130, followed.

Emperor v. *Bhola Singh*, 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130, *Chandan Singh* v. *Emperor*, 43 Ind. Cas. 438; 40 A. 103; 16 A. L. J. 11; 19 Cr. L. J. 150 and *Dhian Singh* v. *Emperor*, 14 Ind. Cas. 649; 9 A. L. J. 180; 13 Cr. L. J. 265, dissented from. A UMED *v.* EMPEROR, 24 Cr. L. J. 826 **858**

——— ss. **149, 326**—*Acquittal on charge under s. 326 read with s. 149—Accused separately tried under s. 326—Conviction, whether legal.*

Petitioners with nine others were charged with an offence under section 326, read with section 149, of the Penal Code, and acquitted, but the petitioners on being separately charged under section 326 were convicted and the conviction was upheld by the Sessions Judge. They applied to the High Court in revision:

Held, that although in the previous case the petitioners were acquitted owing to the fact that the elements constituting a riot had not been established, nevertheless, inasmuch as they had by using cutting weapons caused grievous hurt in circumstances to which the right of private defence of property did not extend, they were rightly convicted in this case.

Patali Singh v. *Emperor*, 47 Ind. Cas. 73; (1918) Pat. 288; 5 P. L. W. 157; 19 Cr. L. J. 877, distinguished. Pat RITLAL SINGH *v.* EMPEROR, 24 Cr. L. J. 813 **717**

——— s. **173**—*Refusal to receive summons—Offence.*

A refusal to receive a summons is not an offence under section 173 of the Penal Code. What seems to be required under the section is some act of opposition offered to the officer serving the process.

Queen v. *Punnamalai Nadan* 5 M. 199; 1 Weir 80; 6 Ind. Jur. 410, 2 Ind. Dec. (N. S) 139; *Zapantis* v. *Emperor*, 57 Ind. Cas. 928; 3

U. B. R. (1920) 202; 21 Cr. L. J. 688, followed. R U THUDAMAWARA *v.* EMPEROR, 1 R. 49; 2 Bur. L. J. 22; (1923) A. I. R. (R.) 146; 24 Cr. L. J. 737 **65**

——— **s. 193**—*Criminal Procedure Code (Act V of 1898), s 195—Evidence Act (I of 1872), s. 91—Civil Procedure Code (Act V of 1908), s. 115, O. XVIII, r. 5, O. XXVI, r. 17—Oudh Laws Act (XVIII of 1876), s. 19—Evidence given before Commissioner—Deposition not read over to witness—Perjury—Sanction to prosecute whether can be granted—Deposition, whether can be proved—Revision—Costs whether can be allowed.*

The provisions of O. XVIII, r. 5 of the Civil Procedure Code are not applicable to Oudh, where corresponding provisions are contained in section 19 of the Oudh Laws Act.

The effect of r. 17 of O. XXVI of the Civil Procedure Code is that the provisions of the Code as in force in Oudh shall apply to witnesses examined on Commission equally with witnesses examined in Court.

Section 19 of the Oudh Laws Act does not require that a deposition shall be read over to the witness, and the same rule applies to witnesses examined on Commission.

A sanction for prosecution, therefore, for perjury granted in respect of a false statement made before a Commissioner appointed by a Court in Oudh, is not invalid merely because the statement in respect of which it is granted was not read over to the witness.

Where a Commission is addressed to a private person, he is the delegate of the Court issuing the Commission and acts under the authority of that Court and must adopt the procedure of that Court.

A Court in Oudh issued a Commissioner to a private person for the examination of witnesses in Behar. The Commissioner examined the witnesses in accordance with the procedure laid down in section 19 of the Oudh Laws Act, and the depositions of the witnesses were not read over to them:

Held, that the procedure adopted by the Commissioner was perfectly legal.

Obiter:—A deposition which is not read over to a witness does not become inadmissible in evidence owing to that defect. Section 91 of the Evidence Act, even if it covers a deposition, merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved.

In re Nalluri Chenchiah, 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296, 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 559, 20 Cr. L. J. 379, dissented from.

Elahi Baksha Kazi v. Emperor, 45 Ind. Cas. 258; 45 C. 825; 22 C. W. N. 616; 27 C. L. J. 377; 19 Cr. L. J. 498, relied on.

Where sanction for prosecution has been granted or refused by a Civil Court and the High Court is moved in revision, the application falls under section 115 of the Civil Procedure Code, and the High Court can, in disposing of the application, allow costs to the successful party as in any other civil revision.

Musaji v. Mohammed Walayatullah Khan, 6 O. C. 216, followed. O FEROZA JAN *v.* AMIR ALI, 9 O. L. J. 593; 9 O. & A. L. R. 103; (1923) A. I. R. (O.) 119; 24 Cr. L. J. 781 **445**

——— **s. 225B**—*Offering resistance or obstruction to lawful apprehension, what constitutes—Absconding, whether resistance or obstruction.*

In order to justify the conviction of a person under section 225B of the Penal Code, for the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself, something more than mere absconding is required; there must be an overt act of resistance or obstruction; some active opposition by show of force. R EMPEROR *v.* ANNAWDIN, 1 R. 218; 2 Bur. L. J. 246; (1923) A. I. R. (R.) 231; 24 Cr. L. J. 848 **960**

——— **s. 228**—*Threatening witness in Court—Offence.*

An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box commits an offence under section 228 of the Penal Code. A ALLU *v.* EMPEROR, 21 A. L. J. 72; (1923) A. I. R. (A.) 193; 45 A. 272; 24 Cr L. J. 756 **260**

——— **s. 300 (4), Ill: (c)**—*Quarrel and exchange of abuse—Death caused by single lathi blow—Intention—Knowledge that death would ensue—Offence.*

If a person, owing to a quarrel and exchange of abuse and without intending to kill, causes the death of another by delivering a single *lathi* blow on his head, he must be taken to have known when striking the blow that his act was so imminently dangerous that it must in all probability cause death; and if he does the act without any excuse he is guilty of murder and his case comes under section 300, clause (4) Illustration (*c*) of the Penal Code. A EMPEROR *v.* UMRAO, 21 A. L. J. 316; (1923) A. I. R. (A.) 355; 24 Cr. L. J. 753 **257**

——— **ss 300 Excep. I, 302, 304**—*Grave and sudden provocation—Altercation between husband and wife—Abuse of husband by wife—Culpable homicide not amounting to murder.*

Deceased was in the habit of going away from her husband's house though she was not ill-treated there. One day the husband, on having heard that she was running away from the house, followed her to a grove and tried to persuade her to accompany him back home but she refused and gave him foul abuse. He thereupon struck her with a *chopper* which he happened to carry at the time, but which he had not taken with him with the intention of hitting her, and caused her death:

Held, that, in view of the circumstances of an Indian household, where the wife is expected to obey and respect her husband the conduct of the wife amounted to grave and sudden provocation within the meaning of Exception I to section 300 of the Penal Code, and as the accused had not carried

Penal Code—contd.

the *chopper* with an intent to hit but merely accidentally, the case was one of culpable homicide not amounting to murder under section 304 of the Penal Code. **O** MAHADEO . EMPEROR, 9 O. L. J. 597; 9 O. & A. L. R. 60 (1923) A. I. R. (O) 112; 24 Cr. L. J. 808 **712**

——— **ss. 307, 352**—*Attempt to commit murder, what constitutes—Presenting unloaded gun and pulling trigger—Offence.*

The act which is punishable under section 307 of the Penal Code must be an act which is itself capable of causing death.

Jiwan Das v. *King-Emperor*, 30 P. R. 1904 Cr.; 1 Cr. L. J. 1078, relied on.

A person can be convicted under section 307 of the Penal Code only if he has done the last proximate act necessary to constitute the completed offence of murder and the completion of the offence is only prevented by some cause independent of his volition.

Queen-Empress v. *Niddha*, 14 A. 38; A. W. N. (1891) 176; 7 Ind. Dec. (N. S.) 397, relied on.

Accused levelled a gun at the complainant and pulled the trigger, but the gun being unloaded, there was no report or discharge:

Held, that the accused could not be convicted of an offence under section 307 of the Penal Code inasmuch as his act could not *per se* possibly cause death and that he was only guilty of an assault under section 352 of the Code. **R** NGA WAIK *v.* EMPEROR, 1 R. 209; 2 Bur. L. J. 76; (1923) A. I. R. (R.) 251; 24 Cr. L. J. 850 **1042**

——— **ss. 341, 447, 504**—*Wrongful restraint and insult in Court compound—Criminal trespass, conviction for, whether justified—Intent, necessary.*

Accused was convicted of offences under sections 341, 447 and 504 of the Penal Code for having wrongfully restrained and abused a person in a Court compound in order to prevent him from bidding at an auction;

Held, (1) that the convictions under sections 341 and 504 were justified;

(2) that having regard to the facts:—

(*a*) that the Court compound was open to the public;

(*b*) that there was no suggestion that the accused entered the compound with the intention of intimidating, insulting or annoying the Magistrate, assuming that the latter was the person in possession;

(*c*) that there was no complaint of trespass by the Magistrate;

the conviction under section 447 of the Code was not justified.

Chandi Pershad v. *Evans*, 22 C. 123; 11 Ind. Dec. (N. S.) 83, relied on. **M** *In re* AVADAYAPPA MUDALIAR, 18 L. W. 181; 24 Cr. L. J. 824; (1924) A. I. R. (M.) 40 **853**

——— **ss. 349, 350**—*Criminal force, offence attended by—Criminal Procedure Code (Act V of 1898), s. 522.*

Where a person is obliged to run away by reason of some others rushing at him with sticks and *lathis*, and using threats towards him, the act of the latter amounts to a resort to criminal force as defined in sections 349 and 350 of the Penal Code, and if by such act the person attacked is deprived of property, an order under section 522, Criminal Procedure Code, restoring the property to him is justified. **A** ASHIQ HUSAIN KHAN *v.* EMPEROR, 45 A. 25; (1923) A. I. R. (A.) 333; 24 Cr. L. J. 857 **1049**

——— **s. 406**—*Criminal Procedure Code (Act V of 1898), s. 179—Criminal breach of trust—Place of trial of offence—Loss to beneficiary, whether "consequence" of offence.*

For the application of section 179 of the Criminal Procedure Code it is essential that the offence should depend on the act done and on the consequence which has ensued.

Simhachalam v. *Rati Kanta Laha*, 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762, followed.

The loss caused to a person by an act of misappropriation of his property by another is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued but only on the act which has been done.

In re Rambilas, 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 29 M. L. J. 173; 15 Cr. L. J. 688, *George Langridge* v. *Grace Atkins*, 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856; *Simhachalam* v. *Rati Kanta Laha*, 41 Ind. Cas. 138; 44 C. 912; 21 C.W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762, followed.

Therefore, a person cannot prosecute another for criminal misappropriation of his property under section 179 of the Criminal Procedure Code at the place of his own residence on the ground that, as a consequence of the act of the accused, wrongful loss was caused to him at that place. **R** AHMED IBRAHIM *v.* A. A. GANNY, 1 R. 56; 2 Bur. L. J. 40; (1923) A. I. R. (R) 209; 24 Cr. L. J. 746 **74**

——— **s. 411**—*Receiving stolen property—Property found in shed in joint possession of several persons and in charge of servant—Presumption.*

Some stolen articles were recovered from a cattle-shed which belonged to three brothers, of whom accused was the youngest, and which was in the immediate charge of a servant. Accused lived at a place three miles distant from the shed and visited it occasionally:

Held, that, under the circumstances, it could not be said that the stolen articles were recovered from the possession of the accused and he could not be convicted of an offence under section 411 of the Penal Code. **L** GANESHI LAL *v.* EMPEROR, 4 L. L. J. 484; 24 Cr. L. J 767 **271**

——— **ss. 415, 417**—*Cheating—Loss, likelihood of.*

The petitioner, a Book-maker of the Calcutta Royal Turf Club allowed the opposite party

Penal Code—concld.

to take bets on credit. In respect of debts due to the petitioner on account of bets the opposite party gave the petitioner a cheque and the petitioner, relying on the assurance of the opposite party that there would be no difficulty in getting the cheque cashed, allowed him to take further bets on credit and the opposite party became furteher indebted to the petitioner. Thereafter, the petitioner presented the cheque for payment and it was dishonoured. Then he applied to the Magistrate for process under section 417, Indian Penal Code:

Held, that it could not be said that the act which the petitioner was induced to do by reason of the deception caused or was likely to cause loss or damage to him as it did not follow that had the petitioner refused to take bets on credit, the opposite party would have made the same wagers in cash, and that, therefore, the case did not come within the four corners of section 415, of the Penal Code. **C** H K. BHEDWAR *v.* C. S. R. RAO, 27 C. W. N. 919; 24 Cr. L. J. 748 **76**

——— s. **430**—*Obstruction of channel by putting up dam or raising existing one—Preventing cutting down of* bund—*Offence.*

Where a supply channel is filled up or is obstructed by putting up a dam or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility, and which if done with the intention to cause, or with knowledge that it is likely to cause, wrongful loss to any person would constitute the offence of mischief. If the act so done causes a diminution of the supply of water an offence is committed under section 430 of the Penal Code.

Preventing a person from cutting down a *bund* does not constitute the offence of mischief. **M** DEENABANDHU RAJAGURU *v.* VISHWARASARAYI LACHANNA DORA, (1923) M. W. N. 634; 24 Cr. L. J. 830 **862**

——— s. **447**—*Criminal trespass—Ingredients of offence—Property not in the possession of complainant.*

In order to establish an offence under section 447 of the Penal Code, it must be shown that the trespass was committed on property which belonged to the complainant, and that the intention of the accused was to commit an offence, or to intimidate, insult or annoy any person.

Chandi Pershad v. *Evans*, 22 C. 123; 11 Ind. Dec. (N. S.) 83, followed. **L** BISHEN SINGH *v.* EMPEROR, 24 Cr. L. J. 790 **534**

Pleadings —*Appeal, second—Adverse possession, finding of—Finding of fact or law.*

A finding on the question of adverse possession is not a finding on a question of fact, but a legal inference drawn from the facts found, and its correctness may be challenged in second appeal. **N** MUNGA *v.* LACHMIPRASAD, 6 N. L. J. 70; (1923) A. I. R. (N.) 65 **51**

——— *Appeal, second—Question of applicability of s. 41, Transfer of Property Act—Question of fact or law.*

The question whether to a set of facts section 41 of the Transfer of Property Act applies or

Pleadings—contd.

not is a question of law and not of fact, and can be raised in second appeal.

Khwaja Muhammad Khan v. *Muhammad Ibrahim*, 26 A. 490; A. W. N. (1904) 99, followed.

Jamna Das v. *Uma Shanker*, 25 Ind. Cas. 158; 36 A. 308; 12 A. L. J. 411, distinguished. **A** MUL RAJ *v.* FAZL IMAM, 21 A. L. J. 424; 45 A. 520; (1923) A. I. R. (A) 583 **307**

——— *Construction of document dealing with origin of holding—Question of fact—Appeal, when permissible.*

A document relating to the origin of a particular holding is not to be treated as involving issues of law merely because it has to be construed. The matter involved is a question of fact, and, unless it can be shown that the lower Court has misdirected itself in point of law in dealing with the question there is no ground for appealing from its decision, and the Appellate Court is not entitled to criticise the merits or otherwise of the conclusion of fact. **P C** MIDNAPUR ZEMINDARY CO., LTD., *v.* UMA CHARAN MANDAL, 21 A. L. J. 723; (1923) A. I. R. (P. C.) 187; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 45 M. L. J. 663; 25 Bom. L. R. 1287 **482**

——— *Declaratory suit—Alternative prayer for joint possession—Plaintiff, whether can claim joint possession as additional relief in appeal.*

In a village owned by a number of co-sharers, some of the co-sharers granted perpetual leases to the defendants. Other co-sharers sued for a declaration that these leases were improper, null and void and unenforceable. They added an alternative prayer for a decree for joint possession with the other co-sharer-defendants. The Trial Court granted the declaration asked for. In appeal, the plaintiffs prayed for joint possession by ejectment of the lessee-defendants, not by way of an alternative relief, but in addition to the declaration already granted, alleging that that their prayer for a simple declaration alone was barred by section 42 of the Specific Relief Act:

Held, that the prayer for ejectment could not be granted under the circumstances, as it had been preferred in the plaint only as an alternative in the event of the Court's holding that a mere suit for declaration did not lie. **A** SARJO KUAR *v* ENAIT **331**

——— *Suit against Railway Campany for compensation for non-delivery of goods—Risk-Note—Failure to plead loss in written statement—Presumption—Loss, whether can be proved during trial—Evidence Act (I of 1872), ss. 103, 106, 114.*

If a Railway Company wishes to escape the ordinary liability of a bailee, it should expressly plead the execution of a Risk-Note and the loss of goods.

Plaintiff sued a Railway Company for compensation for non-delivery of a bale of cotton consigned to him through the defendant Companies. The Company filed a written state-

Pleadings—concld.

ment but there was no assertion or suggestion that the bale of cotton had been lost or destroyed. During trial the Company offered to produce evidence to show that the goods had been lost;

Held, (1) that such evidence could not be admitted;

(2) that a presumption could legally be raised that the goods were still in the possession of the Railway Company and that the plaintiff's case rested upon this presumption;

(3) that the defendant Company not having pleaded loss or special agreement was liable to compensate the plaintiff for the loss he had suffered.

Great Indian Peninsular Railway Company v. *Messrs. Jitan Ram-Nirmal Ram*, 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R (Pat.) 285; 2 Pat. 442, distinguished.

Smith Limited v. *Great Western Railway Company*, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359, followed.

If a conclusion of fact is arrived at by construction of law, the conclusion must involve a question of law. **Pat** EAST INDIAN RAILWAY COMPANY *v.* SUKHDEO DAS GOBARDHAN, 4 P. L. T. 443; (1924) A. I. R. (Pat.) 25 **431**

Pleadings and practice—*Court, whether can make new case for parties.*

An Appellate Court is not competent to set up a case which does not arise out of the pleadings of the parties. **O** RAGHO PERSHAD *v.* SECRETARY OF STATE FOR INDIA, 9 O. L. J. 629; (1923) A I. R. (O.) 114 **369**

Practice—*Criminal trial—Previous litigation—Enmity—Prosecution evidence—Immaterial discrepancies or improbabilities—Failure to call all prosecution witnesses—Inference.*

The fact that the accused have been generally the complainants or plaintiffs in some previous criminal and other proceedings started against the complainants would not justify the Magistrate to consider that the complainants had reasons of enmity against the accused and not *vice versa*. The bitterness engendered by litigation, especially criminal litigation, is a mutual bitterness and the prosecuting or successful party is likely to feel just as embittered against the prosecuted or unsuccessful party as *vice versa*.

It is not permissible to reject the prosecution evidence owing to immaterial discrepancies or improbabilities, unless some alternative explanation of the facts of the case is forthcoming.

There must be some limit to the number of witnesses which a Court is asked to hear, and no argument favourable to the accused can be based on the fact that one or two witnesses, out of a large number, have not been called by the prosecution. **O** EMPEROR *v.* NAROTAM, 10 O. L. J. 68; (1923) A. I. R. (O.) 217; 24 Cr. L. J. 770 **434**

Pre-emption—Arazidars *of village Dudhi, Gorakhpur District, rights of*

Pre-emption—contd.

The *Arazidars* of village Dudhi in the *pargana* of Sidhua Jobna in the Parauna Tahsil of the Gorakhpur District are not co-sharers and have no community of interest or responsibility with the proprietary body and consequently have no right of pre-emption. **A** SURWAN PRASAD *v.* BASDEO NARAIN SINGH, 21 A. L. J. 65; (1923) A. I. R. (A.) 129; 45 A. 237 **124**

——— *Decree, form of—Equities of case—Vendee paying off encumbrances—Pre-emptor, whether liable to pay—Merger—Sale in favour of mortgagee—Mortgage, whether extinguished.*

A pre-emption decree may be moulded in accordance with the justice of the case.

Hazari Lal v. *Ram Narain*, 27 Ind. Cas. 420; 17 O. C. 379, followed.

The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession.

Where, therefore, property subject to the right of pre-emption is sold and after the sale, the vendee pays off encumbrances on that property, the pre-emptor will have to pay not only the purchase money, but also the amount paid by the vendee on account of the encumbrances.

Moulvie Mohamed Shamsool Hooda v. *Shewukram*, 2 I. A. 7; 22 W. R. 409; 4 B. L. R. 226; 3 Sar. P. C. J. 405 (P C.), followed.

In a case where the ownership of mortgaged property comes into the hands of the mortgagee and the latter wishes to hold up his mortgage as a shield against some person who is entitled to a decree for possession of the property, the question is whether the mortgagee kept the mortgage alive at the time when he came into possession of the equity of redemption or whether he allowed it to become extinguished. Ordinarily, where the Court finds that it was to the interest of the mortgagee to keep the mortgage alive, it may assume that he intended to keep it alive.

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), followed.

Where, however, a mortgagee became the owner of the mortgaged property under a decree for specific preformance of an agreement to sell and the Court that passed the decree decided that the true construction of the agreement between the parties was that the mortgage should be extinguished, and the sale-deed drawn up under the decree contained no proviso that the mortgage was to be kept alive; in a suit for pre-emption:

Held, that it could not be presumed that the intention of the mortgagee was to keep the mortgage alive as a shield against a possible pre-emptor.

Bindeshuri Singh v. *Pandit Balraj Sahai*, 10 O. C. 49, distinguished. **O** BALDEO SINGH *v.* DEPUTY COMMISSIONER, KHERI, 10 O. L. J. 112; 9 O. & A. L. R. 587; (1924) A. I. R. (O.) 1 **503**

——— *Entery in* wajib-ul-arz—*Presumption—Village owned by single proprietor—Presumption, whether rebutted.*

Pre-emption—contd.

An entry in a *wajib-ul-arz* about the existence of a custom of pre-emption in a village is not rebutted by the mere fact that forty years or so before the time of the entry, the village was owned by a single person, for it is quite possible that the custom might have grown up during that interval. *Kulsumunnisa* v. *Khaslat Husain*, 50 Ind. Cas. 179; 17 A. L. J. 345; 1 U. P. L. R. (A.) 149, distinguished. A RAM DAS RAI *v.* ABDUL GAFOOR **297**

——— *Exercise of right, mode of—Conveyance by vendee in favour of pre-emptor, effect of—Arbitration, reference to, whether defeats rival pre-emptor—Civil Procedure Code (Act V of 1908), Sch. II, para. 20.*

A pre-emptor who purchases the property sold, privately from the vendee not only asserts his pre-emptive right but asserts it in so efficacious a form as to be entitled to have the bargain secured to him against every one not having a superior right of pre-emption.

But in order to put himself in this position a pre-emptor must do one of two things within limitation, either he must institute a suit for pre-emption or he must obtain a conveyance from the vendee. If he does neither of these things, the mere fact that he has stated that he possesses the right, that he has approached the vendee, or that they have referred their matter to arbitration will not prevent his being barred by limitation.

A pre-emptor who refers his claim to arbitration out of Court and then makes an application under paragraph 20 of Schedule II to the Civil Procedure Code for filing the award made by the arbitrator, must be deemed to be enforcing his claim by suit, and unless the application under paragraph 20 is made within the limitation provided for a suit for limitation, it will be no answer to a claim for pre-emption by a rival pre-emptor. O SHEO DUTT *v.* BISHUNNATH SINGH, 9 O. L. J. 546; (1923) A. I. R. (O.) 91 **206**

——— *Muhammadan Law of pre-emption, adoption of, by Hindus—Principle, whether can be extended—Burden of proof.*

There should be no extension of the Muhammadan Law of pre-emption among Hindus beyond the limits established by proof of custom.

Where it has been proved that the Muhammadan Law of pre-emption has been adopted by Hindus with respect for house property, it cannot be presumed that the right of pre-emption extends to other kinds of property also and the burden is on the plaintiff to prove such extension. *Jagjiwan Haribhai* v. *Kalidas Mulji*, 60 Ind. Cas. 901; 45 B. 604; 23 Bom. L. R. 81, followed. A RAM CHAND KHANNA *v.* GOSAWAMI RAM PURI, 21 A. L. J. 385; 45 A. 501; (1923) A. I. R. (A.) 513 **379**

——— *Three successive suits between same parties—Decrees in two suits—Dismissal of third for default—Defendant becoming co-sharer—Dismissal, whether has retrospective effect.*

Pre-emption—concld.

Plaintiff wanted to pre-empt a sale, but before the institution of his suit, the vendor made another sale of another share in the same village in favour of the same vendee. Subsequent to the suit, the vendee made a gift of the shares sold to him under the two deeds to the defendant. After this transfer a second suit to pre-empt the second sale was instituted. Subsequently, the original vendor executed a deed purporting to be a deed of gift in favour of the same defendant. The plaintiff filed a third suit to pre-empt this transfer. The Court of first instance dismissed all the three suits. On appeal, the first two suits were decreed and the third was remanded, but was ultimately dismissed for default. The defendant appealed to the High Court and urged that, on the dismissal of the third suit, he had become a co-sharer by virtue of the gift and that the dismissal must be given a retrospective effect:

Held, that the claim for pre-emption could not be defeated by virtue of the dismissal of the third suit which took place long after the date of decree of the First Court.

Behari Lal v. *Mohan Singh*, 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268, distinguished.

Sakina Bibi v. *Amiran*, 10 A. 472; A. W. N. (1888) 177; 13 Ind. Jur. 114; 6 Ind. Dec. (N. S.) 317, relied on. A RADHIKA RAMAN BIHARI JI MAHARAJ *v.* BOHRA SHIAM SUNDAR LAL, 21 A. L. J. 518; (1923) A. I. R. (A.) 526; 45 A. 561 **382**

——— *Time fixed for payment—Appeal—Appellate Court, power of, to extend time.*

An Appellate Court has power to extend the time fixed by the Trial Court for payment of the pre-emptive price in a decree for pre-emption.

Kodai Singh v. *Jaisri Singh*, 13 A. 189; 7 Ind. Dec. (N. S.) 118 (F. B.) and *Khurshed-un-nissa* v. *Alim-un-nissa*, 17 Ind. Cas. 868; 10 A. L. J. 421, followed. A GIRDHARI SINGH *v.* BHUPAL SINGH, 45 A. 456; (1923) A. I. R. (A.) 516 **745**

Prescription—*Public, whether can prescribe—Easements and profits a prendre, acquisition of—Dedication—Proof—Easements Act (V of 1882), s. 2 (b).*

The public cannot prescribe for ownership.

The principle applicable to prescription by the public is the same as that recognised in connection with prescriptions for easements or *profits a prendre*.

As regards prescription of this kind the thing to be established is dedication not user. What can be proved is that the public has acquired an easement or a *profits a pendre* by a grant, or dedication, actual, if direct evidence of one is available, or to be presumed, in case such evidence is not available, and in the latter alternative evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or dedication, which is lost, at some time was made.

Smith v. *Andrews*, (1891) 2 Ch. D. 678; 65 L. T. 175; *Attorney-General* v. *Eshar Linoleum Co. Ltd.*, (1901) 2 Ch. D. 647; 70 L. J. Ch. 808; 85 L. T. 414; 50 W. R. 22; 66 J. P. 71 and

Prescription—concld.

Lutchmeeput Singh v. *Sadaulla Nushyo*, 9 C. 698; 12 C. L. R. 383; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115, relied on.

The dedication must, however, be to the public at large, and not to any section of it.

Poole v. *Huskinson*, (1843) 11 M. L. W. 827; 152 E. R. 1039; 63 R. R. 782 and *Muhammad Rustam Ali Khan* v. *Municipal Committee of Karnal City*, 56 Ind. Cas. 1; 47 I. A. 25; 1 P. W. R. 1920; 13 P. L. R. 1920; 38 M. L. J. 455; 1 L. 117; 11 L. W. 579; 18 A. L. J. 466; 22 Bom. L. R. 563; 2 U. P. L. R. (P. C.) 87; 28 M. L. T. 1 (P. C.), relied on. **M** USMAN KASIM SAIT *v.* SECRETARY OF STATE FOR INDIA, 17 L. W 610; (1923) M W. N. 315; 44 M. L. J. 638; (1923) A. I. R. (M.) 624 **25**

Presidency Towns Insolvency Act (III of 1909), s. 52 (2) (c), *applicability of—Goods in possession of insolvent—Consent of true owner, withdrawal of—Equitable mortgagee, whether true owner.*

The pertinent words of section 52 (2) (*c*) of the Presidency Towns Insolvency Act are "by the consent and permission of the true owner." So long as the reputed owner is in possession with that consent and permission, and if he is so at the time of his insolvency, the goods will pass to the Official Assignee for the benefit of all the creditors of the insolvent. But if, prior to the insolvency, the true owner withdraws that consent and communicates that withdrawal to the insolvent, the goods can no longer be said to be in the possession, order, or disposition of the reputed owner so as to pass them to the Official Assignee.

If the true owner *bona fide* demands possession of the goods from the reputed owner, before the latter's insolvency, with a view to taking possession of the goods, though from no fault of his own he fails to get it, the goods are no longer in the possession of the insolvent with his consent. But a mere intention to demand the goods and to get possession of them is not sufficient, there must be a demand communicated to the insolvent.

(Indian and English Authorities discussed).

An equitable mortgagee of goods is the "true owner" of the goods within the meaning of section 52 (2) (*c*) of the Presidency Towns Insolvency Act.

Ex parte Union Bank of Manchester, In re Jackson, (1871) 12 Eq. 354; 40 L. J Bk 57; 24 L. T. 951; 19 W. R. 872 relied on. **R** OFFICIAL ASSIGNEE *v.* MOHAMED E NAIKWARAH, 1 R. 153; 2 Bur. L. J. 248; (1924) A. I. R. (R.) 27 **919**

Probate and Administration Act (V of 1881), ss 4, 12, 14, 15, 41—*Hindu Wills Act (XXI of 1870), s. 2—Succession Act (X of 1865), s. 187—Suit by administrator to recover possession of* debuttar *property transferred by executor in breach of trust created by Will—Adverse possession—Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 134, 142, 144.*

A Hindu died in 1894 after executing a Will in 1889 by which he dedicated his properties to his family idol and appointed his two widows and his adopted son executor of the Will. The

Probate and Administration Act—contd.

executors having neglected for a long time to take out Probate of the Will, the plaintiffs made an application in June 1916 for Letters of Administration with copy of the Will annexed alleging that the persons named in the Will as executors had wasted the estate, contrary to the provisions of the Will, and were consequently not likely to apply for Probate. In July 1917 Letters of Administration with copy of the Will annexed were granted to the plaintiffs, in respect of the *debuttar* properties. In the meantime, the properties had been sold and purchased in September 1905 by the defendants in execution of decrees obtained on the basis of mortgage-bonds executed in 1901 by the son and widows of the testator in which they professed to deal with the properties as the heirs-at-law of the deceased testator without making any reference to the testamentary disposition made by him. In a suit instituted in March 1917 by the plaintiffs as *shebaits* and administrators of the *debuttar* estate of the idol, for recovery of possession of the properties from the defendants:

Held, (1) that when Letters of Administration with copy of the Will annexed were granted to the plaintiffs the Will was established from the date of the death of the testator, and with effect from that very date the disputed properties having become absolutely vested as *debuttar* in the deity, the defendants had not acquired a title which could be supported in derogation of the *debuttar* created by the testator;

(2) that with reference to section 187 of the Succession Act, read with section 2 of the Hindu Wills Act, the suit was not bound to fail, because no order for Letters of Administration with copy of the Will annexed was in existence at the date of its institution; for, so long as compliance with the section was prior to decree the fact that it was after the institution of the suit made no difference and the Court was fully competent to deal with the suit;

(3) that Arts. 134 and 142 of the Schedule to the Limitation Act were equally inapplicable to the suit which was governed by Art. 144, which again did not bar the suit as the *debuttar* had not been extinguished by adverse possession on the part of the defendants.

The first portion of Art. 134 of the First Schedule to the Limitation Act contemplates a suit to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration. This refers to a case where the transfer by the trustee is accompanied by delivery of possession to the transferee so as to render possible and necessary, the institution of a suit for recovery of possession. The Article cannot be interpreted to include within its scope a case where a simple mortgage is executed and the morgtgagor continues in possession as before. The second portion of the Article is intended to provide only for a case where the defendant's vendor purports to transfer full ownership when in fact he has only a mortgagee's right to transfer; it does not refer to the case of a purpchaser from a mortgagee of the

Probate and Administration Act—concld.

interest of the mortgagee as mortgagee. The Article does not apply to forced sales in execution of decrees.

Dispossession within the meaning of Art. 142 of Schedule I to the Limitation Act implies the coming in of a person and his driving out another from possession. Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another.

Persons nominated by a testator to take out Probate of his Will and to carry out a religious trust created by him are persons in whom the estate becomes vested in trust for a specific purpose within the meaning of section 10 of the Limitation Act. They cannot by breach of trust continued for a period of twelve years confer a statutory title on themselves in derogation or extinction of the trust.

The adverse possession of a *shebait* in relation to the *debuttar* estate is fundamentally different in quality from the hostile holding of a stranger claimant, and it would be unsound on principle to tack together the possession of persons who stand in entirely different categories. **C** CHARU CHANDRA PRAMANIK *v.* NAHUSH CHANDRA KUNDU, 36 C. L. J. 35; (1923) A. I. R. (C.) 1; 50 C. 49 **630**

——— **s. 60**—*Sale without leave of Court—Sale, whether void or voidable—Administration suit—Lis pendens, doctrine of, applicability of.*

A sale by an administration without the leave of the Court, as required by section 60 of the Probate and Administration Act, is not void *ab initio* but merely voidable and if no steps are taken within the period prescribed to avoid the sale, it is binding.

Speaking generally, the doctrine of *lis pendens* does not apply to administration suits. **L B** A. L. A. R. FIRM *v.* MAUNG THWE, (1923) A. I. R. (R.) 69 **54**

Procedure—*Petition to Police reported false—Subsequent petition to Magistrate—Magistrate, duty of.*

When a charge made by a person is designated in a Police report as false, he is entitled to file a petition before a Magistrate impugning the correctness of the report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement must be recorded on oath and his complaint dismissed.

Jogendra Nath Mookerjee v. *Emperor*, 33 C. 1; 10 C. W. N. 158; 2 C. L. J. 228; 2 Cr. L. J. 615, followed. **Pat** NAND KISHORE MISSIR *v.* KALIKA MISSIR, (1923) A. I. R. (Pat.) 539; 24 Cr. L. J. 845 **957**

——— *Redemption suit—Appeal from preliminary decree—Final decree passed—Appeal, whether can be treated as from final decree.*

When an appeal is preferred from a preliminary decree in a redemption suit before the passing of a final decree, the appeal cannot, after the final decree in the suit has been passed, be treated as an appeal against the final decree also. **O** SWAMI DAYAL *v.* MUHAMMAD SHER KHAN, 9 O. & A. L. R. 205 **485**

Promissory-note—*Material alteration—Negotiable Instruments Act (XXVI of 1881), s. 87.*

In suits for bond-debts brought on the basis of altered documents the plaintiff is not entitled to succeed. He cannot recover even the amount of which receipt is admitted by the defendant. A material alteration destroys the right of action on the document. **N** PANDURANG *v.* KISHAN, 19 N. L. R. 79; (1923) A. I. R. (N.) 295 **20**

———, *suit based on—Promissory-note inadmissible in evidence—Plaintiff, whether can prove loan.*

Where a loan is evidenced by a promissory-note and the creditor sues the debtor on the basis of the promissory-note but the promissory-note is held to be inadmissible in evidence, the plaintiff should be allowed an opportunity to prove the loan by other evidence.

Bachu Lal v. *Kandhai Lal*, 6 O. C. 16, *Ram Sarup* v. *Jasoda Kunwar*, 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72, relied on. **O** DWARKA *v.* IDU, 9 O. & A. L. R. 245; 26 O. C. 361 **813**

———, *suit on—Pro-note executed in renewal of prior pro-note—Consideration—Forbearance to sue.*

Defendant executed a pro-note in favour of one *K*. After the latter's death the defendant renewed the pro-note in favour of one *R*, who was not entitled to sue on the old pro-note, at the request of the plaintiff who was entitled to sue on it. *R*, subsequently assigned the renewed pro-note in favour of the plaintiff who sued on it. Defendant objected that the renewel in favour of *R* was without consideration as the latter was not entitled to sue on the old pro-note;

Held, that the renewal having been made at the request of the plaintiff, who was entitled to sue on the old pro-note, the forbearance of the plaintiff to sue on the old pro-note was sufficient consideration for the renewed pro-note. **O** MOHAMMAD JAFAR *v.* RAM CHARAN, 10 O. L. J. 43; 9 O. & A. L. R. 155; 26 O. C. 204; (1923) A. I. R. (O.) 176 **316**

Provident Funds Act (IX of 1897), s. 2 (4)—*Civil Procedure Code (Act V of 1908), s. 60 (1) (k)—Compulsory deposit, what is—Deposit, whether attachable after retirement of subscriber.*

The question whether a deposit is a compulsory deposit within the meaning of section 2 (4) of the Provident Funds Act depends on whether it is re-payable on demand or at the option of the subscriber.

The expression "compulsory deposit" in the Provident Funds Act is a term with a technical meaning and a deposit which comes within the definition remains a compulsory deposit until it is drawn out.

Veerchand v. *B. B. & C. I. Ry., Co.*, 29 B. 259; 6 Bom. L. R. 921, *Hindley* v. *Joynarain*, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288 and *Nagindas* v. *Ghelabhai*, 56 Ind. Cas. 449; 44 B. 673; 22 Bom. L. R. 322, relied on.

A compulsory deposit within the meaning of section 2 (4) of the Provident Funds Act does not become attachable by a creditor on the retire-

Provident Funds Act—concld.

ment of the subscriber before it is actually drawn out. A DEVI PRASAD v. SECRETARY OF STATE FOR INDIA, 21 A. L. J. 454; 45 A. 554; (1924) A. I. R. (A.) 68 **746**

——— **ss. 2 (d), 28 (5)**—*Hindu joint family—Insolvency of member—Share of insolvent, whether vests in Receiver—Partition, Receiver, whether can sue for.*

The definition of the word "property" in section 2 (d) of the Provincial Insolvency Act is not exhaustive. It was inserted to make it clear that certain kinds of propety which do not actually belong to the insolvent are to be treated as his property for the purposes of the Insolvency Act, *e. g.*, property over which he may have a power of appointment exercisable for his own benefit.

Under section 28 (5) of the Provincial Insolvency Act, the only property which is exempted from the scope of adjudication is property of the insolvent which is exempted in execution of a decree.

The right, title and interest of a Hindu co-sharer in joint family property may be attached and sold in execution of a decree obtained against him personally.

Deendyal Lal v. *Jugdeep Narain Singh*, 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.), followed.

Therefore, such right, title and interest is "property" of the insolvent which vests in the Receiver on insolvency, and the Receiver is entitled to sue for its partition.

Anant Singh v. *Kalka Singh*, 48 Ind. Cas. 526; 5 O. L. J. 665, dissented from. O LAL BAHADUR v. PASPAT PRASAD, 10 O. L. J. 31; 9 O. & A. L. R. (O.) 173; (1923) A. I. R. (O.) 154 **801**

Provincial Insolvency Act (V of 1920), ss. 59, 68—*Sale of insolvent's property—Application to Court—Procedure—Gift, deed of, executed by insolvent shortly before application for insolvency—Presumption.*

The provisions of the Code of Civil Procedure do not apply to a sale of an insolvent's property by the Receiver under section 59 of the Provincial Insolvency Act.

Meol Chand v. *Murari Lal*, 21 Ind. Cas. 702; 36 A. 8; 11 A. L. J. 979, relied on.

A stranger to insolvency proceedings may at his option seek his redress in the ordinary Civil Courts when aggrieved by any act of the Official Receiver, or he may apply under section 68 of the Provincial Insolvency Act, but if he takes the latter course, he must comply with the terms of the section.

Bhairo Prasad v. *S. P. C. Das*, 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R. (A) 118, relied on.

There is suspicion of fraud where an insolvent executes a deed of gift a few days before filing his application for adjudication, whatever the declaration in the deed of gift may be. O HUSAINI v. MUHAMMAD ZAMIR ABEDI, 9 O. & A. L. R. 440; 26 O. C. 319 **802**

Provincial Small Cause Courts Act (IX of 1887), s. 17, proviso, *scope of—Suit dismissed for default—Order setting aside dismissal, nature of.*

Provincial Small Cause Courts Act—contd.

The words "or in pursuance of the judgment" in the proviso to section 17 of the Provincial Small Cause Courts Act must be read distributively and applied to the words "for a review of judgment" which precede.

Section 17 does not apply to an order setting aside the dismissal for default of a suit by Small Cause Court Judge. The order dismissing the suit for default is not a decree within the meaning of section 2 (2) of the Civil Procedure Code, nor is the application for an order to set the dismissal aside an application for an order to set aside a decree, still less is it an application for review of judgment. A GIRDHARI LAL v. FIRM ACHAL SINGH-THAKAT SINGH, 21 A. L. J. 522; 45 A. 569; (1923) A. I. R. (A.) 605 **64**

——— **Sch. II, Arts. 1, 3, 19**—*Tolls (Army) Act (II of 1901), s. 6—Suit for damages caused by illegal order of President of District Board, nature of—Suit, whether cognizable by Small Cause Court—Suit wrongly brought against President—Interference in revision—Civil Procedure Code (Act V of 1908), s. 115.*

Where the plaintiff, a toll-gate contractor, alleged in his plaint that the President of the District Board issued an order wrongfully forbidding him to collect tolls in respect of certain carts and claimed damages caused by reason of such illegal order:

Held, (1) that the suit was really not one for declaration so as to bring it under Art. 19 of Schedule II to the Provincial Small Cause Courts Act but was really one for damages and the Small Cause Court would, therefore, have jurisdiction to try the suit though in arriving at its decision, it would have to come to a conclusion as to whether the prohibition was rightly or wrongly imposed;

(2) that Arts. 1 and 3 of the Schedule were not applicable to the suit, since the President of the District Board was not an officer of the Government within the meaning of those Articles;

(3) that section 6 of the Tolls (Army) Act, did not bar the jurisdiction of the Court to entertain the suit;

(4) that the mere fact that the suit was wrongly brought against the President of the District Board instead of the District Board itself was not a matter going to the jurisdiction of the Court as to warrant interference with the decree of the lower Court in revision by the High Court under section 115 of the Civil Procedure Code. M PRESIDENT, DISRICT BOARD, SOUTH CANARA v. GOPALAKRISHNA BHATTA, 32 M. L. T. 378; 18 L. W. 82; 45 M. L. J. 125; 46 M. 808; (1923) A. I. R. (M.) 689 **223**

——— **Arts. 2, 25**—*Civil Procedure Code (Act V of 1908), s. 102—Execution of decree—Permission to decree-holder to bid at auction conditional on paying off another decree-holder—Sale set aside—Suit to recover payment, nature of—Appeal, second, whether lies.*

Plaintiff, who was decree-holder in certain execution proceedings, applied for leave to bid at the auction-sale. Leave was granted on condition

Provincial Small Cause Courts Act—concld.

that he paid off the defendant, who was another decree-holder against the same judgment-debtor and who had applied for rateable distribution. Plaintiff complied with the condition and purchased the property put up for sale. Subsequently, a third person was declared the owner of the property sold, which was, consequently, lost to the plaintiff. The latter then sued the defendant for recovery of the amount paid to him together with interest, the total claim being less than Rs. 500:

Held, (1) that the suit did not fall under clause (2) or clause (25) of Schedule II to the Priovincial Small Cause Courts Act, and was, therefore, cognisable by a Small Cause Court;

(2) and that consequently a second appeal was not competent in the case.

Article 2 of Schedule II to the Provincial Small Cause Courts Act refers to suits for damages in respect of acts done under the orders of a Court. **A** KESHO SARAN *v.* KHAIRATI LAL, 21 A. L. J. 248; (1923) A. I. R. (A.) 310; 45 A. 359 **836**

——— **Sch. II, Art. 85 (ii)**—*Suit on* chit—*Allegations of conversion and theft in plaint—Suit, whether cognisable by Small Cause Court—Interest, high rate of.*

A plaint alleged that the defendant in collusion with Railway Officials had taken certain coal belonging to the plaintiff and had misappropriated it or converted it to his own use; that on the plaintiff discussing the matter with him the defendant had executed a *chit* in his favour promising to pay a certain sum. Plaintiff sued to recover this sum from the defendant:

Held, (1) that the suit was one for recovery of a sum of money shown by the *chit* and was not a suit for recovery of damages either for the theft or the conversion of the coal;

(2) that the suit did not, therefore, fall within the purview of Art. 35 (*ii*) of Schedule II to the Provincial Small Cause Courts Act and was cognisable by a Small Cause Court.

Where a Court is properly seized of a suit, it has full jurisdiction over all matters comprised in the plaint, and can, in the absence of a contract between the parties or of evidence of a customary rate of interest, award a high rate of interest having regard to the circumstances of a case. **C** RAKHAL CHANDRA CHATTERJEE *v.* ROHINI KUMAR CHATTERJEE, 37 C. L. J. 399; 27 C. W. N. 549; (1923) A. I. R. (C.) 650 **601**

Punishment—*Offences not distinct—Separate sentences, legality of—Penal Code (Act XLV of 1860), ss. 71, 147, 225—Criminal Procedure Code (Act V of 1898), s. 35.*

Having regard to the provisions of section 71 of the Penal Code and section 35 of the Code of Criminal Procedure a person convicted of offences under section 147 and under section 225 of the Penal Code would not be liable to separate punishment for each offence where the common object of the unlawful assembly of which the accused was a member was the commission of the offence punishable under section 225, Penal Code. Such offences are not distinct offences for which separate sentences can be passed. **C** SARAT CHANDRA GHOSE *v.* EMPEROR, 37 C. L. J. 171; (1923) A. I. R. (C.) 408; 24 Cr. L. J. 851 **10**

Punjab Land Revenue Act (XVII of 1887), s. 141—*Trees, whether land.*

Trees are land within the meaning of section 141 of the Punjab Land Revenue Act, and possession of trees cannot be delivered in execution of a decree except through the Collector as provided for in that section. **L** NIDHI RAM *v.* PARSA RAM, (1923) A. I. R. (L.) 693; 5 L. L. J. 507 **1**

Punjab Municipal Act (III of 1911), ss. 33, 152, 228—*Powers under s. 152, whether can be delegated—Authority to prosecute, form and contents of.*

A Municipal Committee cannot delegate its powers under section 152 of the Punjab Municipal Act to its President.

An authority conferred by a Municipal Committee on any person to conduct prosecutions on behalf of the Committee must, by virtue of the Explanation to section 228 of the Punjab Municipal Act, be in writing and contain full and complete particulars of the person to be prosecuted. **L** GULZAR JAN *v.* EMPEROR, 4 L. 120; 24 Cr. L. J. 769; 5 L. L. J. 512 **43**

Railway Company—Delivery of goods. *See* CONTRACT ACT, 1872, S. 149 **248**

Railways Act (IX of 1890), s. 77, *interpretation of—Money value of claim whether to be stated—Intention to sue.*

Section 77 of the Indian Railways Act merely requires that a demand for compensation shall be made; it nowhere prescribes that the money value of the claim shall be stated, nor does it require the claimant to notify that he intends to sue. **Pat** DURGA PRASAD *v.* G. I. P. RY. AND E. I. RY., (1923) Pat. 284; 5 P. L. T. 42 **293**

——— **s. 77**—*Short delivery—Risk Note, Form B—"Loss," proof of.*

In a suit for compensation for short delivery the Railway are not entitled to set up the Risk Note, Form B, unless it is shown that the loss was due to a theft from a running train or some such cause. The plaintiff cannot be asked to prove that the loss was due to any fault on the part of the Railway Company, unless and until the Railway have set up and proved that the loss has occurred.

Secretary of State for India in Council v. *Jiwan and Abdullah*, 71 Ind. Cas. 609; 21 A. L. J. 220; 45 A. 380; (1923) A. I. R. (A) 426 and *East Indian Railway Co.* v. *Kishen Lal-Tirkhamal*, 73 Ind. Cas. 980; 21 A. L. J. 438; 9 O. & A. L. R. 531; 45 A. 530, relied on. **A** EAST INDIAN RAILWAY *v.* MAKHANLAL-BINDESRI PRASAD, 21 A. L. J. 515; 45 A. 575; (1923) A. I. R. (A.) 605 **814**

——— **Sch. II, cl. (k)**—*Risk-Note X—Article not "excepted"—Railway Company, liability of—Momi motis, whether "excepted."*

If an article consigned to the Railway Company is not in fact one of the excepted arti-

Railways Act—concld.

cles mentioned in Schedule II to the Railways Act, the mere fact of giving the Risk Note X in respect of it does not exonerate the Railway Company from liability in case of its loss.

Momi motis, or wax pearls, are only wax with thin coverings of glass over them and as such cannot be called "articles made of glass" and cannot, therefore, be said to be articles falling under clause (*k*) of the Second Schedule to the Railways Act.

Saminadha Mudali v. *South Indian Railway Company*, 6 M. 420; 2 Ind. Dec. (N. S.) 572, relied upon. **A** KIDAR NATH RAJNARAIN *v.* EAST INDIAN RAILWAY, 21 A. L. J. 351; 45 A. 433; (1923) A. I. R. (A.) 538 **800**

Rangoon High Court—*First Grade Advocate of Judicial Commissioner's Court, Upper Burma, status of—Stamp Act (II of 1899), Sch. I, Art. 30—Legal Practitioners Act (XVIII of 1879), Sch. II—"High Court", meaning of—Entry as Advocate or Pleader of Rangoon High Court—Fee payable.*

The accident that persons, who were really First Grade Pleaders, should have been called First Grade Advocates in Upper Burma, gives them no right to be enrolled as Advocates of the Rangoon High Court. They should be enrolled as Advocates or First Grade Pleaders according to their qualifications.

The Court of the Judicial Commissioner of Upper Burma was not a "High Court" within the meaning of the exemption to Art. 30 of Schedule I to the Stamp Act, which refers to High Courts which enrol Legal Practitioners under the powers given by the Legal Practitioners Act.

The expression "High Court" in the entry in Schedule II to the Legal Practitioners Act refers to High Courts not established by Royal Charter and only to Pleaders authorised to practice in Courts subordinate to the High Court.

First Grade Advocates of the Court of the Judicial Commissioner of Upper Burma must pay a fee of Rs. 500 under Art. 30 of Schedule I to the Stamp Act in order to be enrolled as Advocates or Pleaders of the Rangoon High Court. **R** *In the matter of* CERTAIN FIRST GRADE ADVOCATES, 1 R. 142; (1924) A. I. R. (R.) 1 **918**

Rangoon Rent Act (Burma Act II of 1920), s. 9 (1)—*Lease on favourable terms*—Salami *paid to lessor, recovery of.*

At the time of the grant of a lease, the lessor, in consideration of the tenant's paying, a *salami*, agreed to take a small rent, not to turn the tenant out during a certain period, not to ask for more rent, and to make certain alterations in and additions to the premises leased. In a suit by the tenant to recover back the premium under section 9 (1) of the Rangoon Rent Act:

Held, that these agreements on the part of the landlord were conditonis of the lease and formed a part and parcel of the same and that, therefore, the payment of the premium was within the contemplation of section 9 (1) of the Rangoon Rent Act and the amount was recoverable by the tenant. **L B** ISMAIL YACOOBJEE *v.* ABDOOLA HAJEE ABBA & CO., (1923) A. I. R. (L. B.) 80 **13**

Registration Act (XVI of 1908), ss. 17, 48—*Evidence Act (I of 1872), ss. 35, 91—Partition deed, unregistered, whether admissible to prove partition—Secondary evidence whether admissible.*

A partition deed which affect property exceeding in value Rs. 100 is compulsorily registerable, and unless it is registered, it cannot, under section 48 of the Registration Act, be used as evidence of the partition and, under section 91 of the Evidence Act, secondary evidence in excluded to prove the temrms of the deed. **L B** MAUNG PO LUN *v.* MA E MAI, (1923) A. I. R. (R.) 57 **47**

——— **ss. 17, 49 (c)**—Thekanama, *unregistered, whether can be used as evidence of value of property.*

A *thekanama* which is inadmissible in evidence for want of registration cannot be used as evidence of the value of the property for the purpose of determining the amount of compensation for use and occupation. **O** AJODHYA SINGH *v.* KHUSRO BEGAM, 9 O. & A. L. R. (O.) 321 **582**

——— **s. 17 (1)**—*Writing off large sum in consideration of transfer of immoveable property—Will whether compulsorily registrable.*

Where it was distinctly stated in a Will that Rs. 6,500 out of a partner's share of the partnership assets were written off in consideration of the transfer by the other partner of his moiety share in a certain *kothi*:

Held, that the document was an instrument which acknowledged the receipt of payment of consideration on account of the assignment or extinction of a right, title or interest in immoveable property of the value of more than Rs. 100 within the meaning of section 17 (1) of the Registration Act, and the non-registration of such a document made it inoperative in so far as is purported to affect those of the executants in respect of whom it was not registered. **A** FAKIR CHAND *v.* NANUG RAM **721**

——— **s. 33**—*Power-of-attorney authorising agent to execute documents—Agent presenting document for registration—Presentation, whether legal.*

Section 33 of the Registration Act applies where the person presenting a document is the general attorney of the person executing it and not where it is presented for registration by the actual executant, even though he may have executed it as agent for some one else. **A** AISHA BIBI *v.* CHHAJJU MAL **776**

——— **ss. 36, 71, 72, 73, 77**—*Refusal to register—Application to Registrar headed as appeal, dismissal of—Suit to enforce registration, maintainability of.*

In a suit under section 77 of the Registration Act to enforce registration of a document the Court is only concerned with the genuineness and execution of the document; questions relating to

Registration Act—contd.

the validity of the document are not legitimately within the scope of such a suit.

Plaintiff lodged a sale-deed for registration with the Sub-Registrar and took out a summons directing the defendant to appear and admit execution. Defendant failed to appear and the Sub-Registrar refused to register the deed. Plaintiff thereupon made an application to the Registrar which was headed as an appeal and was described as an application under sections 72 and 73 of the Registration Act. The application was not verified as a plaint as required by section 73. The Registrar rejected the application on the ground that it was an appeal under section 72, which did not, under the circumstances, lie. Plaintiff then filed suit under section 77 of the Registration Act:

Held, (1) that the application to the Registrar was in substance one under section 73 of the Registration Act and the defects were merely formal;

(2) that the mere fact that the application was headed as an appeal or that an erroneous section of the Act was mentioned therein was not sufficient to take it away from the category of an application under section 73 of the Registration Act;

(3) that there had been a substantial compliance with the provisions of section 73 of the Registration Act and that the dismissal of the application by the Registrar, although technically under section 72 was one really under section 76 of the Act;

(4) that, therefore, the suit under section 77 of the Registration Act was maintainable. **L** UTTAM SINGH *v.* KUTAN DEVI, 5 L. L. J. 217; (1924) A. I. R. (L.) 28 **688**

——— **ss. 58 (2), 87**—*Erroneous registration of document—Error in procedure—Defect, whether curable.*

Where a document's presented by a person duly authorised to present it, who thus initiaties the jurisdiction of the Registering Officer, and who does all that he is required to do under the Registration Act and is guilty of no shortcoming thereunder, it is contrary to the scheme of the Act that he should be punished for any error or defect in the procedure of the Registering Officer subsequent to the presentation.

Where, on the application of the purchaser under a sale-deed executed by several persons the Sub-Registrar erroneously admits the deed to registration under section 58 (2) of the Registraton Act in spite of a denial of execution by one of the executants, the error of the Sub-Registrar is an error of procedure curable by section 87 of the Act, if there has been no fraud on the part of the purchaser and the sale-deed in found, as a matter of fact, to have been executes by all the alleged executants. K. S **M.** A. R. CHETTY FIRM *v.* KO TEIK KA, 1 R. 22; 2 Bur. L. J. 69, (1923) A. I. R. (R) 176 **82**

——— **s. 90 (d)**—*Transfer of Property Act (IV of 1882), ss. 4, 107—Assignment of grant by Secretary of State—Registration—Easements*

Registration Act—concld.

Act (V of 1882), s. 59—Grant of land for consideration for erecting ghat—*Right whether runs with land.*

The provisions of the Transfer of Property Act relating to registration of documents must be read as merely supplementary to the provisions of the Registration Act, and the exceptions provided for by section 90 of the Registration Act must be taken to cover cases dealt with by section 107 of the Transfer of Property Act.

An assignment of a grant by the Secretary of State falls within clause (*d*) of section 90 of the Registration Act and does not, therefore, require registration.

A grant of land for consideration for the purpose of erecting a *Ghat*, which provides that the grantee would have a proprietary right in the structure put up by him but not in the soil, is a right which runs with the land and does not fall within the provisions of section 59 of the Easements Act. **O** RAGHO PERSHAD *v.* SECRETARY OF STATE FOR INDIA, 9 O. L. J. 629; (1923) A. I. R. (O.) 114 **369**

Religious endowment—Mahant, *powers of—Sale of* Asthal *properties—Necessity—Benefit.*

The *Mahant* of an establishment has very large administrative powers over the affairs of the *Asthal*, and undoubtedly he has power to sell or mortgage the property in case of need or for the benefit of the *Asthal*.

The *Mahant* of an endowment is the proprietor of the properties, although he holds the properties in trust. **Pat** KEDAR NATH *v.* JAGAR NATH DAS, 1 P. L. R. 73 **134**

Res judicata—*Execution proceedings—Notice to judgment-debtor for settlement of sale proclamation—Terms of proclamation settled* ex parte—*Question of liability of property to attachment, whether* res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

A party who is sought to be affected by the bar of *res judicata* should have had notice of the point that was to be decided and should have had an opportunity of putting forward his contentions against the decision.

Subramania Iyer v. *Rajeswara Sethupathi*, 38 Ind. Cas. 627; 40 M. 1016, followed.

A decree-holder applied for attachment of the moveable property of his judgment-debtor but the proceedings came to nothing. Within a year of these proceedings an application was made for attachment of the immoveable property. No notice was given to the judgment-debtor as none was required by law under the circumstances. An application was then made for the sale of the property and notice was given to the judgment-debtor for settlement of the terms of the sale proclamation. The latter did not attend on the date fixed and the terms of the sale proclamation were settled *ex parte*. Afterwards, the judgment-debtor applied for release of the property alleging that it was not liable to be attached. The decree-holder contended that the question of the liability of the property to attachment was *res judicata* as it must be taken to have been decided

Res judicata—concld.

on the hearing of the application for settling the terms of the sale proclamation:

Held, that notice to the judgment-debtor to be present at the settlement of the terms of the sale proclamation could not be regarded as raising the question of the liability of the property to be attached and, therefore, it could not be said that the judgment-debtor was invited to object to the attachment, and, that being so, the order that followed could not be regarded as an implied adjudication that the property was correctly attached. M CHIDAMBARAM CHETTI *v.* KANDASAMI GOUNDAN, (1923) M. W. N. 571; 45 M. L. J. 346; 18 L. W. 757; 46 M. 768; (1924) A. I. R. (M.) 1 **155**

——— Matter which ought to have been made ground of defence—Appeal, second, question, whether can be raised in. *See* CIVIL PROCEDURE CODE, 1908, S. 11, EXPL. IV **577**

Sale—*Vendor having no saleable interest—Suit to set aside, whether maintainable.*

A suit lies for setting aside a sale on the ground that the vendor had no saleable interest in the property. **Pat** KEDAR NATH *v.* JAGAR NATH DAS, 1 P L. R. 73 **134**

Sanction for prosecution—District Judge, jurisdiction of. *See* CIVIL PROCEDURE CODE, 1908, S. 195 **75**

Service inam—*Trustee, whether can hold* inam *—Resumption*—Inam *burdened with trust, nature of—Surplus income, disposal of—Removal of trustee, grounds for.*

There is nothing in law to prevent the trustee of a temple from being also the holder of a service *inam* in the temple.

Where an *inam* had been granted in favour of one of the ancestors of the defendant for the purpose of enjoying the land and causing the Deeparathana services to be rendered to the deity subject to the payment of a quit rent to Government:

Held, that the *inam* was one to be held by the grantee and his heirs burdened with the trust of doing certain services for the benefit of the temple, and that any surplus left over after the performance of the services accrued to the benefit of the donee and the service-holder was not bound to account for his disposal of the surplus proceeds of the land.

Srinivasa Chariar v. *Evalappa Mudaliar*, 68 Ind. Cas. 1; 31 M. L. T. 1; 16 L. W. 247; 54 B. 565; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.) and *Mohamed Husain Saheb* v. *Mohamed Abdul Rahim Beg Saheb*, 67 Ind. Cas. 492; 42 M. L. J. 272; (1922) M. W. N. 74; 15 L. W 241; (1922) A I. R. (M.) 8, relied on.

The powers of resumption of *inams* and the discretion of exercising it in a proper case rest with the Government, and where the Government has not resumed a temple service *inam*, the properties continue to belong to the service-holder and a Court has no right to declare that a temple service *inam* should revert to the temple to be managed by the trustee as temple property.

Courts will not remove a person who has been in possession of the office of Dharmakartha for many years and belongs to the family of the original trustees at the instance of strangers unconnected with the family unless there is clear evidence of misconduct and unless it appears to be to the clear benefit of the trust that the Dharmakartha should be removed.

So where a trustee belonging to the family of the original trustees set up private ownership in some items of the temple property in genuine ignorance and uncertainty as to his legal position while admitting the ownership of the temple in other items and no case of misappropriation was proved:

Held, that a case has not been made out for the removal of the trustee.

Srinvasa Chariar v. *Evalappa Mudaliar*, 68 Ind Cas 1; 31 M. L. T. 1; 16 L. W. 247; 45 B. 565; 43 M. L. J. 586; 24 Bom. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 524; 27 C. W. N. 317; 21 A. L. J. 250 (P. C.), distinguished.

Subbaraya Chetti v. *Subramania Iyer*, 48 Ind. Cas. 833; (1918) M. W. N. 786, followed. M SESHADU REDDI *v* PICHI REDDI, 16 L. W. 839; (1923) A. I. R. (M.) 163; 32 M. L. T. 89 **85**

Stamp Act (II of 1899), Sch. I, Art. 1—*Statement of account whether acknowledgment—Intention.*

In considering whether a document is an "acknowledgment" within the meaning of Art. 1 of Schedule I to the Stamp Act, the Court has to apply its mind to the question—looking at the document and the surrounding circumstances—as to what the intention was with which the document was given, that is to say, whether it was meant to be a bare acknowledgment and a promise to pay to be used in evidence against the giver, or whether it was given for some other dominant purpose.

Where a document, while supplying evidence of a debt, contains other entries from which it is right to deduce that the intention was to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the document, although it contains a balancing item in the end, is not to supply evidence to the creditor.

Brojender Coomar v. *Bromomoye Choudhrani*, 4 C. 885; 3 C. L. R. 520; 2 Shome L. R. 177; 2 Ind. Dec. (N. S.) 560, *Brojo Gobind Shaha* v. *Golnck Chunder Shaha*, 9 C. 127; 4 Ind. Dec. (N. S.) 737, *Nund Kumar Shaha* v. *Shurnomoyi*, 15 C. 162; 7 Ind. Dec. (N. S) 692 and *Ambica Dat Vyas* v. *Nityanund Singh*, 30 C. 687, relied on. M SURJIMULL MURLIDHAR CHANDICK *v.* AMANTA LAL DAMANI, 45 M. L. J. 399; 18 L. W. 485; (1923) M. W. N. 743, 46 M. 948 **1029**

Specific Relief Act (I of 1877), ss. 39, 42—*Holder of money-decree—Suit to declare sale by judgment-debtor inoperative, whether competent.*

A person who holds a mere money-decree and who has not put that decree into execution and attached the property of his judgment-debtor, has no *locus standi* to sue for a declaration that a sale by the judgment-debtor of his property is fraudulent and inoperative. L B MI SAN MA KHAING *v.* SHWE BA, (1923) A. I. R. (R.) 82 **164**

Specific Relief Act—concld.

——— s. 42—*Custom—Attachment of property—Declaratory suit by reversioners, whether maintainable.*

An attachment infringes the rights of the judgment-debtor and has the effect of placing the property attached *in custodia legis*, but it does not by itself amount to an infringement of rights of his reversioners and does not furnish the latter with a cause of action for a suit for a declaration that the attachment shall not affect their reversionary rights, inasmuch as a mere attachment does not amount to an alienation. **L** CHET RAM *v.* SPEDDING & CO., LTD., 5 L. L. J. 234; (1924) A. I. R. (L.) 52 **479**

——— s. 42—Suit for declaration that alienation by trustee is illegal, whether maintainable. *See* MUHAMMADAN LAW—WAKF **408**

Succession Act (X of 1865), s. 118, application of. *See* WILL, CONSTRUCTION OF **298**

Succession Certificate Act (VII of 1889), s. 9—*Application for certificate by Hindu widow—Security, whether necessary — Reversioners; interests of—Court, duty of.*

Where the widow of a separated Hindu applies for a Succession Certificate to collect debts due to the deceased, she ought not to be called upon to give security. There may be reversioners who are interested, but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow. If there is a danger of the interests of the reversioners being injured there is a proper remedy for this, and it is not a reason for creating an obstacle to the widow recovering the debts before they become time-barred.

The object of a Court should be to grant certificates to the persons lawfully entitled to them and not to go out of its way to make it difficult for them to obtain them. **A** KAUSILLA KUER *v.* SUKHDEI, 21 A. L. J. 452; (1923) A. I. R. (A.) 579 **761**

Surrender—*Joint tenants—Surrender of entire lease by one tenant—Benefit to other tenants.*

One joint tenant is not entitled to surrender the lease on behalf of all the joint tenants unless the surrender is for the benefit of them all. Even where the benefit is doubtful, the surrender would not bind the other point tenants. **R** MAUNG KYAW DUN ZAN *v.* MA SHIN, 1 R. 19; 2 Bur. L. J. 50; (1923) A. I. R. (R.) 151 **68**

Tenant, *holding over, who is.*

A tenant holding over is a person who, after his right to the occupation of land under lawful title is at an end, continues, having no title at all, in possession of the land without the agreement or disagreement of the person in whom the right of possession resides. **N** NARAIN *v.* TUKARAM, (1923) A. I. R. (N.) 310 **98**

Tolls (Army) Act (II of 1901), s. 6. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ARTS. 1, 3, 19 **288**

Tort—*Defamation—Imputing unchastity to woman—Special damage.*

In Burma to impute unchastity to a woman is actionable without proof of special damage. **L B** MA WIN *v.* MA NGON, (1923) A. I. R. (L. B.) 77 **44**

——— *Right, infringement of—Special damage.*

Where a person is in the enjoyment of a right and another deliberately infringes that right, the person injured can succeed in an action for damages without proving special damage, *i.e.* whether an damage has been proved to have accrued to him or not. **L B** MAUNG THIT SA *v.* MAUNG NAT, (1923) A. I. R. (L. B.) 76 **41**

Transfer of Property Act, s. 6. applicability of. *See* HINDU LAW—MITAKSHARA **58**

——— ss. 10, 12—*Landlord and tenant—Lease, permanent and heritable—Covenant restrictive of transfer, validity of—Covenant running with land—Itmam, meaning of.*

A tenancy described as an *itmam* may be assumed to be a permanent, heritable and transferable tenure.

Jogesh Chandra Roy v. *Makbul Ali*, 60 Ind. Cas. 984; 47 C. 979; 25 C. W. N. 857, followed.

As a general principle a covenant is said to run with the land if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him.

Williams v. *Earle*, (1868) 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041, *McEacharn* v. *Colton*, (1902) A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594, *West* v. *Dobb*, (1869) 4 Q. B. 634; 9 B. & S. 755; 38 L. J. Q. B. 289; 20 L. T. 737; 17 W. R. 879, relied upon.

A lease of a permanent, heritable and transferable tenancy, contained a covenant to the effect that if the tenant transferred the property he would pay to the landlord, out of the purchase-money in his hands, one-fourth as *nazar*, and would obtain registration of the name of the transferee, and that if he failed to do so, the transfer would be invalid and the tenant would continue to be liable for the rent:

Held, (1) that having regard to the provisions of sections 10 and 12 of the Transfer of Property Act, the covenant was valid;

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.), followed.

(2) that the covenant was one running with the land and was binding upon all holders of the tenancy during the entire period of the subsistence of the lease. **C** SARADAKRIPA LALA *v.* BHPIN CHANDRA PAL, 37 C. L. J. 538; (1923) A. I. R. (C.) 679 **555**

——— s. 41—*Property sold in execution of decree against ostensible owner—Purchaser, position of—Property entered in name of judgment-debtor at instance of real owner—Real owner, whether can object—Estoppel.*

Transfer of Property Act—contd.

Defendant purchased the property in dispute at an execution sale. Plaintiff who had, several years before, got the property entered in the name of the judgment-debtor, now sued defendant for a declaration that the property belonged to her and not to the judgment-debtor:

Held, (1) that there was nothing to put the defendant on enquiry and the judgment-debtor being the ostensible owner of the property, the principle underlying section 41 of the Transfer of Property Act was applicable to the case;

(2) that the plaintiff having deliberately by her own act got the name of the judgment-debtor entered as owner of the property, she was now estopped from pleading that she was the owner of the property: A MATHURA PRASAD *v* ANANDI KUNWAR, 21 A. L. J. 498; 1924) A. I. R. (A) 63 **911**

——— s. **55** (1) (a)—*Contract Act* (*IX of* 1872), s. 20—*Vendor and purchaser—Duty of vendor to disclose material defect—Constructive notice of defect—Mistake—Matter of fact essential to agreement—Calcutta Improvement Act* (*V of* 1911), *s.* 63, *notice issued under.*

Under section 55 (1) (*a*) of the Transfer of Property Act a seller is not bound to disclose to the buyer a defect of which he is not actually aware. The doctrine of constructive notice does not apply to the case of a seller who is unaware of a defect in the property agreed to be sold.

The fact that a notice has been issued under section 63 of the Calcutta Improvement Act in respect of certain property which is agreed to be sold is "essential to the agreement" within the meaning of section 20 of the Contract Act.

Plaintiff agreed to purchase certain property from the defendant. Previously to this, however, a notice under section 63 of the Calcutta Improvement Act had been issued in respect of a substantial portion of the property, but neither party was aware of this. On the fact coming to the knowledge of the plaintiff he brought a suit for a declaration that the agreement of sale was void and inoperative and to recover the amount paid by him to the defendant as part payment of the purchase price:

Held, (1) that the notice which was issued under section 63 of the Calcutta Improvement Act was "a matter of fact essential to the agreement" within the meaning of section 20 of the Contract Act;

(2) that both parties having been unaware of the fact at the time of entering into the agreement, the agreement was void under section 20 of the Contract Act, and the plaintiff's suit must, therefore, succeed. C NURSING DASS KOTHARI *v.* CHUTTOO LALL MISSER, 50 C. 615; 27 C. W. N. 639 (1923) A. I. R. (C.) 641 **996**

——— s. **59**—*Mortgage—Attestation—Attesting witness.*

A witness stated that the defendant executed a mortgage-bond in his presence and in the presence of certain other persons, and that the witness himself attested the mortgage-bond:

Held, that the evidence was sufficient to establish that the witness signed the document as an attesting witness. Pat ISHWARI PRASAD NARAYAN DEO *v.* CHOTA NAGPUR BANKING ASSOCIATION **841**

——— s. **59**—*Mortgage-deed—Due execution—Attestation—Burden of proof—Presumption—Recitals, value of.*

A mortgage-bond is not duly executed and operative as a mortgage unless it is in fact signed by the mortgagor in the presence of at least two witnesses who sign the document as attesting witnesses.

It is incumbent on the party who relies on a mortgage instrument to establish that the document was attested as required by law.

In the case of a mortgage-deed, one of the attesting witnesses deposed that he saw the execution and signed as an attesting witness while the other said that he affixed his signature as an attesting witness at the request of the mortgagor but was unable to re-collect whether he actually saw the execution of the document. Further it appeared that when the document was presented for registration, the second witness identified the executant, who, in his presence, admitted execution before the registering officer:

Held, that, under the circumstance, an inference might fairly be drawn that the requirements of the law were fulfilled.

Where a mortgage-bond contains a recital that the consideration had been recived by the executant, the burden lies upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which containd an untrue recital. C BENOY BHUSAN ROY *v.* BHIRENDRA NATH DE, 38 C. L. J. 114 **178**

——— s. **68** (c)—*Mortgage—Subsequent partition—Mortgagee dispossessed by share-holder—Suit to recover money from mortgagor, whether maintainable.*

Where subsequent to a mortgage there is a partition and the mortgagee is turned out by the share-holder to whose share the mortgaged land falls, the mortgagee is entitled on being dispossessed to sue the mortgagor for the mortgage-money.

Talek Singh v. *Jalal Singh*, 5 Ind. Cas. 130; 11 C. L. J. 136, followed. Pat RAMNANDAN PARBAT *v.* DENI SAHI, 1 P. L. R. 366; 5 P. L. T. 26 **877**

——— s. **76, cl.** (g)—*Mortgagee's duty to keep accounts—Contract to the contrary.*

A mortgagee is in view of section 76 (*g*) of the Transfer of Property Act, under a statutory obligation to keep clear, full and accrute accounts of all sums received and spent by him as mortgagee. A mortgagee cannot contract himself out of this legal duty, there being no reservation in favour of a contract to the contrary as there is in some of the other clauses of the section.

The only cases in which the performance of the duty imposed by section 76, clause (*g*), of the Transfer of Property Act can be dispensed with are provided for in section 77 of the Act. O LAL BAHADUR *v.* MURLI DHAR **95**

Transfer of Property Act—contd.

——— s. **83**—*Mortgage—Tender—Refusal to accept—Mortgage, whether extinguished—Mortgagor in possession as tenant—Ejectment.*

The making by a mortgagor of a deposit under section 83 of the Transfer of Property Act, which the mortgagee refuses to accept, does not, *ipso facto*, extinguish the mortgage. The parties remain in the relationship to one another of mortgagor and mortgagee, and it is for the mortgagor, dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage, to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully, the mortgage still subsists, and if the mortgagor happens to be in possession of the mortgaged property as tenant of the mortgagee the latter is entitled to eject him in accordance with the terms of the tenancy notwithstanding the tender. A AHMADULLAH *v.* ABDUL RAHIM, 21 A. L. J. 545; 45 A. 592; (1924) A. I. R. (A.) 26 **763**

——— ss. **92, 93**—*Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XXXIV, rr. 7, 8—Limitation Act (IX of 1908), Sch I, Art. 181—Redemption decree passed under Transfer of Property Act—Death of defendant after decree, effect of—Application to deposit money, nature of—Limitation.*

Order XXII, r. 4, of the Civil Procedure Code, does not apply to execution proceedings, it only applies where a defendant dies before the passing of the final decree of the Original or Appellate Court as the case may be.

Under sections 92 and 93 of the Transfer of Property Act only one decree for redemption was passed, and the application to deposit the decretal amount under such a decree is made in execution proceedings, to which O. XXII, r. 4, of the Civil Procedure Code has no application.

A judicially declared right of redemption is a valuable right, according to the ordinary meaning of the word. Once a mortgagor has obtained a decree for redemption his right is definite, ascertained and final, subject only to his depositing the decretal amount.

A decree for redemption obtained under the provisions of the Transfer of Property Act, is not affected by the provisions of the Civil Procedure Code relating to such decrees.

A decree for redemption was obtained in 1906 under sections 92 and 93 of the Transfer of Property Act. An application to deposit the decretal amount was made in 1920. It was discovered that one of the defendants had died in the meanwhile and no application had been made within time to bring his legal representatives on the record:

Held, (1) that the redemption decrees still continued to be governed by the provisions of the Transfer of Property Act;

(2) that, therefore, the application to deposit the decretal amount was an application in execution;

Transfer of Property Act—concld:

(3) that O. XXII, r. 4 of the Civil Procedure Code had no application to such a case, and, therefore, there had been no abatement;

(4) that the right to deposit the decretal amount was a continuing right which could be exercised at any time until an order absolute was passed, and the application was not governed by Art. 181 of Sch. I to the Limitation Act.

Vidyasagar v. *Rattpal*, 25 Ind. Cas. 752; 17 O. C. 347; 1 O. L. J. 433; *Gokaran Singh*, v. *Mangli*, 66 Ind. Cas. 673; 8 O. L. J. 407; followed. O RAM RUP *v.* GHANI AHMAD, 9 O. L. J. 624; 9 O. & A. L. R. 62; (1923) A. I. R. (O.) 156 **162**

——— s. **101**—*Merger—Mortgagee purchasing portion of equity of redemption, effect of.*

Where a mortgagee purchases a portion of the equity of redemption of the property mortgaged with him, there is a merger and the mortgage is extinguished to the extent of the share purchased by the mortgagee.

Shamshad Ali Khan v. *Mohammad Ali Khan*, 47 Ind. Cas. 200; 21 O. C. 172, followed.

A mortgagee who has purchased the equity of redemption cannot set up his own previous mortgage as still subsisting against a pre-emptor.

Bindeshuri Singh v. *Pandit Balraj Sahai*, 10 C. 49, followed. O KALLOO SINGH *v.* BAKHTAWAR SINGH, 9 O. L. J. 657; 9 O. & A. L. R. 113; (1923) A. I. R. (O.) 121; 26 O. C. 289 **360**

——— s. **107**—*"Lease," meaning of—Contract, construction of.*

The word "lease" in section 107 of the Transfer of Property Act is not to be construed in the wider sense in which it is defined in the Registration Act as including an agreement to lease.

Panchaman Bose v. *Chandi Charan Misra*, 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874, followed.

The question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from its entire terms and where the contract operates as an actual demise, it must be deemed to be a lease.

Purmananddas Jiwandas v. *Dharsey Virji*, 10 B. 101; 5 Ind. Dec. (N. S.) 452, followed. O MOHAMMAD ALI *v.* HASAN JAFAR, 10 O. L. J. 109; (1923) A. I. R. (O.) 237 **480**

Trust—*Money paid in execution of decree by* Mutwalli—*Decree setaside*—De facto Mutwalli, *whether entitled to refund of money.*

B, who was the *de facto mutwalli* of a trust, was removed from his office under a decree which also directed him to pay certain trust monies and costs to a Board of Trustees. The payment was made, but the decree was subsequently set aside on appeal. *B* died, and his son *M*, who had succeeded in getting mutation of names effected in his favour in respect of the trust property, and was in possession of it, applied for refund of the money paid by his father to the Board of Trustees:

Held, that *M*, in the capacity of a *de facto mutwalli* of the trust was entitled to claim a refund of the monies, provided he agreed to credit the same to the trust and to duly account therefor

Trust—concld:

to the person or persons who may be declared lawfully entitled to the *mutwallship*. A MUIZ-UD-DIN *v.* MOHAMMAD IKHLAQ, 21 A. L. J. 516; (1924) A. I. R. (A.) 59 **756**

——— *Sale of trust property in execution of decree against trustee—Purchaser in uninterrupted possession—Suit to recover prope ty—Limitation—Limitation Act (IX of 1908), Sch I, Arts. 134, 144.*

Certain trust property was sold in execution of a decree against the trustee, and delivery of pos ession of the property was made to the purchaser who, and those claiming under him, continued in uninterrupted posses ion. More than 12 years afterwards, on the appointment of a new trustee, the present suit was brought to recover the property:

Held, that the suit was barred by limitation under either Art. 134 or Art. 144 of Schedule I of the Limitation Act, the possession of the purchaser being adverse.

Limitation for a suit to recover trust pr perty sold in execution of a decree against the trustee does not begin to run afresh as each new trustee succeeds to the office. P C SUBBAIYA PANDARAM v. MAHAMAD MUSTAPHA MARACAYAR, 21 A. L. J. 730; (1923) A. I. R. (P. C) 175; 45 M. L. J. 588; 25 Bom. L. R. 1275; 46 M. 751; 18 L. W. 903; (1924) M. W. N. 65 **492**

Trusts Act (II of 1882), s. 88. *See* VENDOR AND PURCHASER **209**

U. P. Court of Wards Act (IV of 1912), s. 54—*"Property", meaning of—Suit by transferee of claim against Court of Wards—Notice, necessity of.*

A transferee of a claim against the Court of Wards is bound to give notice under section 54 of the U. P. Court of Wards Act before instituting a suit; a notice given by his transferor who intended to file a similar suit will not enure for his benefit.

Bachchu Singh v. *Secretary of State for India in Council*, 25 A. 187; A W. N. (1903) 13, relied upon.

A suit relating to the property inherited by persons in charge of the Courts of Wards is a suit relating to the property of the wards, within the meaning of section 54 of the U. P. Court of Wards Act.

Lal Singh v. *Collector of Etah*, 25 Ind. Cas. 398; 12 A. L. J. 485; 36 A. 331, distinguished. A MUHAMMAD SIDDIQ ALI KHAN *v.* ANWARUL HASAN, 21 A. L. J. 521; 45 A. 563 **389**

——— s. **61**—*Covenant by Court of Wards—Personal liability of ward—General rule.*

It is a well settled principle of law that a guardian cannot so contract in the name of his ward as to entail the imposition of a personal liability on the ward.

Waghela Rajsanji v. *Shekh Masludin*, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.), *Srinivasa Thathacharlu* v. *Noolamma*, 55 Ind. Cas. 436 11 L. W. 246; (1920) M. W. N. 340, relied upon.

Under section 61 of the U. P. Court of Wards Act, however, a ward becomes personally liable under a covenant entered into by the Court of Wards on his behalf.

Therefore, although the breach of a warranty implied by law in respect of a sale effected by the Court of Wards on behalf of a ward cannot result in the personal liability of the latter for damages, yet where an express covenant of warranty of title has been entered into, the purchaser is entitled to be indemnified. O PIRTHIPAL SINGH *v.* MUHAMMAD EJAZ RASUL KHAN **90**

U. P. Land Revenue Act (III of 1901), s. 34 (5), *scope and applicability of—Failure to make report required by section—Suits for profits under Rent Act, whether barred—Report made by* Patwari, *whether sufficient—Report during pendency of suit.*

The language of sub-section (5) of section 34 of the U. P. Land Revenue Act is perfectly general, and the operation of the sub-section is not confined to suits under the Act. The sub-section prohibits a Revenue Court from entertaining a suit or application of any description by a person who is required to make a report of succession by the section, until the report is made.

Chhajmal Das v. *Sirya*, A. W. N. (1906) 254; 3 A. L. J. 625, relied on.

If mutation has taken place before the institution of a suit, the report required by section 34 becomes unnecessary and sub-section (5) of the section has no application, but if mutation has not yet taken place a report made by the *Patwari*, cannot be a substitute for the report which the section requires to be made by the proprietor.

A report made during the pendency of a suit is of no avail, as sub-section (5) of section 34, debars a Court from even admitting the plaint until the report required by the section has been made. O RUQAIYA BEGAM *v.* IMDAD ALI, 9 O. L. J. 590; 9 O. & A. L. R. 81; (1923) A. I. R. (O.) 117 **321**

——— s. **111 (b)**—*Civil Procedure Code (Act V of 1908), O. I, r. 1, O. II, r. 2—Partition—Title suit—Joinder of parties—Parties not directed by Revenue Court to file suit, whether can join as plaintiffs—Abandonment of claim—Title not claimed, whether can be subsequently asserted.*

A direction by a Revenue Court in the course of a partition proceeding, under section 111 (*b*) of the U. P. Land Revenue Act, to one party to bring a title suit in a Civil Court implies a right of joinder in the suit of any person as plaintiff in whom a joint right of relief exists. The direction to bring a suit to any person must mean that he is to bring it according to, and as permitted by, the law of procedure, and O. I, r. 1 of the Code of Civil Procedure allows such joinder.

Obiter:—Where a party asks for and obtains a declaration of his title against another, that title thenceforth must be deemed to be the title claimed and not anything more. O KUSAM DEI *v.* HUR DUTT, 26 O. C. 98 **459**

——— s. **119**—*Partition of land and trees standing thereon—Trees allotted to one co-sharer and land to another—Suit for removal of trees, whether competent—Limi ation.*

U. P. Land Revenue Act, 1901—concld.

If on partition of a village a certain plot is allotted to one co-sharer, and the trees standing thereon are allotted to another, the former is entitled to have the trees removed from the plot, provided he sues the latter for this purpose within twelve years from the date of the partition.

Sarup v. *Lala*, 42 Ind. Cas. 589; 15 A. L. J. 757; 39 A. 707 (F. B.), distinguished. A NIAMATULLAH *v.* SAFUT-UN-NISSA BIBI **768**

——— s. **138 (2), (3), (4)**, *applicability of—Partition of lessee* mahals—*Joint responsibility of lessees for rent, whether affected.*

Sub-sections (2), (3) and (4) of section 138 of the U. P. Land Revenue Act merely refer to the responsibility for revenue to Government *inter se* of the owners of a *taluqdari mahal* which is partitioned and do not refer to the responsibility *inter se* of the lessees for rent to the *taluqdar* in the various lessee *mahals*. A perfect partition of a lessee *mahal* does not put an end to the joint responsibility of the lessees for rent to the *taluqdar*.

Rudra Partap Singh v. *Sikandar Khan*, 39 Ind. Cas. 598; 10 O. C. 104, followed. O JUGNU KHAN *v.* RUDRA PARTAB SINGH, 26 O. C. 118; (1923) A. I. R. (O.) 216 **429**

U. P. Municipalities Act (II of 1916), s. 16 (3) (c)—*"Place of profit," meaning of—Contractor, position of.*

The proper meaning which should be ascribed to the words "place of profit" in section 16 (3) (*c*) of the U. P. Municipalities Act is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of master and servant.

A contractor who receives remuneration for the supply of articles cannot be said to hold a place of profit, and is not, therefore, disqualified from standing for election to the Municipal Board. A MUHAMMAD BAKSH *v.* MUHAMMAD ABDUL BAQI KHAN, 21 A. L. J. 661 **490**

——— ss. **20, 23**—*Election petition, presentation of—Verification, whether necessary.*

In a District where the practice exists of delivering petitions intended for the Collector to a subordinate official, the presentation of an Election Petition will be good within the meaning of section 20 of the U. P. Municipalities Act, if it is handed over to that official and in fact reaches the Collector within the time fixed by that section.

An Election Petition can only be lodged by a candidate in whose favour votes have been recorded and who claims in the petition to be declared elected in the room of the person whose election is questioned or by ten or more electors. It cannot be presented by a person who though he was a candidate, did not actually go through the contest.

It is not necessary for an Election Petition to be verified in accordance with the provisions for verification of plaints. It is only after the petition has been duly presented that the procedure laid down in the Civil Procedure Code has to be followed. A SURAJ NARAIN *v.* JANG BAHADUR **2**

U. P. Municipalities Act, 1916—concld.

——— s. **28 (e)**—*Municipal Election—Withdrawal of candidate after opening but before close of Poll—Declaration of election of rival candidate.*

A candidate for election as a member of a Municipal Board can withdraw before the time for polling arrives, and can also do so during the polling as also after he is elected.

If out of two candidates for one seat one withdraws after the Poll opens and before the time comes for it to close, it is legal for the Returning Officer to close the Poll and declare the one remaining candidate to have been duly elected. It is not necessary that the Poll should remain open, and that in the end the Returning Officer should declare the election of the remaining candidate. A SULTAN BAKSH *v.* ABDUL MAJID **24**

Usufructuary mortgage—*Possession not delivered—Interest, whether can be claimed.*

When a usufructuary mortgagee is unable to obtain possession of the mortgaged property and there is a definite covenant in the mortgage-deed that, in the event of his being unable to obtain possession, the mortgagee would be entitled to interest; he can claim interest on the mortgage amount. A PHUL CHAND *v.* SURJI, (1923) A. I. R. (A.) 457 **684**

Vendor and purchaser—*Vendee undertaking to discharge mortgage on property—Contract of indemnity—Cause of action—Constructive trust—Pecuniary advantage gained by fiduciary—Restoration—Trusts Act (II of 1882), s. 88.*

A had created two mortgages on a house and some land in favour of *B* and *C*. *D* a friend of *A* made a suggestion according to which the land was sold to *D* for Rs. 5,000 and the house mortgaged to him for Rs. 1,000 and the sums were left with him to pay off the mortgages in favour of *B* and *C* so that *A* would have his house unencumbered except for the newly created mortgage in favour of *D*. *D* paid off the mortgage in favour of *B* but started a dispute with *C* as to the amount due under his mortgage. *C* claimed Rs. 4,938 while *D* tendered a payment of Rs. 4,800, which amount was not accepted by *C*. *A* had no knowledge of and did not concern himself with, the dispute treating it a matter between *C* and *D*. Some years afterwards, *C* brought a suit on his mortgage against *A* and *D*. *A* relying on *D* did not appear in the suit and the defence was managed by *D*. Eventually a decree for Rs. 10,000 was passed for the mortgage amount and interest. In due course *C* took proceedings to bring the mortgaged properties to sale. *D* now paid a sum of Rs. 4,000 and freed the land, of the equity of redemption of which he was the owner, but the house was sold for Rs. 5,500 and *A* ejected therefrom. *A* alleging that the house had been purchased *benami* by *D* sued him for various reliefs:

Held, (1) that *D* under the scheme propounded by him, undertook a liability to indemnify *A* against any claim by *C*.;

Izzatunnissa Begam v. *Pertab Singh*, 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1143; 10 C. L.

Vendor and purchaser—concld.

J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203 (P. C.), relied on.

(2) that the cause of action under the contract of indemnity did not arise until *A* suffered loss by being ejected from the house under the Court sale;

(3) that if the allegation that the house had been purchased by *D benami* in the name of a third person was true, he was bound to restore its possession to *A*, as *D* was throughout in a fiduciary relationship to *A*, in the first place as his agent and, in the second place, as his accepted legal adviser.

Nugent v. *Nugent*, (1907) 2 Ch. 292; 76 L. J. Ch. 614; 97 L. T. 279; 23 T. L. R. 660, *Nugent* v. *Nugent*, (1908) 1 Ch. 546 at p. 548; 77 L. J. Ch. 271; 98 L. T. 354; 24 T. L. R. 296, *Ramasamy Chetty* v. *Karuppan Chetty*, 31 Ind. Cas. 216; 29 M. L. J. 551 and *Deonandan Prasad* v. *Janki Singh*, 39 Ind. Cas. 346; 44 C. 573; 15 A.L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 30 (P. C.), relied on.

(4) that, ordinarily, *D* would have been entitled to a charge on the house for the Rs. 5,500 purchase-money, but on the facts of the case he was not s entitled as he had throughout in his possession money of *A* sufficient to redeem the house from the mortgage under which it was sold.

(5) that *D* was entitled to his mortgage of Rs. 1,000 over the house, but the mortgage for the purpose of interest must date from the time when it became effective, that is, the date when *D* in fact advanced Rs. 1,000 towards paying off *C*, which date was the date of the Court sale;

(6) that, finally, *A* was entitled as damages to all costs to which he had been put in the proceedings taken by *C*. M VENKATANARAYANIAH *v.* SUBRAMANIA IYER, 17 L. W. 453; (1923) A. I. R. (M.) 492 **209**

Wajib-ul-arz *construction of—Custom, proof of.*

Settlement Officers in recording customs in *wajib-ul-arz* have to perform duties which the Government orders them to perform. One of these duties is, to record customs as the Settlement Officer finds them, and not as he might think they ought to be. Where it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. P C BALGOBIND *v.* BADRI PRASAD, 21 A. L. J. 578; (1923) A. I. R. (P. C.) 70; 26 O. C. 217; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 9 O. & A. L. R. 581 (P. C.) **449**

———, *construction of—Pre-emption, provision for—Extraneous matters also included—Record of custom—Presumption—Pre-emption—Transfer of mortgaged property—Consideration*

Wajib-ul-arz—contd.

equivalent to mortgage-money—Transaction, whether sale and pre-emptible.

If a *wajib-ul-arz* contains matters which could not possibly be the subject of a custom then the ordinary presumption that the *wajib-ul-arz* is a record of custom is overturned.

Fazal Hussain v. *Muhammad Sharif*, 24 Ind. Cas. 464; 36 A. 471; 12 A. L. J. 800 and *Surajbali Singh* v. *Mohammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J. 879, followed.

But if a *wajib-ul-arz*, besides mentioning pre-emption, refers to matters such as the manner of inheritance, the power of the widow in possession after her husband's death, the declaration of the manner in which property descends when a deceased co-sharer has left two widows and the exclusion from inheritance of daughters and daughter's sons, *i.e.*, matters which, though not usually customs, can form the subject of customs, it cannot be said that the *wajib-ul-arz* is necessarily not a record of custom.

If the consideration for a transfer of property is only sufficient to pay off a prior mortgage on the property, the personal liability of the mortgagor being still alive on the date of the sale, and the market-value of the property is not higher than the amount of consideration, it cannot be said that the transfer does not amount to a sale, on the ground that the vendor gets nothing under it, for he gets rid of the liability under the mortgage. Such a transaction is a sale and is subject to pre-emption. A ALAMA CHAND *v.* CHHAJJU, (1923) A. I. R. (A.) 530; 45 A. 559 **339**

———, *construction of—Record of custom—Contractual matters, record of, effect of—Presumption.*

Where a *wajib-ul-arz* which is relied upon for the purpose of showing a custom, contains a number of extraneous matters some of which could only have relation to a contract entered into between the parties and which could not possibly be based upon custom, it ought to be taken that the whole *wajib-ul-arz* is not properly a record of custom.

Surajbali Singh v. *Mohammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J. 879, followed. A SITA RAM TEWARI *v.* FOUJDAR RAI, 45 A. 490; (1923) A. I. R. (A.) 525 **315**

———, *construction of—Record of right of pre-emption—Custom or contract—Presumption—Non-customary matters, inclusion of, effect of.*

An entry in a *wajib-ul-arz* as to a right of pre-emption is good *prima facie* evidence of the existence of the custom, unless there is internal evidence in the *wajib-ul-arz* itself or some other evidence or circumstance to rebut it.

Where in the very clause of a *wajib-ul-arz* in which reference is made to pre-emption, reference is also made to a number of other matters which cannot possibly be matters of custom, the presumption is rebutted.

Fazal Hussain v *Muhammad Sharif*, 24 Ind. Cas. 464; 36 A. 471; 12 A. L. J. 800 and *Surajbali Singh* v. *Muhammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J. 879, followed.

Wajib-ul-arz—concld.

Where the pre-emption clause in a *wajib-ul-arz* contained, amongst other matters, the statement that an issueless co-sharer shall have no right to make a gift of his property in favour of a person not entitled (*gair mustahaq*) and that if such a transfer takes place, then on the death of the co-sharer his legal heirs would be the owners of the property:

Held, that the presumption which would ordinarily arise from an entry of a right of pre-emption in the *wajib-ul-arz* had been sufficiently rebutted and there was internal evidence in the clause itself to show that the recitals contained therein were not at all records of custom. A BALWANT SINGH *v.* HARI SINGH, 21 A. L. J. 542: (1924) A. I. R. (A.) 52 322

Will, *construction of—Bequest by Hindu leaving two sons—Half share to be given by first brother to second in certain event—Deed of transfer, whether necessary—Succession Act (X of 1865), s. 118, application of.*

A Hindu Will provided that one of the two sons of the testator should give one-half of the bequeathed property to the other if the latter reformed himself and lived amicably with his brother. The second brother lived respectably and in amity with the first brother for two or three years after the death of the testator and transferred his one-half share in the property. The transferee brought a suit for possession against him, also joining the first brother as a party. It was urged in defence that the transferee had got nothing as the property could not go to the second brother without a deed of transfer from the first:

Held, that a Hindu Will of the above character should not be construed very strictly; that section 118 of the Succession Act was applicable, and that on the happening of the uncertain event of the reformation of the second brother, half of the estate, which under the Will got vested in the first brother, became vested in the second and his transferee was entitled to the same. B SHANKAR MAHABLESHWAR *v.* MANJUNATH SUBBA 298

———, *construction of—Life-estate only created—Remainder, whether can remain in suspense—Devolution of residue, how effected—Hindu Law—Mortgage by father—Son, liability of—Debt whether immoral—Burden of proof—Suit against manager of joint family—Presumption.*

Will—concld.

Wherever a life-estate is created by a Will the remainder cannot remain in suspense but must vest in some one immediately on the death of the testator.

Jotendromohun Tagore v. *Ganendomohun Tagore*, 18 W. R. 359 at p. 371; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J, 82 (P. C.), explained.

Jugmohandas v. *Sir Mangaldas*, 10 B. 528; 5 Ind. Dec. (N. S.) 742, *Tarokessur Roy* v. *Soshi Shikhuressur Roy*, 9 C. 952; 10 I. A. 51; 13 C. L. R. 62; 7 Ind. Jur. 327; 4 Sar. P. C. J 439; 4 Ind. Dec. (N. S.) 1284 (P. C.), distinguished.

A Hindu son cannot escape liability under a decree obtained by a mortgagee against his father and *karta* of the joint family unless he proves that the mortgage-debt was contracted for immoral or illegal purposes or was of an illusory character, whether the decree had been executed or not.

A Hindu executed a Will wherein he made two bequests, one to his wife and the other to his son, both for life without any power of alienation, and without any provision as to the devolution of the absolute estate. The son, on coming into possession, executed certain mortgage-deeds and the mortgagee eventually obtained a decree for sale of the property. Plaintiff, the son of the alienor, thereupon sued for a declaration that the property was not liable to sale in execution of the mortgage-decree:

Held, (1) that, according to the Will, the son succeeded to the life-interest on the death of the wife of the testator, that this life-interest combined with the residue to which he succeeded as heir-at-law and that consequently he became full owner of the property in suit;

(2) that the plaintiff having failed to prove that the mortgage-debt was contracted for immoral or illegal purposes, his suit was liable to be dismissed.

When a suit is brought against the managing member of a joint Hindu family the presumption is that he is sued in a representative capacity. O RUP KISHORE *v.* KANHAIYA LAL, 10 O. L. J. 141; (1923) A. I. R. (O.) 227; 26 O. C. 266 563

Witness called by Court—Right to cross-examine. *See* EVIDENCE ACT, 1872, S. 165 108

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

K UNIVERSITY LIB.
75443
18.12.61.

Title [redacted]

Author [redacted]

Accession No. [redacted]

Call No. [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

High Court
Jammu & Kashmir
Srinagar.

Title [redacted]

Author [redacted]

Accession No. [redacted]

Call No. [redacted]

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DAT
[redacted]			

P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

Title [redacted]

Author [redacted]

Accession No. [redacted]

Call No. [redacted]

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DAT
[redacted]			

Jammu & Kashmir
Srinagar.

Tit[redacted]

Author [redacted]

Accession No. [redacted]

Call No. [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

S. N. Dar
dvocate High Court
Jammu & Kashmir
Srinagar